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

In the Matter of	)	
	)	Docket No. 14-216
Verizon Florida LLC,	)	File No. EB-14-MD-003
Complainant,	)	
	)	
v.	)	
	)	
Florida Power and Light Company,	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 11, 2015 **Released: February 11, 2015**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. Complainant Verizon Florida LLC (Verizon), an incumbent local exchange carrier, alleges that the rates it pays for existing attachments of communications equipment to the poles of Florida Power and Light Company (Florida Power), an electric utility, are unjust and unreasonable. Verizon asks the Commission to order Florida Power to charge Verizon the same rate that Florida Power charges competitive local exchange carriers for their pole attachments. In this Memorandum Opinion and Order, we reject Florida Power's argument that the Commission's 2011 *Pole Attachment Order* is unlawfully retroactive. In addition, we dismiss Verizon's complaint because Verizon has proven neither that the rates established by the governing agreement between Florida Power and Verizon's predecessor are unjust and unreasonable, nor that Verizon is similarly situated to competitive local exchange carriers. Because the Bureau has not previously applied the 2011 *Pole Attachment Order*, we dismiss without prejudice to allow Verizon the option of refiling its complaint with additional evidentiary support.

2. Specifically, we find that Verizon has not met its burden of proving that the attachment rates established in a 1975 Joint Use Agreement (Agreement), which governs the rates that Verizon must pay to Florida Power (Agreement Rates), are unjust and unreasonable in violation of Section 224(b)(1) of the Communications Act of 1934, as amended.[1] In 2011, the Commission held for the first time in the *Pole Attachment Order* that Section 224(b)(1) applies to attachments by incumbent local exchange carriers (LECs) such as Verizon to electric utility poles.[2] To show that the Agreement Rates are unreasonable, Verizon compares those rates to the rates competitive LECs pay Florida Power for their attachments and argues that the Agreement Rates are *per se* unlawful. Verizon concedes, however, that it has received significant benefits under the Agreement that are not available to competitive LECs. Verizon makes no attempt to estimate the value of those unique benefits. Consequently, although

[1] 47 U.S.C. § 224(b)(1) ("the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable").

[2] *See Implementation of Section 224 of the Act; A National Broadband Plan for our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5327–33, paras. 199–213 (2011) (*Pole Attachment Order* or *Order*), *aff'd American Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir.), *cert. denied* 134 S.Ct. 118 (2013).

competitive LECs pay lower attachment rates than Verizon, we cannot find on this record that the Agreement Rates are *per se* unjust or unreasonable.

3. We emphasize the narrowness of this ruling. We are not finding that the Agreement Rates are just and reasonable. Rather, we conclude that Verizon has provided insufficient evidence: (a) to support a finding that the Agreement Rates are unreasonable, and (b) for the Commission to set a just and reasonable rate. Because the Bureau has not previously applied the 2011 *Pole Attachment Order*, we dismiss Verizon's Complaint without prejudice. Verizon may refile its complaint and attempt to fill the evidentiary gaps in the current record.

II. BACKGROUND

A. Regulatory History

4. Before it released the *Pole Attachment Order* in 2011, the Commission had consistently held that Section 224(b)(1)'s requirement that pole attachment rates, terms, and conditions must be "just and reasonable" applied only to attachments by cable companies and competitive LECs, and not attachments by incumbent LECs.[3] In accordance with subsections 224(d) and (e),[4] respectively, the Commission established one formula to calculate the rate paid by cable attachers (the Cable Rate), and a separate formula to calculate the rate paid by competitive LEC attachers (the Old Telecom Rate).[5] The Cable Rate was generally lower than the Old Telecom Rate.[6]

5. In the *Pole Attachment Order*, the Commission adopted a new formula for computing the rate paid by competitive LEC attachers (New Telecom Rate), "thereby reducing the disparity between current telecommunications and cable rates."[7] In addition, "given the evidence in the record regarding current market realities,"[8] the Commission concluded for the first time that Section 224(b)(1) applies to the rates, terms and conditions governing attachments by incumbent LECs, such as Verizon.[9] The record indicated that, although incumbent LECs had in the past owned nearly as many poles as electric utility companies, incumbent LEC pole ownership rates had declined so that, by the time of the *Order*, they owned only about 25 to 30% of joint use poles.[10] As a result, the Commission found that "market forces

[3] *See Pole Attachment Order*, 26 FCC Rcd at 5328, para. 205 & n.614.

[4] 47 U.S.C. § 224(d), (e).

[5] *See Pole Attachment Order*, 26 FCC Rcd at 5296–97, paras. 129–31.

[6] *Id*. at 5297, para. 131.

[7] *Id.* at 5244, para. 8. The Old Telecom Rate compensated pole owners for "fully allocated costs," which are the costs a pole owner incurs in installing and maintaining poles even if there are no other attachers. The New Telecom Rate excludes recovery for a number of these costs, and usually results in a rate that is closer to the Cable Rate. *See id*. at 5300–1, paras. 141–142. By reducing the disparity between the Cable Rate and Old Telecom Rate, the *Pole Attachment Order* alleviated the "uncertainty result[ing] from the risk that, by offering services that potentially could be classified as 'telecommunications services,' a higher telecom rental rate might then be applied to the broadband provider's entire network." *Id*. at 5298, para. 134.

[8] *Id.* at 5328, para. 206.

[9] *See id.* at 5331, para. 209 ("incumbent LECs are entitled to pole attachment rates, terms and conditions that are just and reasonable pursuant to Section 224(b)(1)"); *see also id.* at 5243, 5327, 5330, paras. 8, 202, 208. Unlike cable and competitive LEC attachers, incumbent LECs have no right of access to utilities' poles pursuant to Section 224(f)(1). *Id*. at 5328–29, 5332–33, paras. 202, 207, 212 & n.643. The Commission concluded, however, that "the absence of a statutory right of nondiscriminatory pole access for incumbent LECs under section 224(f) is not incompatible with the Commission's exercise of authority to ensure just and reasonable rates, terms and conditions in situations where incumbent LECs are able to obtain access to poles." *Id.* at 5332, para. 212.

[10] *Id.* at 5328, para. 206.

and independent negotiations may not be alone sufficient to ensure just and reasonable rates, terms and conditions for incumbent LEC pole attachments."[11] The *Order* identified "a need for targeted Commission oversight [of incumbent LEC attachment agreements] to ensure just and reasonable rates, terms, and conditions that might not otherwise result from negotiations standing alone."[12]

6. The Commission recognized that it should exercise its authority to regulate incumbent LEC attachment rates "in a manner that accounts for the potential differences between incumbent LECs and competitive LEC and cable attachers."[13] It noted that incumbent LECs own many poles and historically obtained access to electric utility poles through joint use agreements. Those agreements provide incumbent LECs a number of advantages not afforded to cable operator and competitive LEC attachers, such as guaranteed space on a pole, lower make-ready costs, and no need to obtain advance attachment approval.[14] In light of those differences, the Commission did not adopt a formula for calculating the rate to be paid by incumbent LECs, deciding instead to resolve incumbent LEC complaints on a case-by-case basis.[15] Moreover, the Commission specifically noted that "just and reasonable pole attachment rates for incumbent LECs are not bound by the formulas in sections 224(d) or (e)."[16]

7. The Commission identified several factors it would consider in resolving such complaints, including (i) the relative bargaining power of incumbent LECs and electric utilities,[17] and (ii) the age of the relevant joint use agreement. The Commission distinguished existing joint use agreements from new agreements executed by an incumbent LEC and a utility after release of the *Order*. If an incumbent LEC entering into a new agreement demonstrates that it attaches on terms and conditions that leave it "comparably situated" to competitive LEC or cable attachers, "competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider," *i.e.*, the New Telecom Rate or the Cable Rate.[18] But if a new agreement "includes provisions that materially advantage the incumbent LEC" vis-à-vis other attachers, it is reasonable to look to the Old Telecom Rate as "a reference point" for determining an appropriate rate.[19] The Commission also stated that, in evaluating an incumbent LEC complaint, it would consider the rates, terms and conditions the incumbent LEC offers the utility or other attachers for access to its own poles.[20]

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[11] *Id*. at 5327, para. 199.

[12] *Id.* at 5243, para. 8.

[13] *Id.* at 5333, para. 214.

[14] *Id.* at 5335, para. 216 n.654.

[15] *Id.* at 5334, para. 214 ("We therefore decline at this time to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis"), 5328, para. 203 ("Given that incumbent LECs often can be differently situated from other attachers . . . we conclude that it would not be appropriate to treat them identically to [competitive LEC] or cable operator attachers in all circumstances.").

[16] *Id.* at 5336, para. 217.

[17] "[I]n evaluating incumbent LEC pole attachment complaints, the Commission will consider the incumbent LEC's evidence that it is in an inferior bargaining position to the utility" because the utility owns significantly more poles. *Id*. at 5334, para. 215. On the other hand, "[w]here parties are in a position to achieve just and reasonable rates, terms and conditions through negotiation, we believe it generally is appropriate to defer to such negotiations." *Id.*

[18] *Id*. at 5336, para. 217.

[19] *Id*. at 5336, para. 218.

[20] *Id*. at 5337, para. 219. The Commission added that it would be "skeptical of a complaint by an incumbent LEC seeking a proportionately lower rate to attach to an electric utility's poles than the rate the incumbent LEC is charging the electric utility to attach to its poles." *Id*. at 5337, para. 218. In a joint use arrangement, a just and reasonable rate would be "the same proportionate rate charged the electric utility, given the incumbent LEC's relative usage of the pole (such as the same rate per foot of occupied space.)." *Id.* at para. 218 n.662.

8. The Commission expressed reluctance to adjust attachment rates in joint use agreements entered into before the *Order*'s release. The Commission found that "[n]othing in the record suggests that [joint use] agreements . . . were entered into with the expectation that their provisions would be subject to Commission review."[21] Based on evidence in the record, the Commission observed that incumbent LECs typically owned nearly as many poles as the electric utilities at the time the parties negotiated many of these agreements, and therefore were in a roughly equal bargaining position. "[W]e question the need to second guess the negotiated resolution of arrangements entered into by parties with relatively equal bargaining power."[22] In addition, while competitive LEC and cable agreements are usually structured as lease or license agreements, joint use agreements "reflect a decades-old contractual responsibility of incumbent LECs to share in infrastructure costs and also account for the fact that incumbent LECs still own many poles today."[23] The Commission concluded that "[a] failure to weigh, and account for, the different rights and responsibilities in joint use agreements could lead to marketplace distortions," and it "therefore reject[ed] arguments that rates for pole attachments by incumbent LECs should always be identical to those of [competitive LECs] or cable operators."[24]

9. The *Order* suggested that the Commission might, however, be willing to adjust attachment rates in existing joint use agreements that cannot be terminated. Specifically, it noted that, "[t]o the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement, the Commission can consider that as appropriate in a complaint proceeding."[25]

B. The Parties' Dispute

10. Florida Power and a predecessor to Verizon executed the Agreement in 1975 and amended it in 1978.[26] The Agreement reserves the uppermost six feet of usable space on each pole to Florida Power and the lowest four feet of usable space to Verizon.[27] As amended, the Agreement provides that each party pays fifty percent of the annual costs of owning and maintaining the joint use poles.[28] By June 30 of each year, "the party owning the majority of the jointly used poles will send to the other party their documentation for the annual charge rate for that year for review and acceptance."[29]

11. The record suggests that Florida Power has at all times relevant to this proceeding owned the vast majority of the parties' joint use poles.[30] The most recent estimates in the record indicate that

[21] *Id*. at 5335, para. 216 n.654.

[22] *Id*. at 5335, para. 215.

[23] *Id.* at 5335, para. 216 n.654. *See id*. at 5334, para. 216 n.651 (discussing the difference between joint use agreements and competitive LEC attachment agreements).

[24] *Id.* at 5335, para. 216 n.654.

[25] *Id.* at 5335, para. 216.

[26] Pole Attachment Complaint, File No. EB-14-MD-003 (filed Jan. 31, 2014) (Complaint) Ex. 1 (Agreement); Ex. 2 (Agreement amendment).

[27] Complaint Ex. 1 at 3, § 1.1.7.

[28] *See* Complaint Ex. 2 at para. 1 (attachment rate is "one half of the average annual cost of joint use poles for the next preceding year as determined by the party owning the majority of joint use poles").

[29] *Id.*

[30] *See* Respondent Florida Power and Light Company's Response to Verizon Florida LLC's Complaint, File No. EB-14-MD-003 (filed Apr. 4, 2014) (Response) Ex. A (Kennedy Dec'l) at 3, para. 9.

Florida Power currently owns roughly 90% of 74,000 joint use poles.[31] Verizon has attachments on approximately 67,000 Florida Power poles.[32]

12. Article XI of the Agreement provides that the attachment rate "shall be subject to renegotiation at the request of either party."[33] Article XI also includes an "evergreen" clause providing that if the parties cannot reach a new agreement within six months after such a request,

> this Agreement shall terminate and be of no further force and effect insofar as the making of attachments to additional poles. All other terms and provisions of this Agreement shall remain in full force and effect solely and only for the purpose of governing and controlling the rights and obligations of the parties herein with respect to existing joint use poles.[34]

In addition, Article XVI authorizes either party to terminate the Agreement by providing notice in writing of intent to terminate six months in advance.[35] It further provides that, "notwithstanding any such termination, other applicable provisions of this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."[36]

13. On June 27, 2011, shortly after the Commission released the *Pole Attachment Order*, Verizon sent a letter to Florida Power requesting a meeting to negotiate a new joint use agreement or a "new method for computing pole attachment rates."[37] Florida Power refused to lower the rate for Verizon's existing attachments, relying on the Agreement's evergreen clause, but offered to lower the rate for future attachments. On December 9, 2011, Verizon sent Florida Power a letter announcing Verizon's intent to terminate the Agreement pursuant to Articles XI and XVI.[38] In its Complaint, Verizon contends that the Agreement terminated on June 9, 2012.[39]

14. Florida Power billed Verizon for its attachments to Florida Power's poles in 2011 and 2012 at the rates applicable under the Agreement, namely, $35.465 per pole for 2011 and $36.225 per pole for 2012. Verizon paid the invoices in full for the period up to the July 12, 2011 effective date of the *Pole Attachment Order*. For the period after that date, Verizon applied the New Telecom Rate formula and paid $8.52 per pole.[40] In April 2013, Florida Power brought a collections action in Florida state court seeking to compel Verizon to pay the outstanding balance of the invoice.[41]

15. In its Complaint, Verizon contends that the Agreement Rate violates Section 224(b) of the Act because it is unjust and unreasonable. Verizon argues alternatively that it is entitled to pay either (a) the New Telecom Rate because it is comparably situated to competitive LEC attachers, or (b) the higher Old Telecom Rate if the terms and conditions of the Agreement provide Verizon an advantage

[31] Complaint at 9, para. 17; Response Ex. A (Kennedy Dec'l) at 3, paras. 9, 16.

[32] Complaint at 9, para. 17; Response at 33.

[33] Agreement at 13, Article XI, § 11.1.

[34] *Id.*, § 11.2.

[35] *Id.* at 16, Article XVI.

[36] *Id.*

[37] Complaint Ex. 4 (Letter from Verizon to Florida Power dated June 27, 2011).

[38] *See* Complaint Ex. 5 (Letter from Verizon to Florida Power dated Dec. 9, 2011).

[39] *See* Complaint at 11–12, paras. 24–27; Response at 7.

[40] *See* Complaint at 7, 13–14, paras. 11–12, para. 32–33; Response at 7–9 & Ex. A (Kennedy Dec'l) at 10, paras. 50–51.

[41] Complaint at 14, para. 34; Response at 9.

relative to competitive LEC attachers.[42] Both the New Telecom Rate and the Old Telecom Rate would be substantially lower than the rate specified in the Agreement. Verizon states that it will charge Florida Power a proportionally lower rate for its attachments to Verizon's poles.[43] Verizon argues that it is, and always has been, in an inferior bargaining position with Florida Power because Florida Power has always owned approximately 90% of the joint use poles.[44]

16. As a threshold matter, Florida Power argues that due process prohibits retroactive application of the just and reasonable rate requirement in Section 224(b)(1) to Verizon's existing attachments to Florida Power's poles. Florida Power further argues that the Agreement Rate is reasonable even though it is higher than the New and Old Telecom Rates because Verizon receives a number of benefits under the Agreement that are not provided to other attachers.[45] In particular, Florida Power notes that the Agreement reserves to Verizon the lowest four feet of usable space on the pole, and that Verizon is not required to receive advance approval before attaching to Florida Power's poles or to pay application or inspection fees.[46] Florida Power does not agree that Verizon is in an unequal bargaining position, noting that Verizon is one of the largest corporations in the world, and asserting that Florida Power needs Verizon's poles as much as Verizon needs Florida Power's poles.[47]

III. DISCUSSION

A. The *Pole Attachment Order* Is Not Unlawfully Retroactive.

17. Florida Power makes a threshold argument that the just and reasonable rate requirement in Section 224(b)(1) cannot be applied to the Agreement Rates because the Agreement pre-dates the *Order*.[48] Florida Power is mistaken for two reasons. First, the *Pole Attachment Order* does not apply retroactively. The *Order* plainly states that the rate paid by incumbent LECs may be adjusted only *after* the effective date of the *Order*.[49] Accordingly, Verizon's Complaint requests a refund only from the period following the *Order*'s effective date.[50] This is not a case of unlawful "primary" retroactivity because the *Order* does not alter the past legal consequences of past actions.[51]

[42] Complaint at 23–24, paras. 59–62.

[43] *Id.* at 4.

[44] *Id.* at 9–10.

[45] Response at 27–30.

[46] *Id.* at 27–29.

[47] *Id.* at 23–27.

[48] *Id.* at 3, 10–14.

[49] *See Pole Attachment Order*, 26 FCC Rcd at 5334, para. 214 n.647 ("We decline to apply our new interpretation of section 224 retroactively, and make clear that incumbent LECs only can get refunds of amounts paid subsequent to the effective date of this Order.").

[50] Complaint at 23, para. 50, 24, para. 62.

[51] *See Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219-220 (1988) (Scalia, J., concurring)); *see also Landgraf v. U.S. Film Products*, 511 U.S. 244, 269 (1994) ("A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . ., or upsets expectations based in prior law."). Therefore, the primary retroactivity cases cited by Florida Power are inapposite. *See* Response at 10–14. Indeed, Florida Power appears to recognize the *Pole Attachment Order* is not primarily retroactive, acknowledging that a rule "'does not operate retroactively merely because it applies to prior conduct.'" *See* Response at 13 (quoting *Georgia Power Co. v. Teleport Commc'ns*, 346 F.3d 1033, 1042 (11th Cir. 2003)).

18. Second, Florida Power has not met its burden of showing that prospectively applying a just and reasonable rate would be unlawful because it is "secondarily" retroactive.[52] Florida Power bears a heavy burden. A rule that operates prospectively but affects transactions entered into before its promulgation is invalid only if it is arbitrary and capricious.[53] Florida Power asserts that applying Section 224(b)(1) to reduce the Agreement rates "makes worthless" Florida Power's "substantial and decades-long investments in pole plant to accommodate Verizon."[54] In particular, Florida Power notes that, because the Agreement reserves four feet of space to Verizon, Florida Power paid for poles that were taller and stronger than necessary for its own use, and therefore incurred installation costs that were fifty percent higher than would otherwise have been necessary.[55]

19. We are not persuaded. The D.C. Circuit upheld the Commission's finding that Section 224(b)(1) applies to incumbent LECs.[56] Florida Power does not explain how lawfully applying a statutory provision that requires "just and reasonable" rates on a prospective basis could be "arbitrary and capricious." "Just and reasonable" and "arbitrary and capricious" are mutually exclusive concepts. Moreover, adopting a just and reasonable rate would not render Florida Power's investment in poles "worthless." Florida Power has collected rates under the Agreement for nearly 40 years and would be paid a just and reasonable rate going forward. The Commission made clear in the *Pole Attachment Order* that applying Section 224(b)(1) to incumbent LEC attachments will not result in unreasonably low rates. The *Order* stressed that an appropriate rate is one that incentivizes utility companies to invest in poles, and ensures that electric customers are not burdened by excessive rates.[57] The *Order* also warned against "a failure to weigh, and account for" the special rights received, and responsibilities assumed, by incumbent LECs under joint use agreements.[58] In addition, Florida Power generates revenue by renting space to cable companies and competitive LECs.[59] For all of these reasons, we are confident that a just

[52] *See* Response at 11–12.

[53] *See e.g., Bowen*, 488 U.S. at 219-220 (Scalia, J., concurring) (describing "secondary retroactivity" as a "rule with exclusively future effect [that] can . . . affect past transactions"); *DirecTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) ("A rule that upsets expectations . . . may be sustained 'if it is reasonable,' *i.e.*, if it is not 'arbitrary' or 'capricious.'") (citations omitted); *Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996); *accord Nat'l Cable & Telecomm. Ass'n*, 567 F.3d at 670 (FCC's rule forbidding enforcement of existing exclusivity contracts between cable operators and apartment building owners was merely secondarily retroactive and was lawful under the "deferential standard of review").

[54] Response at 12.

[55] Response at 16, Ex. A (Kennedy Dec'l) at 4, para. 17.

[56] *See American Elec. Power Serv.*, 708 F.3d at 187–88.

[57] *Pole Attachment Order*, 26 FCC Rcd at 5303, para. 146 ("We recognize . . . that pole rental rates historically have helped support the investment utilities make in their pole infrastructure, and acknowledge the utilities' policy concerns about shifting that burden to utility ratepayers."), 5304, para. 148 (acknowledging "the policy interests in utility pole investment and of utility ratepayers"). Thus, in establishing the New Telecom Rate, the Commission was "mindful of the potential burden of reform on utility ratepayers and the incentives of utilities to continue investing in pole infrastructure," *id*. at 5321, para. 181, and therefore concluded that the New Telecom Rate should include recovery of some capital costs incurred by pole owners addition to those recovered through make-ready fees. *Id*. at 5304-5306, paras. 149-151 (defining "cost" for purposes of section 224(e) of the Act to include 44 or 66 percent of the fully allocated costs used to calculate the Old Telecom Rate, depending on whether the poles are in urban or non-urban areas).

[58] *See id.* at 5335 n.654 (rejecting "arguments that rates for pole attachments by incumbent LECs should always be identical to those of [competitive LECs] or cable operators").

[59] *See* Complaint Ex. A (Lindsay Aff.) at 3, para. 9 (Florida Power collects and retains rent from third party attachers); Response Ex. A (Kennedy Dec'l) at 7, para. 37 (admitting that Florida Power receives revenues from third party attachers, including attachers in the space reserved for Verizon).

and reasonable rate under Section 224 will adequately compensate Florida Power.[60] We therefore find that applying the just and reasonable standard to the Agreement is neither arbitrary nor capricious.[61]

B. Verizon Has Not Met Its Burden of Showing that the Agreement Rates Are Unjust and Unreasonable.

20. In its Complaint, Verizon argues that it is effectively unable to terminate the Agreement and obtain a new arrangement because Florida Power, in reliance on the Agreement's evergreen clause, has refused to renegotiate Verizon's rates with respect to existing attachments.[62] Verizon contends that, because Florida Power has always owned approximately 90% of the poles subject to the Agreement, Verizon is in an inferior bargaining position vis-à-vis Florida Power.[63] To show that the attachment rates under the Agreement are unjust and unreasonable, Verizon relies on the following comparison of 2012 rates:

2012 Agreement Rate	$36.22 per pole
Old Telecom Rate	$12.91 per foot of space occupied per pole
New Telecom Rate	$8.52 per foot of space occupied per pole[64]

Verizon claims that because the 2012 Agreement Rate is several times higher than the Old and New Telecom Rates, the Agreement Rate is per se unreasonable.[65] As noted above, the Commission specified in the *Pole Attachment Order* that when an incumbent LEC enters into a new attachment agreement, the New Telecom Rate may be appropriate if the LEC attaches on terms and conditions that leave it "comparably situated" to competitive LECs,[66] while the Old Telecom Rate serves as a "a reference point" if the new agreement "includes provisions that materially advantage the incumbent LEC" vis-à-vis competitive LECs or other attachers.[67] Verizon asserts that it is comparably situated to competitive LECs

[60] Florida Power also argues that Section 224 of the Act "provides the Commission no jurisdiction over [incumbent] LEC attachments." Response at 4, 40–41. The D. C. Circuit rejected that argument in its opinion affirming the *Pole Attachment Order*. *See American Elec. Serv. Power v. FCC*, 708 F.3d at 186–88.

[61] The Commission has applied a new rate to existing pole attachments on many occasions and has been upheld on appeal. *See Georgia Power Co. v. FCC*, 346 F.3d 1033 (11th Cir. 2003) (affirming *Teleport Commc'ns Atlanta, Inc. v. Georgia Power Co.*, Order, 16 FCC Rcd 20238, 20239, para. 4 (Deputy Chief, Cable Services Bur. 2001) (reducing pole rental rate from $53.35 to $6.56)) ; *Time Warner Entertainment v. Florida Power & Light Co.*, Order, 14 FCC Rcd 9149, 9154, para. 14 (Chief, Cable Service Bur. 1999) (substituting new rental rate "for the existing rate in the Agreements"); *Teleprompter of Fairmont, Inc. v. Chesapeake & Potomac Tel. Co.*, Memorandum Opinion and Order, 85 FCC2d 243, 244, para. 2 (1981) ("substitut[ing] the maximum just and reasonable rate for the $4.00 rate set in the contract between the parties").

[62] *See* Complaint at 9–16, paras. 16–38.

[63] *Id.* at 9–10, paras. 17–20.

[64] *Id.* at 7–8, paras. 11–13. Florida Power contends that, properly calculated, the Old and New Telecom Rates for 2012 would be slightly higher ($14.83 and $9.78, respectively). Response at 4, 23, 35.

[65] Complaint at 7–8, paras. 11–13; Pole Attachment Complaint Reply, File No. EB-14-003 (filed Apr. 24, 2014) (Reply) at 1, 5.

[66] *Pole Attachment Order*, 26 FCC Rcd at 5336, para. 217.

[67] *Id.* at 5336, para. 218.

and should therefore pay the New Telecom Rate for its existing attachments.[68] In the alternative, Verizon argues that if it is not similarly situated to competitive attachers, it should pay the Old Telecom Rate.[69]

21. Although the 2012 Agreement Rate exceeds the Old and New Telecom Rates, this fact alone does not establish that the Agreement Rate is unjust and unreasonable. We find that Verizon has failed to meet its burden of proof that the rate is unjust and unreasonable for three reasons.[70] First, because Verizon has received, and continues to receive, unique benefits under the Agreement, we find that Verizon is not similarly situated to competitive LECs and therefore is not entitled to pay the New Telecom Rate. In the *Pole Attachment Order*, the Commission repeatedly noted that joint use agreements are not analogous to lease agreements between competitive LECs and electric utilities because (a) unlike competitive LECs, incumbent LECs have no statutory right of access to utility poles;[71] and (b) incumbent LECs receive unique benefits under joint use agreements that are not available to competitive LECs.[72] In its Response to the Complaint, Florida Power lists the unique advantages the Agreement conferred on Verizon with respect to its existing attachments, including:

- Verizon was not required to file a permit application, pay an initial fee, or wait for approval from Florida Power before attaching.
- Verizon's attachments were not subject to Florida Power inspection at the time of installation, and Verizon was not required to pay an inspection fee.
- The Agreement granted Verizon access to the lowest four feet of usable space on each pole, which is easier to access than the space used by competitors between Verizon's and Florida Power's attachments. This reduces Verizon's installation and maintenance costs.
- To accommodate the four feet of space allotted to Verizon, Florida Power installed taller poles at increased cost.
- The Agreement requires Florida Power to replace poles in certain circumstances to accommodate Verizon; none of Verizon's competitors receive this benefit.
- Unlike competitive LECs, Verizon is not required to purchase its own insurance, list Florida Power as an insured, or indemnify Florida Power.[73]

22. Verizon does not deny that it received these benefits, some of which have prospective value.[74] Verizon likewise does not deny that these benefits remain in effect because, despite its

[68] *Id.* at 17–19, paras. 40–46.

[69] *Id.* at 22, para. 53.

[70] *See* 47 C.F.R. § 1.1404(f) (complainant alleging that a term in a pole attachment agreement is unjust or unreasonable must "specify all information and argument relied upon to justify said claim"); *Knology v. Ga. Power*, 18 FCC Rcd 24615, 24635 (2003) (complainant in a pole attachment proceeding bears the burden of proof).

[71] *See supra* n.9.

[72] *Pole Attachment Order*, 26 FCC Rcd at 5333, 5335–37 , paras. 214, 216 nn.651, 654, & para. 217.

[73] Response at 16, 27–29; Response Ex. A (Kennedy Dec'l) at 4–6, paras. 17–36; Agreement at 3, 5, 7, 9, Article I, § 1.1.7, Article III, §§ 3.1–3.2, Article IV, § 4.4, Article V.

[74] Verizon claims that its "allocated space is not alone responsible for the height and strength of [Florida Power's] pole network." Reply at 6. That is not Florida Power's argument. Rather, Florida Power contends that accommodating the space allotted to Verizon under the Agreement drove up its pole installation costs significantly. (continued….)

termination, the Agreement continues to govern Verizon's attachments to Florida Power's poles.[75] In its Complaint, Verizon does not argue that the Agreement's evergreen clause is unenforceable.[76] Verizon asserts in its Reply that Florida Power cannot rely on the evergreen clause because Florida Power "failed to renegotiate the rental rate and rate formula in good faith," but Verizon cites no legal support for that proposition.[77] Verizon concedes that Florida Power engaged in face-to-face negotiations and in mediation before the Commission's Market Disputes Resolution Division.[78] Florida Power's reliance on the plain language of the evergreen clause is not evidence of bad faith.

23. Second, Verizon has not demonstrated that it should be required to pay no more than the Old Telecom Rate. In Verizon's view, there are only two possible just and reasonable rates for incumbent LEC pole attachments—the New and Old Telecom Rates. But the Commission specifically found in the *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)."[79] In support of applying the Old Telecom Rate, Verizon cites the *Order*'s statement that the Commission would consider the Old Telecom Rate "as a reference point" when determining a just and reasonable attachment rate for a "*new agreement*" between an incumbent LEC and a utility.[80] The agreement at issue here is not a new agreement. It is "an historical joint use agreement," which the Commission repeatedly distinguished from "new agreements."[81] Moreover, a "reference point" is not a rule. The Commission plainly stated in the *Order* that it was not adopting "rules governing incumbent LEC pole attachments, finding it more appropriate to proceed on a case-by-case basis."[82]

24. Third, we find that Verizon has adduced insufficient evidence to support a finding that the Agreement Rates are unreasonable, or for the Commission to set a just and reasonable rate. Verizon concedes that it received and continues to receive benefits under the Agreement that are not provided to other attachers, but it has not produced any evidence showing that the monetary value of those advantages is less than the difference between the Agreement Rates and the New or Old Telecom Rates over time.

(Continued from previous page)
Response at 16; Response Ex. A (Kennedy Dec'l) at 4, para. 17. Although we need not decide this issue now, it appears that at least some of those costs are attributable to Verizon's allotted space on the poles.

[75] *See* Agreement at 13, Article XI, § 11.2; *see also id.* at 17, Article XVI. In its Reply, Verizon argued that "[Florida Power] asserts that Verizon relinquished rights under the Agreement when it was terminated." Reply at 9. Not so. The evidence Verizon cites—a declaration submitted on behalf of Florida Power—related to future pole installations, not attachments in place at the time the Agreement terminated. *See* Response Ex. A (Kennedy Decl.) at 8, para. 43 (noting that as of June 9, 2012, "Verizon relinquished its contractual right to have [Florida Power] install poles tall enough to avoid make-ready work when Verizon intends to attach").

[76] We note that in other circumstances courts have enforced evergreen clauses. *See, e.g., United Mine Workers of America 1974 Pension v. Pittston Co.*, 984 F.2d 469, 473 (D.C. Cir. 1993) (evergreen clause construed to impose "perpetual obligation" on employer to contribute to union pension fund, even though employer did not sign successor agreement to the collective bargaining agreement that established the fund); *Masonry Institute v. McNeela*, 67 F.3d 301 (7th Cir. 1995); *Flynn v. Beeler Barney Assoc's Masonry Contractors, Inc.*, 2004 WL 3712630 (D.D.C. 2004).

[77] Reply at 7.

[78] *See* Complaint at 11–13, paras. 22, 24, 28–31.

[79] *Pole Attachment Order*, 26 FCC Rcd at 5336, para. 217.

[80] *Id.* at 5336–37, para. 218 (emphasis added).

[81] *See id.* at 5334-37, paras. 216–219; *see also id.* at 5336, para. 217 ("historical joint use agreements between incumbent LECs and other utilities implicate rights and responsibilities that differ from those in typical pole lease agreements with [competitive LECs] or cable operators").

[82] *Id.* at 5334, para. 214.

Verizon provides no evidence regarding the value of access to Florida Power's poles or occupying the lowest usable space on each pole. Verizon likewise made no attempt to estimate the costs Florida Power incurred by installing taller poles to accommodate Verizon. For its 67,000 attachments, Verizon was not required to pay make-ready costs and post-attachment inspection fees that competitive LECs must pay, yet Verizon has made no attempt to quantify the expenses it avoided under the Agreement. Absent such evidence, we are unable to determine whether the Agreement Rates are just and reasonable.[83] Verizon's raw comparison of the Agreement Rates to the Old and New Telecom Rates is not sufficient to show that the Agreement Rates are unjust.

C. Verizon's Complaint Should Be Dismissed Without Prejudice.

25. Because Verizon has failed to meet its burden of proof, we do not grant the Complaint.[84] That does not necessarily mean, however, that Verizon must pay the Agreement Rates in perpetuity. As contemplated in the *Pole Attachment Order*, this appears to be a case in which "an incumbent LEC . . . genuinely lacks the ability to terminate an existing agreement."[85] Because the Bureau has not previously applied the 2011 *Pole Attachment Order*, and dismissal with prejudice could force Verizon to pay the relatively high Agreement Rates for as long as its attachments remain on Florida Power's poles pursuant to the evergreen clause, we dismiss Verizon's Complaint without prejudice. "The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[86] When a complainant fails to meet its burden of showing that a term in a pole attachment agreement is unjust or unreasonable,[87] "the Commission may dismiss the complaint."[88] If the Commission elects to do so, dismissal "will be with prejudice if the complaint has been dismissed previously."[89] Because the Commission has not previously dismissed Verizon's complaint, in this instance we dismiss without prejudice.

26. The *Order* established that the just and reasonable standard in Section 224(b)(1) applies to incumbent LEC pole attachments. The *Order* did not adopt a rate formula for existing joint use agreements, nor did it specify the type of evidence required to establish that the Agreement Rates are unjust and unreasonable. Although Verizon received benefits under the Agreement that were not available to other attachers, it is possible that the value of those benefits does not justify Florida Power

[83] Verizon argues in its Reply that the advantages provided by the Agreement are irrelevant because it "seeks to be comparably situated to a [competitive] LEC attacher by attaching based on the terms and conditions of Florida Power's license agreement with Verizon's [competitive] LEC affiliate." Reply at 9. As discussed above, Verizon has already reaped the benefits of the Agreement and will continue to enjoy those benefits into the future. As a result, Verizon is not comparably situated to other Florida Power attachers.

[84] The Complaint also fails because it does not provide evidence as to the rate Verizon charges cable companies and competitive LECs to attach to its poles. *See Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218 ("[I]n evaluating an incumbent LEC's complaint, the Commission may also consider the rates, terms and conditions that the incumbent LEC offers to . . . other attachers for access to the incumbent LEC's poles.").

[85] *Pole Attachment Order*, 26 FCC Rcd at 5336, para. 216.

[86] 47 U.S.C §154(j); *see* 47 C.F.R. § 1.1415.

[87] *See supra* paras. 21–24; *see* 47 C.F.R. § 1.1404(f)–(g).

[88] *Id.* § 1.1406(b). In the alternative, the Commission "may require the complainant to file additional information." *Id.* We view these alternatives—dismissing without prejudice or asking the complainant to supplement the record—as functionally equivalent. In either case, the Commission has made a determination that the record is insufficient to warrant granting the Complaint. In this Order, we exercise our discretion to dismiss without prejudice rather than requesting additional information.

[89] *Id.* § 1.1406(d).

charging Verizon higher contractual rates for as long as Verizon's attachments remain on Florida Power's poles. Verizon may refile its complaint and attempt to fill the evidentiary gaps in the current record.

IV. ORDERING CLAUSE

27. Accordingly, **IT IS ORDERED**, pursuant to Sections 4(i), 4(j) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 224 that the Complaint is **DISMISSED WITHOUT PREJUDICE**, and that **THIS PROCEEDING IS TERMINATED**.

FEDERAL COMMUNICATIONS COMMISSION

Travis LeBlanc
Chief, Enforcement Bureau