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BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 19-187 Bureau ID No. EB-19-MD-006

REDACTED

AMENDED REPLY LEGAL ANALYSIS
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

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* Certain information in this Amended Reply Legal Analysis has been designated confidential pursuant to 47 C.F.R. § 1.731. The designated information is marked with a text box in the confidential version of these pleadings and is redacted in the public version.

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I. INTRODUCTION AND SUMMARY

FPL's pleadings confirm that the Commission should apply its new telecom rate presumption and force a reduction of FPL's unlawfully high rental rates. FPL continues to reject the Commission's authority over ILEC rates, an issue settled almost 9 years ago.[1] It argues that the age of the parties' Joint Use Agreement ("JUA") should place it beyond the reach of federal law, but that age does not make the JUA immune from technological and competitive developments or from the changes to the pole attachment regime that Congress and the Commission enacted to promote deployment of the advanced services needed today and in the future. And FPL challenges the Commission's new telecom rate presumption itself—arguing that it can never apply to existing attachments made to existing poles under existing agreements. But the Commission rejected these arguments when it sought to promote broadband deployment by eliminating the "outdated rate disparities" that persist under existing agreements, like the parties' 1975 JUA.[2] The Commission should promptly enforce its new telecom rate presumption in this case.

FPL tries to hide the rates it has charged AT&T's competitors, which cannot be found in FPL's Answer. But it admitted in response to AT&T's interrogatories that it has been charging AT&T rental rates that are up to [redacted] *times* the rates FPL charged AT&T's competitors for use of wood distribution poles, up to [redacted] *times* the rates FPL charged AT&T's competitors for use of concrete distribution poles, and [redacted] *times* the rates FPL charged AT&T's competitors for use of

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[1] *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 (2011) ("*Pole Attachment Order*"), *aff'd*, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013).

[2] *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) ("*Third Report and Order*").

transmission poles. FPL does not come close to rebutting the Commission's presumption that AT&T should be charged a new telecom rate like its competitors, let alone provide clear and convincing evidence that AT&T receives net material benefits under the JUA that advantage AT&T over its competitors. Instead, FPL offers conflicting factual claims riddled with error, hypotheticals that are not grounded in reality or supported by actual data, and its own stated belief that AT&T should pay the JUA rates until AT&T removes its facilities from more than 425,000 poles regardless of Commission rulings. Indeed, FPL did not provide a single license agreement as purported "evidence" of AT&T's competitive advantages or a single invoice or payment record showing it collected some cost from AT&T's competitors that was not also paid for by AT&T.

Lacking any legal or factual basis for its exceptionally high pole attachment rates, FPL tries to sow confusion, obscure the facts, accuse AT&T of misconduct, and skirt settled precedent. But all its machinations and revisionist history cannot conceal that FPL is trying to turn back the clock on the Commission's deployment and competition initiatives. For nearly a decade, the Commission has worked to "establish rental rates for pole attachments that are as low and close to uniform as possible … to promote broadband deployment."[3] FPL argues that AT&T should instead pay many multiples of the rates paid by its competitors, amounting to a more than █ million annual impact. FPL defends this extraordinary premium with dubious attempts to quantify the difference between a hypothetical world in which FPL shares poles with communications attachers and one in which it does not. But this argument is 100% contrary to the Commission's objectives and the principle of competitive neutrality that has motivated its rate reforms. The shared use of FPL's utility poles does not differentiate AT&T from its

[3] National Broadband Plan at 110 (2010).

competitors or detract in any way from the fundamental principle that a properly calculated new telecom rate will "fully compensate [FPL] for costs caused by third-party attachments," including AT&T's.[4]

The Commission should soundly reject FPL's arguments, enforce its new telecom rate presumption, and refund the excess amounts FPL has unlawfully collected since 2014. In so doing, the Commission will take a valuable step forward in its decade-long effort to promote deployment through competitively neutral rates.

II. LEGAL ANALYSIS

A. FPL's Position Is In Direct Conflict With The Commission's Goals.

The Commission has worked for nearly a decade to harmonize pole attachment rates at the fully compensatory new telecom level in order to promote competitive neutrality and accelerate deployment of broadband and other advanced services that are "crucial to our nation's economic growth, global competitiveness, and civic life."[5] FPL seeks the exact opposite. Stuck in the 1970s, FPL argues that AT&T should forever pay many multiples of the rates AT&T's competitors pay to use comparable space on FPL's existing utility poles *and* that AT&T should

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[4] *Pole Attachment Order*, 26 FCC Rcd at 5324 (¶ 191).

[5] *In the Matter of Connect America Fund*, 26 FCC Rcd 17663, 17667 (¶ 3) (2011); *see also, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123); *Pole Attachment Order*, 26 FCC Rcd at 5241 (¶ 1) ("Th[is] Order is designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation."); National Broadband Plan at 110 ("To support the goal of broadband deployment, rates for pole attachments should be as low and as close to uniform as possible.").

pay exponentially more than its competitors to deploy facilities in the future.[6] FPL's two-pronged attack on the Commission's authority and objectives should be soundly rejected.

FPL first seeks to forever preserve the unjust and unreasonable rates it charges AT&T on the existing joint use network.[7] And the competitive disparity is stark. For comparable space on FPL's poles, FPL charges AT&T's competitors rates that, while themselves unlawfully inflated,[8] are still a mere fraction of the rates FPL charges AT&T:[9]

	2014[10]	2015	2016	2017	2018
Wood Distribution Poles					
New telecom rate FPL charged	$10.44	$11.54	$12.94	$14.84	$16.85
Cable rate FPL charged	$10.46	$11.57	$12.97	$14.88	$16.89
Rate FPL charged AT&T					
Concrete Distribution Poles					
New telecom rate FPL charged	$10.44	$11.54	$12.94	$14.84	$16.85
Cable rate FPL charged	$10.46	$11.57	$12.97	$14.88	$16.89
Effective rate FPL charged AT&T					
Transmission Poles					
New telecom rate FPL charged	$68.06	$76.34	$84.22	$104.60	$103.43
Cable rate FPL charged	$39.70	$33.32	$36.75	$45.65	$45.14
Effective rate FPL charged AT&T					

[6] *See, e.g.*, FPL's Resp. to AT&T's Interrog. No. 1 (rates charged AT&T), No. 5 (rates charged AT&T's competitors); Answer ¶ 27 ("FPL admits that it has restricted AT&T's right to access FPL's poles and terminated the parties' 1975 JUA ....").

[7] *See, e.g.*, Answer ¶ 4 ("[T]he Commission has no statutory authority to regulate the rates, terms, and conditions of incumbent local exchange carrier pole attachments.").

[8] *See* Section II.E.1, below; *see also* Reply Ex. A at ATT00915-16, 18 (Rhinehart Reply Aff. ¶¶ 7, 11).

[9] *See* FPL's Resp. to AT&T's Interrog. No. 5.

[10] This table compares the per-pole rates that FPL charged AT&T to the per-pole rates FPL charged AT&T's competitors based on the preceding year's cost data, using 1 foot as the space-occupied input to the Commission's rate formula. *See id.*

But FPL does not just seek to preserve these unreasonably high rental rates in perpetuity. It also seeks to exacerbate the competitive disparity by exponentially increasing AT&T's deployment costs. Faced with a request for "just and reasonable" rates, FPL refused to disclose its new telecom rates—let alone negotiate just and reasonable rates or even make an offer[11]—and terminated the parties' JUA so that AT&T can no longer deploy on new FPL pole lines.[12] And because AT&T did not drop its request for "just and reasonable" rates, FPL now demands that AT&T "remove AT&T's equipment from FPL's infrastructure."[13]

FPL continues to threaten this major disruption to AT&T and its customers, arguing that FPL can force the removal of a significant portion of AT&T's network because AT&T paid in full FPL's disputed rental invoices at the end—rather than the beginning—of a contractual pre-complaint dispute resolution process designed to try to negotiate the lawful amounts that should be paid.[14] FPL also continues to press forward with its termination of AT&T's ability to deploy on new FPL pole lines[15]—which itself significantly increases costs and negatively impacts deployment.[16] "Florida is a fast-growing state," as FPL explains, and it requires rapid

[11] *See, e.g.*, Compl. Ex. B at ATT00058 (Miller Aff. ¶ 22); *see also* FPL's Br. in Support of Its Answer ("FPL Br.") at 19 ("FPL also emphasized to AT&T several times that FPL was unwilling to negotiate a new rate going forward.").

[12] AT&T's Am. Pole Attachment Compl. ("Compl.") Ex. 23 at ATT00250 (Notice of Termination (Mar. 25, 2019)); *see also* Compl. Ex. 1 at ATT00128 (JUA, Art. XVI).

[13] Answer ¶ 17.

[14] *Id.*; *see also, e.g.*, Compilation of Court Pleadings Filed Mar. 4, 2020, Ex. 2 at ATT01137 (arguing that AT&T's failure to pay FPL's invoices by the due date FPL selected "was justification for FPL's … termination of AT&T's rights to remain attached to FPL's poles" irrespective of AT&T's later payment of the invoices in full at the conclusion of theJUA-mandated pre-complaint mediation process).

[15] *See* Compl. Ex. 1 at ATT00128 (JUA, Art. XVI).

[16] *See* Reply Ex. C at ATT00976-77 (Peters Reply Aff. ¶ 28) (stating that FPL's termination of the "further granting of joint use" will increase AT&T's deployment costs); *see also, e.g.*, *Pole*

deployment of broadband and other advanced services.[17] Instead of promoting that deployment—or at least offering to negotiate a new agreement to allow future deployment on new FPL pole lines—FPL insists that termination is required as part of "collection efforts" of outstanding, and disputed, rental payments.[18] But there is nothing to collect: 9 months ago, "AT&T delivered payment to FPL in the form of two checks totaling [REDACTED], which represented the outstanding principal balance."[19]

FPL's actions are evidence of some of the most extreme forms of intransigence and resistance to the competition and deployment objectives that prompted the Commission to take further action in 2018 to accelerate the rate relief that ILECs should have received in 2011.[20] The Commission should promptly enforce its new telecom rate presumption, find that FPL has not rebutted the presumption with clear and convincing evidence that AT&T enjoys a net material advantage over its competitors, and provide AT&T the competitively neutral new telecom rate and refunds that are essential to achieving the Commission's goals.

B. FPL Cannot Avoid The New Telecom Rate Presumption.

FPL tries to escape the new telecom rate presumption with specious arguments that conflict with Commission precedent and that, if accepted, would render the presumption incapable of eliminating the "outdated rate disparities" it was adopted to correct.

Attachment Order, 2011 FCC Rcd at 5242 (¶ 4) ("[E]nvironmental and zoning restrictions and the very significant costs of erecting a separate pole network or entrenching cable underground" often leave "'no practical alternative [for network deployment] except to utilize available space on existing poles.'") (citation omitted).

[17] Answer Ex. A at FPL00005 (Kennedy Decl. ¶ 9).

[18] *See, e.g.*, FPL Br. at 19; Answer ¶ 17.

[19] FPL Br. at 13.

[20] *Third Report and Order*, 33 FCC Rcd at 7767-68 (¶ 123).

1. The Commission Already Rejected FPL's Meritless Retroactivity, Takings, And Due Process Arguments.

FPL argues that the new telecom rate presumption cannot apply to an existing agreement like the JUA because it would be unlawfully retroactive and would raise due process concerns.[21] The Commission rejected FPL's arguments the last time FPL presented them, and they remain meritless this time around.[22]

First, FPL argues that the Commission cannot lawfully apply a "just and reasonable" rate to a JUA that pre-dates the 2011 *Pole Attachment Order* because FPL purportedly invested in a pole network that is "taller and stronger than FPL needed and would have built for itself."[23] There is no need to reconsider this already rejected argument.[24]

Second, FPL argues that the Commission cannot lawfully apply the new telecom rate presumption to a JUA that pre-dates the 2018 *Third Report and Order*.[25] This argument also fails. There is no problem with unlawful "primary" retroactivity because the presumption applies only where a JUA was "entered into, renewed, or in evergreen status *after the effective date of [the 2018] Order*."[26] And there is no problem with unlawful "secondary" retroactivity because the use of a rebuttable presumption to ensure "just and reasonable" rates cannot be

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[21] *See* FPL Br. at 24-33.

[22] *See Verizon Fla. v. Fla. Power & Light Co.*, Memorandum Op. & Order, 30 FCC Rcd 1140,1145-47 (¶¶ 17-19) (EB 2015) ("*FPL Order*"). *Compare* FPL Br. at 22-23 *with* Public Version of FPL's Resp. to Verizon Florida's Compl., File No. EB-14-MD-003, at 10-20 (Apr. 4, 2014).

[23] FPL Br. at 25; *see generally id.* at 24-32, 35 n.124. The factual basis for this claim is also meritless. *See* Section II.C.2, below.

[24] *See FPL Order*, 30 FCC Rcd at 1145-47 (¶¶ 17-19).

[25] *See* FPL Br. at 29-32.

[26] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475) (emphasis added); *see also FPL Order*, 30 FCC Rcd at 1145 (¶ 17) (citing cases) (emphasis in original).

"arbitrary and capricious" when using any procedure to ensure "just and reasonable" rates is not.[27]

FPL argues that things are different this time around because the pre-existing telecom rate is a "hard cap" instead of a "reference point."[28] The "hard cap," FPL argues, is "arbitrary and capricious" because it may not fully compensate FPL for its past investment.[29] But FPL has not rebutted the new telecom rate presumption and so it will be fully compensated with a new telecom rental rate.[30] And, even if it had rebutted the presumption, the FCC has still ensured that FPL will be fully compensated by a "just and reasonable" rate.[31] "'Just and reasonable' and 'arbitrary and capricious' are mutually exclusive concepts."[32] Nor can FPL show that any of its investment has been "worthless."[33] FPL has instead been *over*-compensated in the past for its investment and will be compensated for that investment going forward; it has "collected rates

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[27] *FPL Order*, 30 FCC Rcd at 1145-46 (¶¶ 17-19) ("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.... 'Just and reasonable' and 'arbitrary and capricious' are mutually exclusive concepts.") (citing cases).

[28] FPL Br. at 31-32.

[29] *Id.* (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring) and arguing that, if "FPL recover[s] less than its incremental[ ] cost attributable to AT&T," its additional investment would be "worthless").

[30] *See* Section II.C, below; *see also Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 & n.569) (quoting National Broadband Plan at 110).

[31] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); *see also* Reply Ex. A at ATT00913-14 (Rhinehart Reply Aff. ¶ 3) (stating that the properly calculated pre-existing telecom rate, using the FCC presumptive inputs for an ILEC's attachments, is about 1.5 times the properly calculated new telecom rate).

[32] *FPL Order*, 30 FCC Rcd at 1146 (¶ 19).

[33] This is particularly so because FPL has expressed a desire to remove AT&T from its poles. FPL cannot show that accepting a "just and reasonable" rate from AT&T would render FPL's investment "worthless" when FPL says it would prefer to receive *no* rental income from AT&T. *See* Answer ¶ 17.

under the Agreement for [over] 40 years[,] would be paid a just and reasonable rate going forward," and will continue to "generate[ ] revenue by renting space to cable companies and [C]LECs."[34] Thus, ensuring FPL receives a "just and reasonable" rate from AT&T "will not result in unreasonably low rates" to FPL, or create any unlawful retroactivity.[35]

Third, FPL argues that, "even assuming the *2018 Third Report and Order* applies on a going-forward basis," due process concerns prevent the Commission from applying a new rate to an existing agreement.[36] Not so. FPL was on notice during all years in dispute that it was required by federal law to charge AT&T a "just and reasonable" rate.[37] And the Commission has broad authority "to take whatever action it deems 'appropriate and necessary' [when] it finds a particular rate ... to be unjust or unreasonable,"[38] including authority to "[o]rder a refund."[39] Thus, "[t]he Commission has applied a new rate to existing pole attachments on many occasions and has been upheld on appeal,"[40] including in the case that FPL cites.[41]

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[34] *FPL Order*, 30 FCC Rcd at 1146 (¶ 19); *see also* Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11) (admitting that FPL leases space to third party attachers, including attachers in the space reserved for AT&T).

[35] *FPL Order*, 30 FCC Rcd at 1146 (¶ 19).

[36] *See* FPL Br. at 32-33.

[37] *See Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202) ("[W]here [I]LECs have such access [to utilities' poles], they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1).").

[38] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 77 FCC 2d 187, 195 (¶ 22) (1980); *see also Monongahela Power Co. v. FCC*, 655 F.2d 1254, 1257 (D.C. Cir. 1981) ("The Commission may proceed 'to hear and resolve complaints ...,' including those involving preexisting contracts, using the methods for calculating and apportioning costs that it has prescribed.") (internal citation omitted).

[39] 47 C.F.R. § 1.1407(a).

[40] *FPL Order*, 30 FCC Rcd at 1147 (¶ 19 n.61) (citing cases).

[41] *See Ga. Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033 (11th Cir. 2003) (cited at FPL Br. at 32) (affirming *Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 16 FCC Rcd

Fourth, FPL argues that it would be improper to use the new telecom rate presumption to set the "just and reasonable" rate during the applicable 2014 to 2018 statute of limitations.[42] But an "administrative regulation does not operate retroactively merely because it applies to prior conduct."[43] It must also impair rights FPL had during the 2014 to 2018 refund period, increase FPL's liability for those years, or impose new duties on that time period.[44] FPL has not tried to meet this standard, and cannot do so.[45] From 2014 to 2018, FPL was bound by the "just and reasonable" rate requirement, faced equal liability for rent collected in violation of federal law, and was subject to a comparable obligation to justify the rates it charged.[46] For this reason, the Commission need not enforce its presumption to award rate relief; the new telecom rate is the "just and reasonable" rate under the standard adopted by the Commission in 2011 *and* in 2018.[47] FPL cannot avoid just and reasonable new telecom rates based on arguments about retroactivity.

20238, 20239 (¶ 4) (Deputy Chief, Cable Services Bur. 2001); *see also Teleprompter of Fairmont, Inc. v. Chesapeake & Potomac Tel. Co.*, 85 FCC 2d 243, 244 (¶ 2) (1981); *Time Warner Entm't v. Fla. Power & Light Co.*, 14 FCC Rcd 9149, 9154-55 (¶¶ 14, 15) (Chief, Cable Service Bur. 1999) (terminating unlawful rate under an existing agreement, substituting a new "just and reasonable" rate, and ordering FPL to refund unlawfully collected rental payments plus interest).

[42] *See* FPL Br. at 32-33.

[43] *See id.* at 32 (quoting *Ga. Power Co.*, 346 F.3d at 1042).

[44] *See Ga. Power Co.*, 346 F.3d at 1043 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

[45] FPL's argument relies solely on claims about expectations decades ago. *See, e.g.*, FPL Br. at 25 ("forty-three years"), 27 ("more than forty years"), 28 ("several decades"), 29 ("four decades-old"), 31 ("decades long"), 32 ("many decades").

[46] *See Heritage Cablevision Assocs. of Dallas, L.P. v. Tex. Utils. Elec. Co.*, 6 FCC Rcd 7099, 7105 (¶ 29) (1991) (quoting 47 C.F.R. § 1.1407(a)); *see also Verizon Va., LLC v. Va. Electr. & Power Co.*, 32 FCC Rcd 3750, 3759-61 (¶¶ 20-22) (EB 2017) ("*Dominion Order*") (requiring electric utility to justify its rates).

[47] *See* Compl., Section III.B; *see also* Section II.C-D, below.

2. The New Telecom Rate Presumption Applies To The JUA.

FPL next argues that, if the new telecom rate presumption applies to existing agreements, it should not apply to the JUA. FPL's arguments flatly conflict with the *Third Report and Order* and should be rejected.

First, FPL argues that the JUA was not "new or newly renewed" after the effective date of the *Third Report and Order* because it "has an effective date of January 1, 1975, and was last revised with an effective date of June 1, 2007."[48] But in the *Third Report and Order*, the Commission held that the new telecom rate presumption applies to "new or newly-renewed" agreements which, it explained, include "agreements that are automatically renewed, extended, or placed in evergreen status" following the *Order*'s effective date.[49] FPL cannot read this definition out of the *Order*.

And the JUA falls squarely within the definition. By its terms, the JUA automatically extended after the *Order*'s March 2019 effective date; it states that, after the JUA's initial term expired on January 1, 1980, the JUA "*shall continue* in force thereafter" until it is terminated upon six months written notice.[50] The words "continue" and "extend" are synonyms.[51] FPL admits that the JUA was "valid and enforceable" when the *Third Report and Order* took effect—and thus the JUA must have automatically extended each day after its initial term expired on

[48] Answer ¶ 9; *see also* FPL Br. at 22-24.

[49] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475); *see also* FPL Br. at 23 (admitting that "renewal includes agreements that are automatically renewed, extended, or placed in evergreen status") (quoting *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475)).

[50] Compl. Ex. 1 at ATT00128 (JUA, Art. XVI) (emphasis added); *see also* Compl. ¶ 11.

[51] *See* Compl. ¶ 11 ("'Continue' means '[t]o carry further in time, space or development: *extend*' and 'extend' means 'to lengthen, prolong; to *continue* ...'") (citations omitted).

January 1, 1980.[52] FPL also admits that, after the *Order*'s effective date, FPL terminated the JUA as it applies to "the further granting of joint use of poles."[53] This placed the JUA in evergreen status because, notwithstanding such termination, the JUA "shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."[54]

FPL is wrong in arguing that the JUA could *not* be placed in evergreen status because it *includes* an "evergreen" provision.[55] The Commission found that a JUA is in "evergreen status" where, as here, the "agreement has been terminated," but the electric utility continues to argue that the lawful "rates [are] established by the joint use agreement for existing attachments."[56] And while FPL states in a footnote that it also provided notice of termination under a separate JUA provision that does not include express evergreen protection,[57] its observation is irrelevant. FPL indisputably provided notice of termination under the evergreen provision, which means that the JUA "shall remain in full force and effect with respect to all poles jointly used by the

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[52] FPL Br. at 22-23.

[53] *Id.* at 2; Compl. Ex. 23 at ATT00250 (Notice of Termination (Mar. 25, 2019)) ("[P]ursuant to Article XVI of the Agreement, FPL hereby provides notice that it is terminating all rights related to the further granting of joint use of poles.... [a]s provided by Article XVI.").

[54] Compl. Ex. 1 at ATT00128 (JUA, Art. XVI).

[55] FPL Br. at 23 n.83. FPL's related claim that the JUA is a "perpetual license" that could not renew, *id.*, is refuted by FPL's admission that the JUA remained "valid and enforceable" in March 2019, so must have renewed after its initial term. *See* Answer ¶ 11 (admitting that "an event ... occurred in 1980" when the JUA's initial term expired); *see also* Compl. ¶ 11 & n.19 ("Renew" means to "repeat so as to reaffirm" or "begin again") (citations omitted); Compl. Ex. 1 at ATT00128 (JUA, Art. XVI) (setting initial term).

[56] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475) (citing *FPL Order*, 30 FCC Rcd 1140); *see also* FPL Br. at 33 ("The 1975 JUA Rates are Lawful").

[57] FPL Br. at 23 n.83.

parties at the time of [its] termination" in September 2019.[58] The parties continue to jointly use poles after that termination,[59] so the JUA is in "evergreen status" and the new telecom rate presumption applies.[60]

Second, FPL argues that the JUA is not entitled to the presumption because it is not a "pole attachment contract."[61] FPL provides no explanation for this assertion,[62] although FPL has long sought to recharacterize joint use agreements as "infrastructure cost sharing agreements" in an effort to avoid the Commission's rate reforms.[63] But simply re-labeling the JUA does not remove it from the Commission's *Order* requiring application of the new telecom rate presumption, as the JUA still governs the parties' attachments to each other's poles and sets the annual "rental" for that use.[64] And although FPL argues that replacing the JUA rates with proportional new telecom rates would not appropriately share the cost of FPL's capital

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[58] *See* FPL Br. at 23 n.83. *See also* Compl. Ex. 1 at ATT00128 (JUA, Art. XVI); Compl. Ex. 23 at ATT00250 (Notice of Termination (Mar. 25, 2019) (mistakenly including August 2019 effective date instead of date "6 months from the date of this letter").

[59] *See, e.g.*, Answer Ex. E at FPL00167 (Murphy Decl. ¶ 6) ("AT&T occupies 401,919 FPL distribution poles in Florida.").

[60] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475).

[61] Answer ¶ 9.

[62] *But see* 47 C.F.R. § 1.726(b) ("The answer shall advise the complainant and the Commission fully requiring fully and completely of the nature of any defense ....").

[63] *See, e.g.*, Reply Comments of FPL et al. at 28, *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future* (Oct. 10, 2010) (arguing that ILECs are not entitled to just and reasonable rates because joint use agreements reflect are "infrastructure cost sharing agreements"); Reply Brief of FPL et al. at 16, *Am. Elec. Power Serv. Corp. v. FCC*, No. 11-1146, 2012 WL 1187988 (D.C. Cir. Apr. 9, 2012) (arguing that "joint use agreements ... are infrastructure cost sharing agreements"); *see also* FPL Br. at 1 (describing the JUA as an agreement for "the equitable sharing of the ownership costs of a mutually constructed and beneficial network of poles").

[64] *See, e.g.*, Compl. Ex. 1 at ATT00121 (JUA, Art. X).

investment in the network,[65] that is not true. A properly calculated new telecom rate is "*fully compensatory*" to the pole owner.[66] That does not change when the attacher also owns poles. Instead, the new telecom rate formula, properly applied to each party's use of the other party's poles, will "fully compensate [each] pole owner for costs caused by [the other party's] attachments."[67] Thus, regardless of how FPL describes the JUA, it is a "newly-renewed joint use agreement[ ]" that the Commission has rightly found is presumptively entitled to a just and reasonable, new telecom rate.[68]

Third, FPL argues that the new telecom rate presumption should not apply to the JUA because the Commission sought "to minimize the divergence from past practices for 'privately-negotiated agreements.'"[69] But "past practice" also required FPL to charge AT&T a "just and reasonable" rate under the JUA. Indeed, in 2015, the Commission emphasized that FPL could *not* "force Verizon to pay the relatively high Agreement Rates for as long as its attachments remain on [FPL]'s poles" under a JUA that, like the JUA at issue, was also entered into in 1975.[70] And in its 2018 *Third Report and Order*, the Commission found that the new telecom rate presumption *should* "impact privately-negotiated agreements" entered or renewed after the

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[65] *See, e.g.*, FPL Br. at 25-27, 31-32. FPL's 10 alleged investments in the network are duplicative of its meritless attempt to rebut the presumption, which is addressed below. *See* Section II.C, below.

[66] *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (quoting National Broadband Plan at 110) (emphasis added); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987).

[67] *Pole Attachment Order*, 26 FCC Rcd at 5324 (¶ 191).

[68] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127) (applying new telecom rate presumption to "newly-negotiated and newly-renewed joint use agreements").

[69] FPL Br. at 24.

[70] *See FPL Order*, 30 FCC Rcd at 1143, 1150 (¶¶ 10, 25).

Order's effective date.[71] As the Commission explained, a federal statutory right "may not be defeated by private contractual provisions."[72] Any other standard "would subvert the supremacy of federal law over contracts."[73] Thus, as FPL admits, FCC orders override contrary JUA language.[74]

The Commission also explained that the new telecom rate presumption must apply to existing attachments on existing poles under existing JUAs because there lies the "outdated rate disparities" that the presumption is intended to eliminate.[75] FPL would instead require AT&T to pay the egregiously high JUA rates on more than 425,000 existing joint use poles in perpetuity—or incur the cost to deploy an unnecessary, unwanted, and duplicative pole network for existing poles and future pole lines. Nothing could be more contrary to the Commission's goal of reducing infrastructure costs to promote deployment.[76] As a result, the new telecom rate presumption does not, and cannot, have an exception for existing poles.

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[71] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475); *see also id.* (¶ 127 & n.479) (rejecting argument "that we should not apply the presumption to existing agreements").

[72] *Id.* at 7731 (¶ 50) (citation omitted).

[73] *Id.* (internal quotation and alternation omitted); *see also In the Matter of Implementation of Section 224 of the Act*, 25 FCC Rcd 11864, 11908 (¶ 105) (2010) ("*Pole Attachment Order NPRM*") ("The Commission would not be fulfilling [its statutory] duty if it were to substitute the requirements of contract law for the dictates of section 224.").

[74] *See* Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11) ("Under FCC order, FPL is not permitted to reserve four feet of space on each FPL pole for AT&T's use" even though the JUA reserves 4 feet for AT&T's exclusive use); *see also* Compl. Ex. 1 at ATT00111 (JUA § 1.1.7).

[75] *Third Report and Order*, 33 FCC Rcd at 7767, 7770 (¶ 127).

[76] *See, e.g.*, Reply Ex. D at ATT00992, ATT01005-07 (Dippon Reply Aff. ¶¶ 22, 48-52).

C. The New Telecom Rate Is The Just And Reasonable Rate Because FPL Did Not Rebut The Presumption With Clear And Convincing Evidence.

FPL did not provide "clear and convincing evidence that [AT&T] receives net benefits under its pole attachment agreement with [FPL] that materially advantage [AT&T] over other telecommunications attachers."[77] Therefore, by law, the new telecom rate applies.[78] FPL's attempt to rebut the presumption relies primarily on its own word—simply stating that it "provided evidence of eighteen net benefits," without attaching a single executed license agreement or any real-world data to substantiate its allegations and quantifications.[79] This is not "clear and convincing" evidence that rebuts the presumption.[80] A closer review of FPL's allegations—and the license agreements it produced in response to AT&T's interrogatories—confirms that FPL did not and cannot meet its burden.[81]

1. FPL's Case Rests On Foundational Legal Errors.

Several legal errors infect FPL's case and establish that FPL has not rebutted the new telecom rate presumption. *First*, quoting language from the *Third Report and Order* that it considers dispositive, FPL argues that it has rebutted the presumption because "AT&T 'continue[s] to possess greater bargaining power than other attachers [and] ... continues to own a

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[77] *See Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123); *see also, e.g.*, 7A Fed. Proc., L. Ed. § 17:36 (Clear and convincing evidence is "evidence so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.").

[78] 47 C.F.R. § 1.1413(b); *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123).

[79] *See* FPL Br. at 73; *see also* Reply Ex. D at ATT00989, ATT00996-97 (Dippon Reply Aff. ¶¶ 15, 33).

[80] *See, e.g.*, *In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

[81] Representative license agreements are attached as Reply Exhibits 1-4.

large number of poles.'"[82] But, FPL takes this language out-of-context. It does not create a new way to rebut the presumption. Instead, this language merely explains why the Commission made the new telecom presumption rebuttable—ILECs that own a large number of poles relative to the electric utility may be able to negotiate a JUA that provides the ILEC a net material advantage over its competitors. But even in such cases, there is just one way to rebut the presumption—with clear and convincing evidence that the ILEC "receives net benefits that materially advantage the [I]LEC over other telecommunications attachers."[83] And, with FPL's pole ownership advantage now "two-to-one (67% to 33%),"[84] this is not a case where AT&T has leverage to negotiate "just and reasonable" rates.[85] Absent evidence of net material competitive advantages under the JUA, the new telecom rate applies.[86]

Second, FPL tries to eliminate the principle of competitive neutrality from the analysis, arguing that the JUA provides "value to AT&T."[87] But mere "value" is not the legal standard and has not been the legal standard since 2011; the JUA must provide AT&T net material *competitive* value to justify charging AT&T a rate higher than the new telecom rate.[88] Much of

[82] FPL Br. at 72 (quoting *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126)).

[83] *Third Report and Order*, 33 FCC Rcd at 7770-71 (¶ 128).

[84] *See* Compl. ¶ 23; Answer ¶ 23 ("FPL admits that the relative pole ownership percentages supplied by AT&T in paragraph 23 are accurate."); *see also Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206) ("[E]lectric utilities appear to own approximately 65-70 percent of poles, compared to historical ownership levels that that were closer to parity."); *Dominion Order*, 32 FCC Rcd at 3757 (¶ 13) (relying on "Dominion's nearly two-to-one pole ownership advantage").

[85] Compl. Ex. D at ATT00086 (Dippon Aff. ¶ 26).

[86] *Third Report and* Order, 33 FCC Rcd at 7770-71 (¶ 128).

[87] *See, e.g.*, FPL Br. at 43.

[88] *See Third Report and Order*, 33 FCC Rcd at 7767-68 (¶ 123); *see also* 47 C.F.R. § 1.1413(b); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶¶ 217-18) (holding that an ILEC should be charged "the same rate as the comparable competitors" unless the JUA "includes provisions that materially advantage the [I]LEC *vis a vis* a telecommunications carrier or cable operator"); *FPL*

FPL's analysis is thus irrelevant. The two alleged benefits FPL describes as "chief" speak to the wrong question, alleging that (1) it "has built and maintained, and continues to build and maintain, poles of sufficient height and strength to accommodate" attachers in addition to FPL, and (2) that "even in the event of a termination, AT&T can remain attached to FPL's poles."[89] Each can be said equally of AT&T's competitors.[90] FPL cannot rebut the presumption with alleged benefits that even FPL says apply to "the entire communication/CATV industry."[91]

Third, FPL all but ignores the impact of the JUA's termination on its analysis of a just and reasonable rate post-termination, except to admit in a footnote that its reliance on an alleged benefit "assumes" the JUA does not remain terminated.[92] But FPL cannot prove that AT&T is materially advantaged by alleged "benefits" which do not exist (assuming they ever did) now that "the further granting of joint use of poles" has been terminated.[93] And the vast majority of

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Order, 30 FCC Rcd at 1140 (¶ 2) (emphasizing that alleged benefits must "not [be] available to competitive LECs").

[89] Answer ¶ 8; *see also* Answer Ex. A at FPL00003 (Kennedy Decl. ¶ 7) ("But for the JUA, FPL is not and never has been obligated to build pole infrastructure tall enough to accommodate more facilities than what is required to serve its electric customers.").

[90] *See* Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 9) (If FPL installed poles only for FPL's "own purposes .... it would not only impact AT&T, but the entire communication/CATV industry"); FPL Br. at 60 (FPL is under a "legal obligation to provide mandatory access" to its poles to "CLECs and CATV providers"); 47 U.S.C. § 224(f) (guaranteeing pole access to AT&T's competitors, even in the event of termination of their license agreements).

[91] Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 9); *see also, e.g.*, *id.* (Kennedy Decl. ¶ 10) (admitting that "in many instances AT&T's alleged rivals" are comparably situated); *id.* at FPL00012 (Kennedy Decl. ¶ 17) (admitting comparability of AT&T and "all carriers providing telecommunications services"); *id.* at FPL00014 (Kennedy Decl. ¶ 23) (admitting alleged benefit "may also meet the requirements of other telecom providers").

[92] *See id.* at FPL00008 (Kennedy Decl. ¶ 11 n.14).

[93] Compl. Ex. 1 at ATT00128 (JUA, Art. XVI); Compl. Ex. 23 at ATT00250 (Notice of Termination (Mar. 25, 2019)); *see also FPL Order*, 30 FCC Rcd at 1148 (¶ 22) (requiring "prospective value").

FPL's alleged benefits fall into this category. FPL, for example, relies on the height and strength of possible future new pole lines to which AT&T cannot attach[94] and on one-time differences that occur, if ever, when AT&T attaches its facilities in the future to a new FPL pole line.[95] These alleged benefits cannot occur when FPL has terminated the JUA giving AT&T the right to attach to these future new FPL pole lines. The vast majority of FPL's alleged benefits fall into this category. FPL argues that AT&T has received this preferential treatment (*i.e.*, a benefit) under the JUA because an "existing attachment ... has already been deployed."[96] But FPL has not, and cannot, show that a one-time service provided years or decades ago *continues* to provide AT&T competitive value that should be embedded into an annually recurring per-pole rental rate, particularly when AT&T has been paying annual per-pole rates that were many multiples of its competitors' throughout that time period as well.[97]

Finally, FPL did not account for "*net* benefits" as required.[98] FPL admits that AT&T owns more than 213,000 poles to which FPL is attached and that AT&T bears unique costs as a result.[99] The Commission has long emphasized that any analysis of "competitive neutrality" must "account for ... different rights *and responsibilities*."[100] Rebutting the presumption thus

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[94] *See, e.g.*, Answer Ex. A at FPL00005, FPL00014 (Kennedy Decl. ¶¶ 9, 25) (pole height and strength).

[95] *See, e.g.*, *id.* at FPL00006, FPL00010, FPL00012 (Kennedy Decl. ¶¶ 10, 15, 17) (permitting, make-ready, acquiring permission to use the right-of-way).

[96] *See* Answer ¶ 16.

[97] *See, e.g.*, Compl. Ex. D at ATT00092 (Dippon Aff. ¶ 38); *see also FPL Order*, 30 FCC Rcd at 1149 (¶ 24) (considering "the difference between the Agreement Rates and the New ... Telecom Rates *over time*") (emphasis added).

[98] *Third Report and Order*, 33 FCC Rcd at 7767-68 (¶ 123) (emphasis added).

[99] FPL Br. at 65; Answer Ex. A at FPL00025 (Kennedy Decl., Ex. A).

[100] *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654) (emphasis added).

requires FPL to prove that AT&T has a "net benefit" after accounting for competitive *disadvantages* that impose additional costs on AT&T relative to its competitors.[101] These include reciprocal terms in the JUA that require AT&T to provide the same alleged "benefit" to FPL[102] and that impose pole ownership costs on AT&T, but not on its competitors under FPL's license agreements.[103]

FPL makes four arguments that would have the Commission eliminate "net benefits" from the analysis. These arguments lack legal and factual merit.[104] FPL first claims that AT&T could own fewer poles (and thus have lower pole ownership costs) if AT&T had agreed to sell poles to FPL.[105] This argument assumes FPL made a formal offer to purchase AT&T's poles, which it did not.[106] It also confirms that AT&T *does* own poles—and therefore *does* incur unique pole ownership costs that must be accounted for when trying to rebut the presumption.[107] FPL next asserts that AT&T "does not actually invest in its pole network,"[108] hyperbole that is flatly contradicted by AT&T's publicly reported pole investment data[109] and FPL's admission that AT&T does incur "pole ownership costs."[110] FPL's third argument is that AT&T's pole

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[101] *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123).

[102] *See, e.g.*, *Dominion Order*, 32 FCC Rcd at 3760 (¶ 21) (finding Dominion could not justify the rates it charged by "identifying as alleged 'benefits' to Verizon services that Verizon is likewise required to extend to Dominion under the Joint Use Agreements").

[103] *See, e.g.*, Compl. Ex. B at ATT00059 (Miller Aff. ¶¶ 25-26).

[104] FPL Br. at 63-65.

[105] *Id.* at 63.

[106] Reply Ex. C at ATT00965 (Peters Reply Aff. ¶ 8).

[107] Compl. Ex. B at ATT00059-60 (Miller Decl. ¶¶ 25-26).

[108] FPL Br. at 63-64.

[109] *See, e.g.*, Reply Ex. A at ATT00931 (Rhinehart Reply Aff. ¶ 39).

[110] *See* FPL Br. at 65; *see also* Reply Ex. A at ATT00931 (Rhinehart Reply Aff. ¶ 39).

ownership costs should be irrelevant because AT&T should be "reimbursed for its pole ownership costs through the rates it charges attachers."[111] FPL thus implicitly admits that rates for AT&T and FPL *should* be set at the fully compensatory new telecom rate. Fourth, FPL argues that reciprocal provisions in the JUA may not apply equally to the parties because FPL owns two-thirds of the jointly used poles.[112] But FPL relies on alleged "benefits" that apply equally to the parties regardless of the pole ownership disparity—each, for example, has insurance requirements that apply to all jointly used poles and has not taken out a ████ security bond in order to attach to the other's poles.[113] And, in any event, FPL's theory would still require an offset to account for "alleged 'benefits' ... that [AT&T] is likewise required to extend to [FPL] under the [JUA]."[114] FPL provides none, and so has failed to rebut the presumption.[115]

2. FPL's 18 Alleged Benefits Are Redundant And Replete With Flaws.

A review of the 18 "benefits" that FPL alleged also confirms that FPL failed to rebut the new telecom rate presumption.[116] Its list contains hypothetical, irrelevant, repetitive, unsupported, and non-existent "benefits" in an attempt to create net material competitive value where none exists.[117]

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[111] FPL Br. at 65.

[112] *Id.*

[113] *See* Compl. Ex. C at ATT000068-69 (Peters Aff. ¶ 10); Compl. Ex. D at ATT00091 (Dippon Aff. ¶ 36); Reply Ex. C at ATT00967-68 (Peters Reply Aff. ¶ 12); Reply Ex. D at ATT01004-05 (Dippon Reply Aff. ¶ 46); *see also, e.g.*, Reply Ex. 1 at FPL-000216 (License 1 § 14.1).

[114] *See Dominion Order*, 32 FCC Rcd at 3760 (¶ 21).

[115] *Third Report and Order*, 33 FCC Rcd at 7770-71 (¶ 128) ("Utilities can rebut the presumption we adopt today in a complaint proceeding by demonstrating that the [I]LEC receives *net benefits* that materially advantage the [I]LEC over other telecommunications attachers.") (emphasis added).

[116] FPL Br. at 47-60.

[117] *See, e.g.*, Reply Ex D at ATT00987-89, ATT00996-97 (Dippon Reply Aff. ¶¶ 13-14, 33-47).

First, FPL claims that AT&T avoided "market" rates to attach to FPL's poles.[118] But AT&T has been paying rates that are *higher* than rates that would be charged in a competitive market.[119] And FPL explains why: without AT&T having a statutory right of access to FPL's poles, FPL can charge AT&T any rate it wants up to the cost of "building [AT&T]'s own pole line, undergrounding its own facilities or establishing a wire[line] network on non-FPL facilities."[120] FPL then points to the "unregulated attachment rate" it has imposed on three entities, and claims that AT&T "avoided" similarly high "market" rates (although AT&T pays a rate higher than this "unregulated attachment rate" to attach to FPL's transmission poles).[121] The argument is thus absurd, but also irrelevant. AT&T has a federal right to a "just and reasonable" rate that is presumptively the new telecom rate.[122] FPL cannot rebut that presumption by pointing to unjust and unreasonable monopoly rates it charges others or could otherwise have imposed on AT&T.

FPL is also wrong when it claims that but for the JUA, it could charge AT&T these monopoly rates even though AT&T has the right to "just and reasonable" rates.[123] FPL's claim requires some imagination; FPL pretends that without the JUA, it would have installed poles that could not accommodate *any* communications attachers.[124] Then FPL claims that, even if "the

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[118] *See* FPL Br. at 48-49.

[119] *See, e.g.*, Reply Ex. D at ATT00997 (Dippon Reply Aff. ¶ 35).

[120] FPL Br. at 48.

[121] *See id.* at 48-49; Answer Ex. A at FPL00003-04 (Kennedy Decl. ¶ 7); FPL's Resp. to AT&T's Interrog. No. 5 (showing rates charged [REDACTED] [REDACTED]).

[122] *See Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126).

[123] FPL Br. at 48 n.179.

[124] *Id.* at 48.

FCC regulated access to and rates, terms, and conditions for ILECs, ... FPL's poles would have been at full capacity and AT&T would be a buyer 'waiting in the wings'" for pole space.[125] In that scenario, FPL postulates that the Eleventh Circuit may have found that pole space was "rivalrous," such that the provision of pole space to one entity precludes another from attaching to the pole.[126] Then, FPL guesses, the Eleventh Circuit may have found that FPL's monopoly rates are the proper measure of "just compensation."[127]

But none of this happened. FPL installed distribution poles that "stand 55-feet tall" for FPL's own purposes—to "strengthen [the] electric grid."[128] It also installed poles with the expectation that several communications providers would attach.[129] And several can attach; FPL's average pole height is 40.4 feet,[130] and a shorter 37.5-foot pole presumptively holds 4 communications attachers.[131] Space is not scarce on FPL's poles, and so FPL cannot substitute so-called "market rates" for "just and reasonable" rates.[132]

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[125] *Id.* at 48 n.179 (quoting *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370 (11th Cir. 2002)); *see also* Answer, Affirmative Defense K.

[126] FPL Br. at 48 n.179; *see also Ala. Power Co.*, 311 F.3d at 1370-71.

[127] FPL Br. at 48 n.179; *see also Ala. Power Co.*, 311 F.3d at 1370-71.

[128] *See* Reply Ex. 6 (Featured Stories: FPL installs new poles to strengthen electric grid and help communities prepare for hurricane season).

[129] *See* Initial Comments of FPL et al. Regarding Safety and Reliability at 6, *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules* (Mar. 7, 2008) ("Third party attachment standards ... are part in parcel of an electric utility's overhead distribution construction standards."). Data show that FPL has installed poles of comparable height regardless of whether FPL is the only attacher, whether AT&T is attached, or whether a third party is also attached. *See* Reply Ex. D at ATT01001-02 (Dippon Reply Aff. ¶ 42); *see also* Reply Ex. A at ATT00932 (Rhinehart Reply Aff. ¶ 40).

[130] *See* Answer Ex. A at FPL00015 (Kennedy Decl. ¶ 28).

[131] 47 C.F.R. §§ 1.1409(b), 1.1410.

[132] *See Ala. Power Co.*, 311 F.3d at 1370-71.

Second, FPL argues that AT&T enjoyed "savings" over other ILECs.[133] But FPL cannot rely on the "unjust and unreasonable" rates it charges to other ILECs to rebut a presumption that AT&T is entitled to "just and reasonable" rates.[134] And regardless, FPL is wrong about AT&T's alleged "savings."[135] FPL points to rates for wood distribution poles, which it says were about lower for AT&T than for some other ILECs.[136] But FPL charged AT&T rates for concrete distribution poles that were about than the rates charged the same ILECs.[137] AT&T was not advantaged.[138]

Third, FPL claims that AT&T is advantaged because FPL says that it installed joint use poles 10 feet taller than the non-joint use poles that could meet its own service needs.[139] This argument is specious. AT&T is not advantaged over its competitors because FPL installed poles "taller than [FPL] needs to serve its electric customers."[140] AT&T *and* its competitors require

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[133] FPL Br. at 50. This claim contradicts FPL's prior assertion that "the rates invoiced and paid for all ILECs using its poles are the same." *See* FPL's Answer to Verizon's Interrog. No. 5, publicly filed as Verizon's Public Reply Ex. 5, *Verizon Fla. LLC v. Fla. Power & Light Co.*, Dkt. No. 15-73, File No. EB-15-MD-002.

[134] *See* 47 C.F.R. § 1.1413(b) (presumption must be rebutted with evidence regarding "other telecommunications carriers or cable television systems providing telecommunications services *on the same poles*") (emphasis added). By definition, ILECs are not "on the same poles" with other ILECs.

[135] FPL Br. at 50.

[136] *See also* FPL's Resp. to AT&T's Interrog. No. 5.

[137] *See id.* FPL charged another ILEC rates —about the rate AT&T paid for use of wood distribution poles and transmission poles and the rate AT&T paid for use of concrete distribution poles. *Id.*

[138] Reply Ex. A at ATT00934 (Rhinehart Reply Aff. ¶ 43).

[139] FPL Br. at 50-51; *see also* Answer Ex. A at FPL00005, FPL00030, FPL00032 (Kennedy Decl. ¶ 9 & Ex. C) (relying on alleged difference in cost for 35-foot and 45-foot poles).

[140] FPL Br. at 50.

FPL's joint use poles.[141] As FPL explained, "if FPL were to install poles 10' shorter, it would not only impact AT&T but the entire communication/CATV industry."[142]

Indeed, pole height alone cannot rebut the new telecom rate presumption because the new telecom rate is "fully compensatory" for poles of whatever height FPL installed.[143] And FPL bases its valuation of this claim on installation of 45-foot poles, but it could *not* have installed them because of the JUA, as the JUA defines a "normal joint use pole" as a 35- or 40-foot pole.[144] Indeed, more than half of the joint use poles recently sampled by FPL's contractor were 30-, 35-, or 40-foot poles.[145] And there is sufficient room on a 35-foot pole or a 40-foot pole for FPL, AT&T, and many other communications providers.[146]

FPL also cannot credibly fault AT&T for the installation of poles 10 feet taller based on AT&T's space requirements.[147] FPL's best-case-scenario is that "AT&T occupies an average of 1.18' of space per joint use pole" and FPL admits that it does not reserve any additional space for

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[141] *See, e.g.*, Reply Ex. C at ATT00971-72 (Peters Reply Aff. ¶ 19).

[142] Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 9).

[143] *See* 18 C.F.R. Pt. 101 (stating that Account 364 includes "[p]oles, wood, steel, concrete, or other material"); *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12176 (App. E-2) (2001) ("*Consolidated Partial Order*") (App. E-2) (including investment in Account 364 in new telecom rate calculation); *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (finding new telecom rate "fully compensatory").

[144] Compl. Ex. 1 at ATT00111 (JUA § 1.1.5).

[145] Answer Ex. E at FPL00174-217 (Murphy Decl., Ex. B); *see also* Reply Ex. A at ATT00931-32 (Rhinehart Reply Aff. ¶ 40).

[146] *See, e.g.*, 47 C.F.R. §§ 1.1409(b), 1.1410 (presuming 5 attaching entities on a 37.5-foot pole); Reply Ex. C at ATT00972 (Peters Reply Aff. ¶ 20).

[147] FPL Br. at 50-51.

AT&T.[148] AT&T does not require a 10 foot taller pole to use 1.18 feet of space. Nonetheless, FPL tries to increase the space needed by AT&T to try to justify the need for a 10 foot taller pole by rounding up after combining 4 feet of space FPL was supposed to reserve for AT&T under the JUA but did not[149] and 3.33 feet of "safety space" the Commission long ago found is "usable and used by the electric utility."[150] But just and reasonable rates are based on space that is "*actually occupied*,"[151] and AT&T does not "actually occupy" materially greater space—or require taller poles—than its competitors.[152]

Fourth, FPL alleges that it "voluntarily expand[s] capacity" to make room for AT&T and installed poles tall enough to let AT&T "avoid make-ready."[153] AT&T does the same for FPL.[154] And FPL voluntarily expands capacity to make room for AT&T's competitors and installed poles tall enough to let those competitors avoid make-ready as well.[155]

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[148] Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11) ("[A]fter AT&T has already made its first attachment, FPL cannot deny access to attachers requesting to attach in the remaining amount of AT&T's reserved space."); Answer Ex. E at FPL00166 (Murphy Decl. ¶ 3) (stating that "AT&T occupies an average of 1.18' of space per joint use pole").

[149] *See* Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11) ("FPL is not permitted to reserve four feet of space on each FPL pole for AT&T's use.").

[150] *See* FPL Br. at 70 n.278 (acknowledging "[t]he Commission's prior order regarding safety space being allocated to the electric utility"); *see also Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51) (holding "the 40-inch safety space ... is usable and used by the electric utility"); *Television Cable Serv., Inc. v. Monongahela Power Co.*, 88 FCC 2d 63, 68 (¶¶ 10-11) (1981) (rejecting argument that "the 40-inch safety space" should be added "to the 12 inches regularly allotted to [a cable attacher] to compute the space occupied").

[151] *Consolidated Partial Order*, 16 FCC Rcd at 12143 (¶ 78) (emphasis added); *see also* 47 C.F.R. § 1.1406(d).

[152] *See, e.g.*, 47 C.F.R. §§ 1.1410; *see also* Compl. Ex. C at ATT00069 (Peters Aff ¶ 11); Reply Ex. C at ATT00975 (Peters Reply Aff. ¶ 25).

[153] FPL Br. at 51.

[154] Reply Ex. C at ATT00973-74 (Peters Reply Aff. ¶ 22).

[155] *See* Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 10); FPL Br. at 52.

FPL relies on some undefined number of "times" when it may choose not to expand capacity for AT&T's competitors,[156] but FPL has the equivalent right under the JUA.[157] And the number of times that FPL would be faced with a decision of whether to replace a pole to provide additional space must be few. FPL says its poles average 40.4 feet tall, so they should accommodate more than 4 communications attachers,[158] particularly when using "a range of practices, such as line rearrangement, overlashing, boxing, and bracketing."[159] And where a pole replacement is needed, FPL has every incentive to provide it, as FPL will then receive additional rental income and ████████.[160]

FPL's claim that AT&T "avoided" make-ready is a mere repackaging of its meritless pole height claim. FPL relies on its hypothetical scenario in which FPL did not install joint use poles that could accommodate any communications attachers.[161] Then, FPL reasons, AT&T would have had to pay make-ready to replace all of FPL's poles with taller poles "that could accommodate communication space as well as a communication worker safety space."[162] FPL

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[156] Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 10).

[157] FPL Br. at 51 (admitting it is only "in certain circumstances" that FPL must "expand capacity to accommodate AT&T").

[158] *See* Answer Ex. A at FPL00015 (Kennedy Decl. ¶ 28) (40.4 foot average pole height); *see also* 47 C.F.R. §§ 1.1409(c), 1.1410 (presuming a 37.5-foot pole can hold 5 attaching entities).

[159] *Pole Attachment Order NPRM,* 25 FCC Rcd at 11872 (¶ 16); *see also Pole Attachment Order*, 26 FCC Rcd at 5341 (¶ 232) ("capacity is not insufficient where a request can be accommodated using traditional methods of attachment").

[160] *See* Reply Ex. C at ATT0073-74 (Peters Reply Aff. ¶ 22).

[161] *See* FPL Br. at 52.

[162] *Id.*

thus claims that AT&T "avoided" the cost of replacing every FPL pole, which it says would have been 35-foot poles, with 45-foot poles at present-day value.[163]

FPL's replacement cost methodology has been soundly rejected.[164] And the argument itself makes no sense. AT&T could have attached to shorter 35-foot and 40-foot poles without replacing them, as reflected in the JUA.[165] It is also a disingenuous argument, as FPL has installed 40-foot poles where AT&T is attached—and 45-foot poles where AT&T is not (and cannot be) attached.[166] It is thus mere fiction to claim that AT&T would have had to rebuild FPL's network absent the JUA, let alone rebuild it using modern-day materials at current-day costs.[167]

It is also pure fantasy to imply that AT&T's competitors needed to replace FPL's pole each time they attached.[168] FPL admits that "in many instances AT&T's alleged rivals can use any available space on an existing joint use pole."[169] And so FPL provides what must be an alternate valuation for allegedly "avoided" make-ready on poles that have "a communications

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[163] Answer Ex. A at FPL00006, FPL00035 (Kennedy Decl. ¶ 10 & Ex. D) (alleging value based on a current day [redacted] estimate to replace 35-foot pole with a 45-foot pole). FPL also claims that it costs "as much as [redacted]" to install a replacement concrete pole, *id.* at FPL00006 (Kennedy Decl. ¶ 10), but later states it costs [redacted], *id.* at FPL00014 (Kennedy Decl. ¶ 25).

[164] *See Ala. Cable Telecomm. Ass'n v. Ala. Power Co.*, 16 FCC Rcd 12209, 12234 (¶ 57) (2001) ("Respondent's final attempt at appraisal, using replacement costs ... also fails.").

[165] Compl. Ex. 1 at ATT00111 (JUA § 1.1.5).

[166] Reply Ex. D at ATT01001-02 (Dippon Reply Aff. ¶ 42); *see also* Reply Ex. A at ATT00932 (Rhinehart Reply Aff. ¶ 40).

[167] Reply Ex. A at ATT00931-32 (Rhinehart Reply Aff. ¶ 40); Reply Ex. C at ATT00977 (Peters Reply Aff. ¶ 29); Reply Ex. D at ATT00999-102 (Dippon Reply Aff. ¶¶ 38-42).

[168] *See* Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 10) (assuming replacement of every pole).

[169] *Id.*

space and ... safety space already."[170] But this valuation is useless because FPL omitted the make-ready costs that AT&T paid over the same time period[171] and provided no "backup or itemization" to permit a comparison.[172] It thus adds nothing to state that AT&T's competitors, like AT&T, paid costs related to "cable and conductor rearrangement as well as pole change-outs" over the last 5 years.[173]

Fifth, FPL argues that the JUA advantages AT&T's wireless affiliate because AT&T may someday seek to acquire and sublet space on FPL's poles to its wireless affiliate.[174] FPL's argument is ridiculous and irrelevant. AT&T's wireless affiliate does not need to acquire space on FPL's poles under the JUA and certainly not at the excessive rates that FPL has charged

[170] FPL Br. at 52.

[171] *See Answer* Ex. A at FPL00013 (Kennedy Decl. ¶ 19) (admitting AT&T pays FPL for make-ready and pole replacements).

[172] *See Knology, Inc. v. Ga. Power Co.*, 18 FCC Rcd 24615, 24636 (¶ 50) (2003); *see also In Re Applications of John D. Bomberger*, 7 FCC Rcd 1849, 1852 (¶ 31 n.15) (1992) (finding data unreliable where party "did not produce any back-up documents to his written but factually unsupported cost estimates"). FPL did not include any supporting documentation in its Answer for its claim that AT&T's competitors paid over [redacted] in make-ready from 2014-2018. *See* FPL Br. at 52; Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 10). It also failed to substantiate the claim when responding to AT&T's interrogatories, as it produced invoices amounting to [redacted]. *See* Reply Ex. C at ATT00970 (Peters Reply Aff. ¶ 16).

[173] *See* FPL Br. at 52; Answer Ex. A at FPL00006-07 (Kennedy Decl. ¶ 10); *see also Dominion Order*, 32 FCC Rcd at 3759 (¶ 20) (rejecting valuation based on "the amount that all of its licensees 'collectively' paid, thus omitting the information needed to analyze whether, and if so, the extent to which, Verizon has been advantaged relative to a typical competitor or an average of its competitors.").

[174] FPL Br. at 53. FPL's claimed [redacted] valuation of this alleged advantage is particularly hypothetical. It assumes AT&T's affiliate would replace 10,000 35-foot FPL poles with 45-foot poles to deploy wireless nodes. But FPL says its poles already average 40.4 feet in height and, in any event, there are other infrastructure options in the area—such as AT&T's 213,210 poles. *See* FPL Br. at 53; Answer Ex. A at FPL00007-08, FPL00025, FPL00035 (Kennedy Decl. ¶ 11, n.13 & Exs. A, D).

AT&T; it has its own statutory right to attach to FPL's poles at the new telecom rate.[175] Also, AT&T's wireless affiliate is not a party to the JUA or this proceeding.[176] Moreover, FPL's argument relies on pure speculation, imputing an advantage to AT&T that it has not sought and does not receive: 4 feet of space on FPL's poles for wireless attachments.[177] Lastly, FPL does not explain how AT&T could sublet space on FPL's poles when the JUA allows only a pole owner to sublet space on its own poles.[178]

Sixth, FPL argues that AT&T is advantaged because FPL typically invoices AT&T for rent in March following a rental year, but sends "other telecom providers" a semi-annual invoice in December and June.[179] This certainly has not advantaged AT&T over its competitors because AT&T has paid far higher JUA rates annually.[180] Nor would it advantage AT&T over its competitors if AT&T paid the new telecom rates it seeks here, as AT&T would then pay the same annual rate in March that its competitors pay semi-annually 3 months earlier in December and 3 months later in June.[181] FPL's claimed advantage is inappropriately based on the "unjust

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[175] *See Pole Attachment Order*, 26 FCC Rcd at 5306 (¶ 153) ("We also reaffirm that wireless carriers are entitled to the benefits and protection of section 224, including the right to the telecom rate under section 224(e).").

[176] FPL Br. at 53.

[177] *See id.*; Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11).

[178] *See* Answer Ex. A at FPL00008 (Kennedy Decl. ¶ 11) (citing JUA § 14.4); *see also* Compl. Ex. 1 at ATT00127 (JUA § 14.4) ("Each Owner reserves the right to use, or permit to be used by other third parties, such attachments *on poles owned by it* which would not interfere with the rights of the Licensee with respect to use of such poles.") (emphasis added).

[179] *See* FPL Br. at 54; Answer Ex. A at FPL00008 (Kennedy Decl. ¶ 12); FPL's Resp. to AT&T's Interrog. No. 5.

[180] FPL's Resp. to AT&T's Interrog. No. 5.

[181] *See* Reply Ex. D at ATT01003-04 (Dippon Reply Aff. ¶ 45); *see also* FPL's Resp. to AT&T's Interrog. No. 5 (showing FPL billed CLECs a $10.44 per pole rate, and cable companies a $10.46 per pole rate, in December 2014 and June 2015); Compl. Ex. A at ATT00016 (Rhinehart

and unreasonable" rates AT&T pays instead of the rates that would set AT&T on par with its competitors, improperly ignores the reciprocal delay in FPL's payment of rent to AT&T, mischaracterizes the time differential, and incorrectly uses an interest rate considerably higher than it could have earned had it received payment earlier and invested the funds.[182]

Seventh, FPL argues that AT&T is advantaged by its lowest position on the pole and ascribes an unexplained "[REDACTED]" value to that position "[REDACTED] [REDACTED]."[183] FPL claims that AT&T's position on the pole causes make-ready delays to its competitors that AT&T does not experience,[184] but, as FPL admits, the Commission has worked to eliminate such delays with its one-touch make-ready rules.[185] And AT&T can experience similar delays if make-ready is required for its own attachments.[186]

Once attached, AT&T's position on the pole increases AT&T's costs as compared to its competitors.[187] FPL disagrees, but only because it is "unaware of any accidents necessitating AT&T's replacement of a joint use pole cause[d] by AT&T's attachment position on the pole."[188] This head-in-the-sand approach does not rebut AT&T's evidence of damage to its facilities, which may or may not require replacement of a pole,[189] especially when FPL's license

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Aff., Ex. R-1) (calculating a $10.46 per pole new telecom rate for the 2014 rental year, which would have been invoiced in March 2015).

[182] Reply Ex. D at ATT01002-03 (Dippon Reply Aff. ¶¶ 44-45); *see also* Answer Ex. A at FPL00009 (Kennedy Decl. ¶ 12).

[183] *See* FPL Br. at 54-55; *see also* Answer Ex. A at FPL00116 (Kennedy Decl., Ex. J).

[184] FPL Br. at 54-55.

[185] *Id.* at 55 n.208.

[186] Reply Ex. C at ATT00977-78 (Peters Reply Aff. ¶ 30).

[187] *See, e.g.*, Compl. Ex. B at ATT00060 (Miller Aff. ¶¶ 27-28).

[188] *See* FPL Br. at 55.

[189] *See* Reply Ex. C at ATT00978-79 (Peters Reply Aff. ¶ 33).

agreements [redacted].[190]

And while FPL questions why AT&T did not try to negotiate a different position given the increased costs, FPL answers its own question by admitting that AT&T's location is the result of the origin of joint use, and must generally continue so that various communications facilities do not crisscross midspan.[191]

Eighth, FPL claims that AT&T is advantaged when FPL replaces its poles that are too old or must be relocated due to roadwork.[192] But AT&T's competitors are equally advantaged by these pole replacements and relocations, as FPL admits: "other telecom attachers are able to free ride on this arrangement because they are attached to a joint use pole."[193]

Ninth, FPL claims that AT&T saves time and money because it does not use the same permitting process that its competitors use before attaching to FPL's poles.[194] As to time savings, FPL admits that the Commission's one-touch make-ready rules undercut arguments about potential delay.[195] And even before those rules, FPL boasted that it could complete make-ready for attachers in as few as 27 days.[196] AT&T has required comparable time to attach, which

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[190] *See* Reply Ex. 1 at FPL-000214 (License 1 [redacted]); Reply Ex. 2 at FPL-000794 (License 2 [redacted]); Reply Ex. 3 at FPL-002804 (License 3 [redacted]); Reply Ex. 4 at FPL-002072 (License 4 [redacted]).

[191] *See* FPL Br. at 54 ("standard practice and code compliance" requires AT&T's location).

[192] *See id.* at 55. This argument highlights some of the unique pole ownership costs required of AT&T, but not its competitors, as AT&T also replaces its poles when they are too old or must be relocated due to roadwork without contribution from other attachers. *See* Ex. C at ATT00968 (Peters Reply Aff. ¶ 13).

[193] FPL Br. at 55.

[194] FPL Br. at 56.

[195] Answer Ex. A at FPL00009 (Kennedy Decl. ¶ 13) ("[T]he FCC's new one touch make-ready process provides AT&T's alleged competitors some potential relief from … delays.").

[196] *See* Decl. of Thomas J. Kennedy, P.E. in Support of FPL's Comments, W.C. Dkt. 07-245 (Aug. 16, 2010) at ¶ 17 ("Kennedy 2010 Comments Decl."); *see also* Second Decl. of Thomas J.

makes sense because it must perform the same work managed through the same joint use software program its competitors use.[197]

As to permit fees, FPL "has given us nothing except its conclusory allegations."[198] It relies on "typical" fees, does not provide invoices to substantiate those fees, does not disclose the fees it charged historically, and does not subtract permit fees that FPL did not have to pay to attach to AT&T's poles.[199] FPL also builds its valuation on the same unreasonable assumption that "AT&T would require make-ready on all new attachments without a joint use agreement."[200] In reality, "FPL does not perform communications make-ready work in the communications space"[201] and so, at best, requires a make-ready permit for work in the electric space, which it says is needed just 10 percent of the time.[202] FPL also admits that the permit fees cover the cost of services FPL does *not* provide AT&T.[203] And, while FPL questions whether AT&T in fact incurs the cost to perform the work itself,[204] this unsupported conjecture does not rebut the

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Kennedy in Support of FPL's Comments, P.E. W.C. Dkt. 07-245 (Apr. 22, 2008) at ¶ 4 ("FPL … rarely receives complaints about the length of time taken to complete a make-ready job.").

[197] Reply Ex. C at ATT00977-78 (Peters Reply Aff. ¶ 30).

[198] *See In Re Rust Craft Broad. Co., Steubenville, Ohio*, Petition for Reconsideration, 68 FCC 2d 1013, 1016 (1978).

[199] *Id.*; Answer Ex. A at FPL00010 (Kennedy Decl. ¶ 15); *see also* FPL's Answer to Verizon's Interrog. No. 6, publicly filed as Verizon's Public Reply Ex. 5, *Verizon Fla. LLC v. Fla. Power & Light Co.*, Dkt. No. 15-73, File No. EB-15-MD-002 (showing that FPL historically charged lower permit fees).

[200] Answer Ex. A at FPL00010 (Kennedy Decl. ¶ 15).

[201] *See* Kennedy 2010 Comments Decl. ¶ 12.

[202] *See* Decl. of Thomas J. Kennedy, P.E. in Support of FPL's Reply Comments, W.C. Dkt. No. 07-245 (Oct. 4, 2010) at ¶ 2 ("The percentage of FPL poles which require electric supply space make ready is approximately 10%.").

[203] *See* Answer Ex. A at FPL00010 (Kennedy Decl. ¶ 15).

[204] *See id.*

presumption or undermine the contrary sworn testimony from AT&T.[205] FPL cannot "'embed in [AT&T's] rental rate [these permit] costs that [FPL] does not incur.'"[206]

Tenth, FPL repeats a prior alleged benefit when it claims that AT&T does not "undergo the same post-inspection process to which other telecom providers are subject."[207] This process is part of the permitting process FPL relied on above and the costs (which FPL does not incur for AT&T) are covered by the same permit fees.[208] But AT&T incurs the cost to perform post-inspection work on its own facilities, just as FPL performs post-inspection work of its facilities on AT&T's poles.[209] There is thus no net advantage to AT&T or any unreimbursed cost that could justify payment of a higher rate to FPL.[210]

Eleventh, FPL argues that AT&T "essentially" avoided the "potential" for a [REDACTED] unauthorized attachment fee included in some of its license agreements.[211] Of course, this fee is

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[205] *See, e.g.*, Compl. Ex. C at ATT00068 (Peters Aff. ¶ 9); Reply Ex. C at ATT00969-70 (Peters Reply Aff. ¶ 15).

[206] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

[207] FPL Br. at 57. It is not clear whether FPL completes these post-installation inspections in every instance, [REDACTED]. *See, e.g.*, Reply Ex. 2 at FPL-000794 (License 2 [REDACTED]; Reply Ex. 3 at FPL-002807 (License 3 [REDACTED]; *see also* Reply Ex. 1 at FPL-000210 (License 1 [REDACTED]); Reply Ex. 4 at FPL-002075 (License 4 [REDACTED]).

[208] *See* Reply Ex. A at FPL00010 (Kennedy Decl. ¶ 15) (describing fees as covering "permit and post-attachment inspection costs"); FPL's Answer to Verizon's Interrog. No. 6, publicly filed as Verizon's Public Reply Ex. 5, *Verizon Fla. LLC v. Fla. Power & Light Co.*, Dkt. No. 15-73, File No. EB-15-MD-002 (explaining that an inspection fee is a "component" of the non-make-ready and make-ready permit fees); *see also* FPL Br. at 57 ([REDACTED]).

[209] *See* Reply Ex. C at ATT00978 (Peters Reply Aff. ¶ 32).

[210] *See, e.g.*, *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

[211] FPL Br. at 57; Answer Ex. A at FPL00013 (Kennedy Decl. ¶ 18). Some of FPL's license agreements [REDACTED]. *See, e.g.*, Reply Ex. 2 (License 2).

entirely avoidable by AT&T's competitors as well, as they can simply permit their attachments in advance or correct the issue when notified.[212] And FPL has not produced a single document showing that it has charged any unauthorized attachment fees, or that they have been paid.[213] AT&T, in contrast, *has* paid FPL significant sums in back rent for every new attachment identified in a survey.[214] With JUA rates approaching [REDACTED] per pole, AT&T has certainly been disadvantaged as compared to a competitor subject to an entirely avoidable one-time [REDACTED] fee.[215]

Twelfth, FPL makes the bald claim that AT&T saves "approximately 20%" in make-ready costs because it does not pay some undefined and unquantified set of "indirect overhead" involving "administrative and general expenses."[216] FPL cannot rebut the presumption based on such "generalized contentions,"[217] particularly when an allocation of "administrative and general

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[212] *See Pole Attachment Order*, 26 FCC Rcd at 5291 (¶ 115) (stating that certain specified unauthorized attachment fees would be reasonable if (1) the pole owner provides "specific notice of a violation (including pole number and location) before seeking relief against a pole occupant" and (2) the attacher fails to either submit a plan of correction or correct the violation and provide notice of the correction within certain specified time periods).

[213] *See, e.g.*, Answer Ex. A at FPL00013 (Kennedy Decl. ¶ 18).

[214] *See* Compl. Ex. 2 at ATT00141, ATT00143-44, ATT00147 (charging AT&T back rent for attachments identified in surveys); *see also* Compl. Ex. 1 at ATT00123 (JUA § 10.10) ("The adjustment and the number of attachments shall be deemed to have been made equally over the years elapsed since the preceding inventory. Unless otherwise agreed upon, retroactive billing for the pro-rated adjustment will be added to the normal billing for the year following completion of the field inventory.").

[215] FPL implies that this is an annually recurring [REDACTED] per pole fee. *See, e.g.*, FPL Br. at 57; Answer Ex. A at FPL00116 (Kennedy Decl., Ex. J). It is not. At most, AT&T's competitors would pay a 1-time [REDACTED] fee for an isolated unpermitted attachment. *See, e.g.* Reply Ex. C at ATT00968-69 (Peters Reply Aff. ¶ 14 n.17).

[216] FPL Br. at 57-58; *see also* Reply Ex. A at FPL00013, -117 (Kennedy Decl. ¶ 19 & Ex. J).

[217] *See, e.g.*, *In the Matter of Investigation of Special Access Tariffs of Local Exch. Carriers*, 2 FCC Rcd 3507 (1987).

expenses" is already included in a properly calculated new telecom rate.[218] And, in any event, FPL must also receive the same alleged benefit when AT&T performs make-ready at FPL's request, further eliminating the possibility of any net benefit.[219]

Thirteenth, FPL argues that AT&T has received land rights from FPL, but admits AT&T's competitors have comparable rights.[220] FPL claims AT&T saved [redacted] in permit fees for use of the public right of way,[221] but concedes that "[m]ost agencies do *not* charge a permit fee for aerial attachments."[222] FPL also guesses that AT&T saved [redacted] because of FPL's easements,[223] but admits its easements "include easement rights for all carriers providing telecommunications services."[224] FPL's argument thus boils down to speculation that "many telecom carriers have no idea these easements exist" and a guess that

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[218] *See, e.g.*, *Consolidated Partial Order*, 16 FCC Rcd at 12125 (¶ 44) ("[W]e currently allocate administrative expenses by dividing total administrative and general expenses by net plant investment."); *see also Cavalier Tel., LLC v. Va. Elec. and Power Co.*, 15 FCC Rcd 9563, 9574 (¶ 22) (2000), vacated by settlement, 17 FCC Rcd 24414 (2002) ("Because Respondent provided no explanation that the administrative costs ... are not otherwise included in the carrying charges, we find that the fees are an unjust and unreasonable rate, term, or condition.").

[219] *See* Reply Ex. C at ATT00971 (Peters Reply Aff. ¶ 18).

[220] *See* Answer Ex. A at FPL00012-13 (Kennedy Decl. ¶ 17); *see also* FPL Br. at 58.

[221] Answer Ex. A at FPL00013 (Kennedy Decl. ¶ 17).

[222] *Id.* (emphasis added).

[223] *Id.* at FPL00012 (Kennedy Decl. ¶ 17). Access to FPL's easements is not guaranteed under the JUA. *See* Compl. Ex. 1 at ATT00120 (JUA § 7.2) ("While the Owner and the Licensee will cooperate as far as may be practicable in obtaining rights-of-way for both parties of joint use poles, no guarantee is given by the Owner of permission from property owners, municipalities or others for use of poles and right-of-way easement by the Licensee.").

[224] Answer Ex. A at FPL00012 (Kennedy Decl. ¶ 17). FPL's valuation for this alleged benefit is pure speculation based on an improper assumption that AT&T, as an attacher, would be acquiring the first easement for the particular property. *Id.* But if AT&T required an easement for an attachment, FPL would have already obtained an easement for the pole. And so any "value" would be the far lower "difference in value of the land before and after the second easement." *Cordones v. Brevard Cnty.*, 781 So. 2d 519, 524 (Fla. Dist. Ct. App. 2001).

easements for "communications purposes" may not apply to cable companies.[225] This is no reason to inflate AT&T's rental rate. FPL's easements treat AT&T the same as "telecommunications carriers [and] cable television systems providing telecommunications services on the same poles."[226] They do not rebut the new telecom rate presumption.[227]

Fourteenth, FPL argues that AT&T may take ownership of a joint use pole when FPL abandons it.[228] FPL assigns no "specific dollar value" to this allegation[229] and does not identify any poles abandoned by FPL that AT&T has sought to take ownership. Moreover, some of AT&T's competitors [redacted][230] and FPL enjoys the reciprocal right with respect to poles abandoned by AT&T.[231] This is not a net benefit.

Fifteenth, FPL notes that AT&T is able to use FPL's common grounding pole bond,[232] but admits the bond "may also meet the requirements of other telecom providers."[233] FPL thus claims only that, if additional bonding were required, it would charge AT&T's competitors for the work.[234] FPL provides no evidence that any attacher has required additional bonding, which

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[225] Answer Ex. A at FPL00012 (Kennedy Decl. ¶ 17). Although FPL did not attach easements or explain why it thinks they exclude cable companies, it previously argued that easements covering "communications purposes" do not reach cable television. *See* FPL's Public Resp. to Verizon Fla.'s Pole Attachment Compl. at 19, Dkt. No. 15-73 (June 29, 2015).

[226] 47 C.F.R. § 1.1413(b).

[227] *Id.*; *see also* Reply Ex. A at ATT00932-34 (Rhinehart Reply Aff. ¶¶ 41-42).

[228] FPL Br. at 58.

[229] *See* Answer Ex. A at FPL00013-14 (Kennedy Decl. p. 12 & ¶ 22).

[230] *See* Reply Ex. 3 at FPL-002813 (License 3 [redacted]); Reply Ex. 4 at FPL-002080-81 (License 4 [redacted]).

[231] Compl. Ex. 1 at ATT00121 (JUA, Art. IX).

[232] FPL Br. at 59.

[233] Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 23).

[234] FPL Br. at 59.

is unlikely since each attacher on a pole must attach to the same ground bond for safety purposes.[235] Nor has FPL shown that it has performed any such work and charged for it.[236] Perhaps this is the reason why FPL withdrew the identical argument from its prior pole attachment complaint proceeding.[237]

Sixteenth, FPL argues that AT&T does not need to "carry insurance to indemnify FPL and name it as an additional insured" or post a security bond.[238] But the vast majority of FPL's license agreements ███.[239] ███,[240] which AT&T covered long ago in higher rental rates. In any event, these provisions are reciprocal. AT&T and FPL are covered by the same liability provision; neither is contractually required to purchase insurance; and each has waived the security bond requirement.[241] AT&T does not receive a net benefit that justifies a higher rate.[242]

Seventeenth, FPL claims that AT&T has been advantaged by the installation of "stronger concrete poles."[243] But AT&T's competitors also attach to FPL's concrete poles, and FPL is

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[235] Reply Ex. C at ATT00978 (Peters Reply Aff. ¶ 31).

[236] *See, e.g.*, Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 23).

[237] *See* Verizon Fla.'s Public Reply in Support of Its Pole Attachment Compl. against FPL, Ex. 8 at 2, Dkt. No. 15-73 (Nov. 24, 2015).

[238] FPL Br. at 59; Answer Ex. A at FPL00014 (Kennedy Decl. ¶¶ 24, 26). While FPL claims that the security bond would "cover the cost of removal of their facilities," AT&T's competitors have a statutory right to remain attached to FPL's poles. *See* 47 U.S.C. § 224(f).

[239] Reply Ex. C at ATT00967-68 (Peters Reply Aff. ¶ 12).

[240] *See, e.g.*, Reply Ex. 1 at FPL-000216 (License 1 ███).

[241] *See* Compl. Ex. 1 at ATT00125-26 (JUA Art. XIII); Reply Ex. C at ATT00967-68 (Peters Reply Aff. ¶ 12); Reply Ex. D at ATT01004-05 (Dippon Reply Aff. ¶ 46).

[242] *See* Reply Ex. C at ATT00979 (Peters Reply Aff. ¶ 35); Reply Ex. D at ATT01004-05 (Dippon Reply Aff. ¶ 46).

[243] FPL Br. at 59.

fully compensated for their costs at the new telecom rental rate.[244] FPL cannot credibly claim that it requires █ times that rate from AT&T. Nor can it establish that it is installing concrete poles *because* of AT&T.[245] FPL measured AT&T's facilities and found that they occupy comparable space to that required by AT&T's competitors.[246] Neither their size nor "girth" requires concrete poles.[247] FPL has instead replaced and "reinforce[d] existing utility poles with stronger wood or concrete poles" in order to "strengthen[ ] *the electric grid*."[248]

Eighteenth, FPL contends that the JUA benefits AT&T by requiring FPL to cover some of the cost for AT&T to build a new pole line for AT&T's facilities if FPL builds a transmission line over an existing FPL distribution pole line.[249] But, even if true, this provision of the JUA does not create a material benefit relative to AT&T's competitors because, as FPL acknowledges, AT&T, like its competitors, could simply attach to the new transmission pole line.[250] FPL also does not allege that this has ever occurred, does not assign a "specific dollar value" to this allegation, and does not explain how the possibility that FPL could redesign its

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[244] *See* 18 C.F.R. Pt. 101 (stating that Account 364 includes "[p]oles, wood, steel, concrete, or other material"); *Consolidated Partial Order*, 16 FCC Rcd at 12176 (App. E-2) (including investment in Account 364 in new telecom rate calculation); *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (finding new telecom rate "fully compensatory").

[245] *See* FPL Br. at 59; Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 25).

[246] *See* Answer Ex. E at FPL00166 (Murphy Decl. ¶ 3).

[247] FPL Br. at 59; Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 25).

[248] *See* Reply Ex. 6 (FPL installs new poles to strengthen electric grid and help communities prepare for hurricane season) (emphasis added).

[249] FPL Br. at 59-60; Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 27).

[250] FPL Br. at 59-60; Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 27).

network in a way that imposes costs on AT&T should nonetheless result in AT&T paying a higher rental rate to FPL.[251] This speculation does not amount to a net benefit to AT&T.

3. AT&T's "Voluntary" Pole Access Cannot Support A Higher Rate.

Having unsuccessfully scoured the JUA for any possible advantage, FPL recasts its arguments into a claim that the JUA itself is the benefit because it provides AT&T with "voluntary access" to FPL's poles.[252] In FPL's view, because AT&T does not have a statutory right of access to FPL's poles, the JUA allowed AT&T to "avoid the cost of building an entire network on its own."[253] FPL's argument is no more valid argued in this manner. It also fails as a matter of law.

A JUA that provides AT&T with "voluntary access" to FPL's poles is not a net material competitive benefit that can rebut the new telecom rate presumption because other attachers have the same or superior access. As the Commission has concluded, "excess, unused pole attachment space, is the same whether the attachment is obtained through voluntarily signed contracts or through mandatory access."[254] For that reason, FPL must prove that AT&T "receives significant material benefits beyond basic pole attachment or other rights given to another telecommunications attacher."[255] And, as already demonstrated, FPL cannot make that showing. An ILEC's lack of a statutory right of access cannot justify a higher rate.

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[251] FPL Br. at 59-60; Answer Ex. A at FPL00013-14 (Kennedy Decl. at page 12 & ¶ 27).

[252] FPL Br. at 60-63.

[253] *Id.* at 62.

[254] *Ala. Cable Telecomms. Ass'n*, 16 FCC Rcd at 12232 (¶¶ 51-52).

[255] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128).

Nor can the fact that the JUA provided AT&T access to FPL's poles in 1975, years before the 1996 Telecommunications Act introduced competition to the market.[256] The Commission would not have adopted a presumption if it could be rebutted in every case by an immutable difference between ILECs and CLECs.[257] And, in any event, even in the early years of the 1975 JUA, AT&T's "voluntary access" to FPL's poles was not unique. Before 1996, all access to access to utility poles was voluntary.[258] Yet, cable companies were in the market and attaching to poles, including those of FPL, when the JUA was signed in 1975.[259] Thus, AT&T's "voluntary access" to FPL's poles is not as unique or beneficial as FPL suggests and that access does not rebut the new telecom rate presumption.[260]

D. FPL Cannot Lawfully Charge The JUA Rates Under The 2011 *Pole Attachment Order* Either.

Without evidence that can rebut the new telecom rate presumption, FPL relies almost exclusively on arguments that the 2011 *Pole Attachment Order* applies and precludes any rental

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[256] *See* FPL Br. at 63.

[257] *See Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126).

[258] Cable companies have enjoyed the right to "just and reasonable" rates since 1978. *See, e.g., FCC v. Fla. Power Corp.*, 480 U.S. 245, 247-48 (1987) ("*Fla. Power Corp.*"); *see also Gulf Power Co. v. United States*, 187 F.3d 1324, 1326-27 (11th Cir. 1999).

[259] *See, e.g., Fla. Power Corp.*, 480 U.S. at 247 (For "the past 30 years, utility companies throughout the country have entered into arrangements for the leasing of space on poles to operators of cable television systems."); S. Rep. 95-580, 95th Cong., 1st Sess. 1977, 1978 U.S.C.C.A.N. 109, 120 ("It is the general practice of the cable television (CATV) industry in the construction and maintenance of a cable system to lease space on existing utility poles for the attachment of cable distribution facilities."); Answer Ex. A at FPL00052-53 (Kennedy Decl., Ex. E at Art. XV) (The parties' 1961 agreement refers to the "[e]xisting rights of other parties" on the joint use poles."); Compl. Ex. 1 at ATT00127 (JUA § 14.2) (The JUA accommodates the "[e]xisting rights of other parties.").

[260] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128).

relief.[261] These arguments are irrelevant because they speak to the wrong standard given the applicability of the 2018 *Third Report and Order*. They are also incorrect.

1. Existing JUAs Are Subject To Challenge Under The 2011 *Order*.

FPL first argues that the JUA should not be subject to *any* review because the 2011 *Order* applies only to "new agreements."[262] The 2011 *Order* says otherwise and establishes a framework for reviewing agreements that pre-date the *Order*.[263] The Commission confirmed this in FPL's last rate dispute, which also involved a 1975 joint use agreement.[264] It then explained that the Commission has "on many occasions" substituted a just and reasonable rate for an agreed upon unjust and unreasonable rate.[265] And indeed, "pole attachment rates cannot be held reasonable simply because they have been agreed to."[266] "The Commission has a duty under section 224 to 'adopt procedures necessary and appropriate to hear and resolve complaints concerning … rates, terms, and conditions' of pole attachment pursuant to the requirements of section 224. The Commission would not be fulfilling that duty if it were to substitute the requirements of contract law for the dictates of section 224."[267] Thus, AT&T need not "pay the relatively high Agreement Rates for as long as its attachments remain on Florida Power's poles" simply because the JUA predates the 2011 *Order*.[268]

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[261] FPL Br. at 34-70.

[262] *Id.* at 34-35.

[263] *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216).

[264] *FPL Order*, 30 FCC Rcd at 1143 (¶ 9).

[265] *Id.* at 1147 (¶ 19 n.61) (citing cases).

[266] *Selkirk Commc'ns, Inc. v. Fla. Power & Light Co.*, 8 FCC Rcd 387, 389 (¶ 17) (1993).

[267] *Pole Attachment Order NPRM*, 25 FCC Rcd at 11908 (¶ 105) (cited with approval at *Pole Attachment Order*, 26 FCC Rcd at 5292 (¶ 119 n.368)).

[268] *FPL Order*, 30 FCC Rcd at 1150 (¶ 25).

2. FPL's Answer Evidences Its Use Of Its Pole Ownership Advantage To Impose Unjust And Unreasonable Rates.

FPL has a 2-to-1 (67% to 33%) pole ownership advantage over AT&T[269] and its witness says "pole ownership means bargaining power."[270] Rate relief is therefore appropriate under the 2011 *Order*.[271] FPL tries six different ways to avoid that fact,[272] but each lacks merit.

First, FPL argues that a pole ownership disparity should not be considered indicative of bargaining leverage because, absent joint use, FPL would also have to find alternate infrastructure for joint use poles owned by AT&T.[273] The Commission rejected this argument based on "[s]tandard economic theories."[274] And FPL proves the Commission was correct, as it admits that, absent FCC regulation of rates, it has leverage to impose rates on AT&T up to the cost of "building [AT&T]'s own pole line, undergrounding its own facilities or establishing a wire[line] network on non-FPL facilities."[275] That is the definition of bargaining leverage.[276]

Second, FPL argues that if pole ownership numbers are considered, FPL owned 59.4% of the joint use poles in 1975, and so was shy of the 65% ownership advantage the Commission previously found justifies rate relief.[277] But the Commission did not limit rate relief to

[269] *See* Compl. ¶ 23; Answer ¶ 23 ("FPL admits that the relative pole ownership percentages supplied by AT&T in paragraph 23 are accurate.").

[270] Answer Ex. A at FPL00004 (Kennedy Decl. ¶ 8).

[271] *See Pole Attachment Order*, 26 FCC Rcd at 5334 (¶ 215).

[272] FPL Br. at 35-41.

[273] FPL Br. at 36-37; *see also* Answer ¶ 23.

[274] *See Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206 n.618) (explaining why a pole ownership disparity provides leverage under "[s]tandard economic theories").

[275] FPL Br. at 48.

[276] Reply Ex. D at ATT01005-07 (Dippon Reply Aff. ¶¶ 48-52).

[277] FPL Br. at 36; *see also Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206).

agreements entered decades ago at some specified ownership level; it simply acknowledged that, if "[I]LECs owned approximately the *same number* of poles as electric utilities *and* were able to ensure just and reasonable rates, terms, and conditions" through negotiations, such rates *may* remain "just and reasonable."[278] AT&T never owned the "same number" of poles as FPL[279] and the rates are manifestly *not* just and reasonable.[280] But more importantly, the Commission sought to provide rate relief where, as here, "[o]ver time, aggregate [I]LEC pole ownership has diminished relative to that of electric utilities."[281] AT&T's ownership ratio has "declined ... primarily due to FPL's FPSC-ordered storm hardening initiatives,"[282] creating a 2-to-1 pole ownership advantage today that justifies rate relief.[283]

Third, FPL argues that AT&T had "bargaining power" in 1975 because AT&T "clearly and successfully negotiated the agreement it desired,"[284] including a "major change in cost allocation."[285] This is laughable.[286] The "major change" FPL relies on is the allocation of 47.4% of pole costs to AT&T, and 52.6% to FPL, to set the rental rate when the prior agreement had

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[278] *See Third Report and Order*, 33 FCC Rcd at 7768 (¶ 124) (describing *Pole Attachment Order*) (emphases added).

[279] *Id.*

[280] *See* Compl. ¶¶ 21-22; *see also* Section II.C, below.

[281] *Pole Attachment Order*, 26 FCC Rcd at 5328-29 (¶ 206).

[282] Answer Ex. A at FPL00004, FPL00025 (Kennedy Decl. ¶ 8 & Ex. A).

[283] *Dominion Order*, 32 FCC Rcd at 3757 (¶ 13) ("nearly two-to-one pole ownership advantage"); *see also Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206) (estimating that electric utilities "own approximately 65-70 percent of poles").

[284] FPL Br. at 37-39.

[285] FPL Br. at 5.

[286] AT&T did not even negotiate the JUA, which FPL admits was entered by AT&T's predecessor Southern Bell Telephone and Telegraph Company about 10 years before FPL hired its fact witness. *See id.* at 1; *see also* Answer Ex. A at FPL00002 (Kennedy Decl. ¶ 4).

allocated 50% to each.[287] This modest change had about a █ per pole impact on the rates AT&T paid for wood distribution poles over the last 5 years; in other words, AT&T's rates were about █, instead of █, more per wood distribution pole than the new telecom rates applicable to its competitors.[288] And FPL itself admits that the space allocations do not reflect reality: "AT&T's and FPL's use of pole infrastructure is not comparable. They ... are not attaching the same type of equipment to poles; they do not have the same space requirements."[289] Best case scenario, AT&T uses 1.18 feet of space, while FPL requires at least 10.5 feet.[290] The immateriality of the change AT&T's predecessor obtained in 1975 thus confirms rather than refutes FPL's use of its pole ownership advantage to impose unjust and unreasonable rates.[291]

Fourth, FPL claims that "the parties' recent conduct shows that there has been no exertion of bargaining power by FPL."[292] This too is laughable, as FPL's recent activity screams otherwise. FPL terminated the JUA because AT&T asked for "just and reasonable" rates,[293] wants to "remove AT&T's equipment from FPL's infrastructure,"[294] and continues to press

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[287] FPL Br. at 5; *see also id.* at 38.

[288] *See* FPL's Resp. to AT&T's Interrog. No. 5; Compl. Ex. A at ATT00008-09 (Rhinehart Aff. ¶ 16).

[289] Answer ¶ 22.

[290] *See* Answer Ex. D at FPL00164 (Deaton Decl., Ex. RBD-1) (10.5 feet for FPL); Answer Ex. E at FPL00166 (Murphy Decl. ¶ 3) (1.18 feet for AT&T); *see also* Reply Ex. 3 at FPL-002803 (License 3 █) (█ █).

[291] *See* Reply Ex. A at ATT00934-35 (Rhinehart Reply Aff. ¶ 43); Reply Ex. D at ATT00997-98 (Dippon Reply Aff. ¶ 36).

[292] FPL Br. at 39-40.

[293] Answer ¶ 17 (admitting FPL terminated the JUA because of the parties' rate dispute).

[294] *Id.*

ahead with its "collection efforts" in Florida federal court even though AT&T paid the disputed invoices in full several months ago and before FPL even served its complaint.[295]

FPL attributes significance to a claim that it "offered to purchase AT&T's poles and negotiate attachment rates and arrangements that would be comparable to what FPL provides to non-ILECs."[296] FPL does not provide a single piece of paper substantiating this offer, proposing a price for the poles, or offering new telecom rates in exchange for the sale. For good reason. FPL's witness admits that a pole purchase was just an "idea" he raised.[297] He also notes that AT&T expressed a willingness to consider an offer if one were extended so long as FPL *also* offered "lower attachment rates" comparable to those charged "other telecom providers."[298] FPL would not commit to do so, stating only "that all these things could be considered and addressed" later.[299] But FPL never did extend a formal offer to purchase poles *or* lower rental rates.[300] Instead, FPL refused to negotiate a different rate, claiming, despite the *Pole Attachment Order* and the unambiguous language in the *Third Report and Order*, that it is "not aware of any federal law that requires FPL to take affirmative action to change an agreed upon contract rate."[301] And,

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[295] *See* Answer ¶ 17; FPL Br. at 13; *see also* ATT00716, ATT00719, ATT00721.

[296] FPL Br. at 40.

[297] Answer Ex. A at FPL00020 (Kennedy Decl. ¶ 36). Mr. Kennedy also apparently confuses AT&T with its wireless affiliate, as AT&T does not own wireless "towers," and so would not refer to them in a conversation about utility poles.

[298] *Id.*

[299] *Id.*

[300] *See also* Reply Ex. C at ATT00965 (Peters Reply Aff. ¶ 8).

[301] Compl. Ex. 10 at ATT00188 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 4, 2018)); *see also* Compl. Ex. 12 at ATT00197 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 20, 2018) ("Also, as we have previously communicated, there is nothing in the 2011 FCC Order that affirmatively requires the parties to modify an existing agreed upon contract rate.").

in any event, FPL's entire argument about a possible purchase of AT&T's poles is irrelevant because AT&T does not need to sell poles in order to secure the "just and reasonable" rate for use of FPL's poles that is guaranteed by federal law.

Fifth, FPL argues that AT&T must have bargaining power to negotiate just and reasonable rates because its parent is "the largest telecommunications provider in the world."[302] But AT&T's position as a telecommunications provider provides no leverage in negotiations over use of utility poles. Instead, the Commission rightly looks to pole ownership counts and the resulting rental rates in this context because "exclusive control over access to pole lines ... unquestionably" places FPL in a position to charge unreasonably high pole attachment rates.[303]

Sixth, FPL argues that AT&T "is, and always has been, free to install its own poles as it enters new service areas."[304] If true,[305] it proves why rate relief is so needed. "Given the benefits of pole attachments to minimize 'unnecessary and costly duplication of plant for all pole users,'" Congress directed the Commission to ensure "just and reasonable" pole attachment rates.[306] FPL cannot perpetuate its far higher JUA rates by arguing that AT&T could incur even higher costs to deploy an unwanted duplicative network.[307]

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[302] FPL Br. at 39.

[303] *See Pole Attachment Order*, 26 FCC Rcd at 5242, 5329 (¶¶ 4 & 206 n.618) (internal quotations omitted); *see also id.* at 5329 (¶ 206) (stating that an ILEC's "historical monopoly over local telephone service has not always translated into marketplace power").

[304] FPL Br. at 41.

[305] *See Pole Attachment Order*, 26 FCC Rcd at 5242 (¶ 4) ("Congress concluded that [o]wing to a variety of factors, including environmental or zoning restrictions and the very significant costs of erecting a separate pole network or entrenching cable underground, there is often no practical alternative [for network deployment] except to utilize available space on existing poles." (internal quotations omitted)).

[306] *Id.* (quoting S. Rep. No. 580, at 13 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 121).

[307] *See* Reply Ex. D at ATT00987, ATT00997 (Dippon Reply Aff. ¶¶ 12, 34-35).

3. FPL's Other Efforts To Justify Its Rates Under The 2011 *Order* Fail.

FPL makes five additional arguments in its effort to avoid the rate reductions intended by the 2011 *Pole Attachment Order*. They fail also.

First, FPL argues that AT&T does not "genuinely lack[] the ability to terminate" the JUA rates and obtain new ones.[308] The Enforcement Bureau decided this against FPL in its last rate dispute, relying on an evergreen clause that, like the clause in the JUA, requires payment of the JUA rates after termination as evidence that rate relief was justified because the ILEC "genuinely lacks the ability to terminate an existing agreement.'"[309] The same is true here, where FPL informed AT&T that nothing "requires [FPL] to modify an existing agreed upon contract rate.[310] FPL now claims AT&T *may* have been able to negotiate a new agreement, but only if AT&T had "follow[ed] up" on FPL's "idea" to buy all of AT&T's poles, something that, by definition, would have further *reduced* AT&T's leverage.[311] But this is pure litigation positioning. During negotiations, FPL flatly refused to "take affirmative action to change an agreed upon contract rate."[312] Simply put, AT&T had no real ability to terminate the JUA or to negotiate new, reasonable attachment rates.

Second, FPL argues that the disparity between the rates paid by AT&T and FPL must not be as bad as the "significant disparity" considered in the *Dominion Order* because, in 2017, FPL

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[308] FPL Br. at 41 (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216)).

[309] *FPL Order*, 30 FCC Rcd at 1150 (¶ 25) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216)).

[310] Compl. Ex. 12 at ATT00197 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 20, 2018) ("Also, as we have previously communicated, there is nothing in the 2011 FCC Order that affirmatively requires the parties to modify an existing agreed upon contract rate.").

[311] FPL Br. at 41-42.

[312] Compl. Ex. 10 at ATT00188 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 4, 2018)).

paid AT&T a rate that was [redacted] per pole higher than the rate AT&T paid FPL.[313] But FPL *should* pay a higher rate, as it uses substantially more pole space—10.5 feet compared to AT&T's use of, at most, only 1.18 feet of space.[314] Yet the rate that FPL charges AT&T is relatively close to the rate that FPL pays AT&T because the JUA divides pole costs nearly in half—47.4% to AT&T for a wood distribution pole versus 52.6% for FPL.[315] The Commission instead expected that ILECs and electric utilities would each pay "roughly the same proportionate rate given the parties' relative usage of the pole 'such as the same rate per foot of occupied space.'"[316]

Third, FPL argues that AT&T failed to meet its burden under the 2011 *Pole Attachment Order* to "demonstrate that the [JUA] at issue does not provide a material advantage ... relative to cable operators or telecommunications carriers."[317] But AT&T provided substantial evidence, testimony, and argument that more than satisfies its burden under Commission rules.[318] Thus,

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[313] *Id.* at 43; *see also* Compl. Ex. B at ATT00052 (Miller Aff. ¶ 28) (showing that AT&T paid [redacted] per wood distribution pole for 2017, while FPL paid [redacted] per pole).

[314] *See* Answer Ex. D at FPL00164 (Deaton Decl., Ex. RBD-1) (10.5 feet for FPL); Answer Ex. E at FPL00166 (Murphy Decl. ¶ 3) (1.18 feet for AT&T).

[315] *See, e.g.*, FPL Br. at 38; *see also* Compl. Ex. B at ATT00052 (Miller Aff. ¶ 28) (showing that AT&T paid a [redacted] per wood distribution pole for 2017, while FPL paid [redacted] per pole).

[316] *See Dominion Order*, 32 FCC Rcd at 3760 (¶ 21 n.78) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662)).

[317] *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217); *see also* FPL Br. at 44-46.

[318] *See* 47 C.F.R. § 1.1406(a) ("The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable."); *Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co.*, 11 FCC Rcd 11202, 11207 (¶ 11) (1996) (finding a *prima facie* case is established by "a statement of the specific unreasonable pole attachment rate, term or condition and all arguments used to support its claim of unreasonableness."); *see also, e.g.*, *Cable Television Ass'n of Ga. v. Ga. Power Co.*, 18 FCC Rcd 16333, 16337 (¶ 8) (2003) (finding *prima facie* case where Complaint "could have been more detailed," but nonetheless "identifie[d] the factual basis of the allegations"); *Fla. Cable Telecomms. Ass'n*, 18 FCC Rcd at 9605-06 (¶ 13) (finding *prima facie* case where Complaint alleged that a rate proposal was significantly higher

the question is whether FPL has justified the JUA rates regardless of whether they are reviewed under the standard adopted in 2011 or 2018.[319] It has not.

Indeed, FPL's defense of the JUA rates for wood and concrete distribution poles (near-█ per wood pole and near-█ per concrete pole) is that the wood distribution pole rate is less than pre-existing telecom rates it claims are as high as █ per pole.[320] But, these inflated pre-existing telecom rates of up to █ per pole are incorrectly calculated.[321] The pre-existing telecom rate for wood and concrete poles can only be about $25 per pole, at most, as by rule the pre-existing telecom rate is about 1.5 times the $16 per pole new telecom rate that FPL charged AT&T's competitors.[322] In comparison, the near-█ and near-█ per pole rates that FPL charges AT&T are exorbitant.[323] The following table shows the pre-existing telecom rates that FPL should have calculated using the new telecom rates it charged AT&T's competitors for use

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than the Commission's cable rate); *Time Warner Entm't*, 14 FCC Rcd at 9150-51 (¶ 3) (finding *prima facie* case because "Complaint contains information required under Section 1.1404(a-g), although [respondent] disputes the accuracy of some of the information"); *Selkirk Commc'ns*, 8 FCC Rcd at 389 (¶ 17) (finding *prima facie* case where Complaint alleged that licensee was "required to pay a rate ... that is higher than the regulated rate ... for traditional cable attachments").

[319] *See Dominion Order*, 32 FCC Rcd at 3759-61 (¶¶ 20-22 & n.70) (requiring electric utility to justify its rates); *see also Knology, Inc. v. Ga. Power Co.*, 18 FCC Rcd 24615, 24635 (¶ 49) (2003) ("[A]fter [the complainant] establishes a *prima facie* case regarding specific accounts, [the respondent] must produce evidence explaining the challenged charges."); *Marcus Cable Assocs., LP v. Tex. Utils. Elec. Co.*, 18 FCC Rcd 15932, 15938-39 (¶ 13) (2003) ("Once a complainant in a pole attachment matter meets its burden of establishing a *prima facie* case, the respondent bears a burden to explain or defend its actions."); *Selkirk Commc'ns*, 8 FCC Rcd at 389 (¶ 17) ("Once [a] prima facie showing is made, ... the respondent must justify the rate, term or condition alleged in the complaint not to be just and reasonable." (internal quotation omitted)).

[320] Answer Ex. D at FPL00156 (Deaton Decl. ¶ 9); *see also* FPL Br. at 14, 69; Answer ¶¶ 21, 38.

[321] Reply Ex. A at ATT00916-23 (Rhinehart Reply Aff. ¶¶ 8-20).

[322] *See, e.g.*, *id.* at ATT00916-17 (¶ 8).

[323] FPL's Resp. to AT&T's Interrog. No. 5.

of wood and concrete distribution poles as compared to the JUA rates FPL charged AT&T for the use of the same poles:

Comparison of per-pole rates	2014	2015	2016	2017	2018
Pre-existing telecom rate converted from new telecom rates FPL charged[324]	$15.82	$17.48	$19.61	$22.48	$25.53
Rate FPL charged AT&T (wood)					
Effective rate FPL charged AT&T (concrete)					

Even under these most-favorable to FPL circumstances, the rates FPL charged AT&T are unlawful, as they far exceed the "hard cap" set by the *Third Report and Order* and the "reference point" set by the *Pole Attachment Order*.[325]

Fourth, FPL argues that the Commission should "decline to disturb" the JUA rates under the 2011 *Order* based on the same non-offer that FPL thought about making to purchase AT&T's poles.[326] But there was no offer. And so the argument has no more merit when repeated in this context.

Fifth, FPL relies on the 18 alleged benefits detailed above as justification for its rates, but they are no more persuasive under the standard adopted in 2011.[327] Because AT&T attaches to FPL's poles based on "terms and conditions that leave it 'comparably situated' to [C]LEC or

[324] These rates are themselves unlawfully inflated, as the properly calculated pre-existing telecom rates are $15.84, $16.85, $18.37, $20.18, and $23.94 per pole for the 2014 to 2018 rental years. *See* Reply Ex. A at ATT00916-17, ATT00923 (Rhinehart Reply Aff. ¶¶ 8, 20).

[325] *See Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

[326] FPL Br. at 46-47; *see also* Reply Ex. C at ATT00965 (Peters Reply Aff. ¶ 8).

[327] FPL Br. at 47-67; *see* Section II.C.2, above.

cable attachers, 'competitive neutrality counsels in favor of affording [AT&T] *the same rate* as the comparable provider,' *i.e.*, the New Telecom Rate."[328]

E. AT&T Should Be Awarded A Properly Calculated Per-Pole New Telecom Rate Effective As Of The 2014 Rental Year.

Because FPL has not identified any material advantages that AT&T enjoys over its competitors, much less a net material advantage, AT&T should be charged a properly calculated new telecom "rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2),"[329] and FPL should be ordered to refund the amounts it collected from AT&T in violation of federal law, plus interest, during the applicable 5-year statute of limitations period.[330] During the 2014 through 2018 rental years, the new telecom rates for AT&T's use of FPL's poles were $10.46, $11.12, $12.12, $13.32, and $15.80 per pole, respectively.[331] FPL argues for higher rental rates and a shorter statute of limitations,[332] but its arguments conflict with Commission precedent.

1. FPL's Rate Calculations Are Unlawfully Inflated.

FPL asks for rates that were *not* calculated "in accordance with [47 C.F.R.] § 1.1406(e)(2)" as required.[333] FPL admits that it has been charging AT&T's competitors a new telecom rate in the $10 to $17 range.[334] But FPL argues that if it is forced to charge AT&T

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[328] *FPL Order*, 30 FCC Rcd at 1142 (¶ 7) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217)).

[329] 47 C.F.R. § 1.1413(b).

[330] 47 C.F.R. § 1.1407(a).

[331] Compl. Ex. A at ATT00008 (Rhinehart Aff. ¶ 14); Reply Ex. A at ATT00923 (Rhinehart Reply Aff. ¶ 20).

[332] FPL Br. at 14 n.50, 68-70, 74-75; Answer ¶ 32.

[333] 47 C.F.R. § 1.1413(b); *see also* Reply Ex. A at ATT00915-24 (Rhinehart Reply Aff. ¶¶ 7-21).

[334] FPL charged new telecom rates of $10.44, $11.54, $12.94, $14.84, and $16.85 for the 2014 to 2018 rental years. *See* FPL's Resp. to AT&T's Interrog. No. 5.

under the new telecom rate formula, the rate for AT&T should be up to ▇ higher.[335] FPL's tailor-made rates for AT&T must be rejected. AT&T is entitled to a competitively neutral rate calculated "in accordance with [47 C.F.R.] § 1.1406(e)(2)" because "*greater rate parity* ... can energize and further accelerate broadband deployment."[336]

FPL's rate manipulations fall into 5 categories. *First*, FPL assigns AT&T 4.5 feet of space on a pole,[337] even though FPL uses the presumptive 1-foot input for its other communications attachers.[338] FPL arrives at 4.5 feet of space by improperly including 3.3 feet of safety space, which it acknowledges the "Commission's prior order ... allocated to the electric utility."[339] FPL argues that this prior Commission order does not apply to ILECs and that AT&T should be allocated the safety space because it is needed solely due to the taller poles FPL installed to accommodate joint use.[340] This argument has been considered and rejected by the

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[335] FPL claims AT&T should pay new telecom rates of ▇ ▇ for the 2014 to 2018 rental years. FPL Br. at 74; Answer ¶¶ 13, 19. FPL also inflates its pre-existing telecom rates, claiming that AT&T should pay up to ▇ per pole for the 2014 to 2018 rental years, even though the new telecom rates FPL charged convert into pre-existing telecom rates no higher than $25.53. *See* FPL Br. at 14, 69; Answer ¶ 21; *see also* Reply Ex. A at ATT00916-17 (Rhinehart Reply Aff. ¶ 8).

[336] 47 C.F.R. § 1.1413(b); *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) (emphasis added; internal quotation omitted).

[337] FPL Br. at 70; Answer Ex. D at FPL00153, FPL00162 (Deaton Decl. ¶ 8 & Ex. RBD-1).

[338] FPL's Resp. to AT&T's Interrog. No. 5.

[339] FPL Br. at 70 n.278.

[340] *Id.*; *see also* Answer Ex. A at FPL00016 (Kennedy Decl. ¶ 30 n.26). FPL assumes that AT&T was the first communications attacher on every FPL pole, but cable companies were in the market and attaching to poles when the JUA was signed in 1975. *See Fla. Power Corp.*, 480 U.S. at 247 (For "the past 30 years, utility companies throughout the country have entered into arrangements for the leasing of space on poles to operators of cable television systems."); S. Rep. 95-580, 95th Cong., 1st Sess. 1977, 1978 U.S.C.C.A.N. 109, 120 ("It is the general practice of the cable television (CATV) industry in the construction and maintenance of a cable system to lease space on existing utility poles for the attachment of cable distribution facilities.").

Commission. In response to electric utilities' requests to remove the safety space from usable space because it exists solely "to protect attaching entities' workers," the Commission definitively concluded: "It is the presence of the potentially hazardous electric lines that makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers. The space is usable and is used by the electric utilities."[341] The Commission's reasoning applies no less to poles shared with AT&T than on poles shared with AT&T's competitors.[342] In fact, the "safety space" is rarely even adjacent to AT&T's facilities, which are typically the lowest on the pole, whereas the safety space divides FPL's facilities from the highest communications attachments on the pole.[343]

Second, FPL relies on an unreliable and hurried post-hoc review of 2,000 poles to decrease the average number of attaching entities input from the FCC's presumptive 5 to 2.99 and increase the average amount of space occupied by AT&T from the FCC's presumptive 1 foot to 1.18 feet.[344] FPL's alternate inputs are not valid and "probative direct evidence" sufficient to rebut the Commission's presumptions.[345] FPL admits it "did not have any data to contradict" the FCC's presumptive inputs during the 2014 to 2018 rental years; it cannot create that data now to retroactively inflate rates, especially when its contractor explains that "naturally

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[341] *Amendment of the Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, 6467 (¶¶ 21-22) (2000).

[342] *See Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51); *see also* Reply Ex. C at ATT00974 (Peters Reply Aff. ¶ 23).

[343] *See, e.g.*, Reply Ex. C at ATT00974 (Peters Reply Aff. ¶ 23); Reply Ex. D at ATT00993-94 (Dippon Reply Aff. ¶ 27).

[344] FPL Br. at 69-70; *see also* Answer Ex. E at FPL00168 (Murphy Decl. ¶¶ 8-23).

[345] *See In the Matter of Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, 2 FCC Rcd 4387, 4394 (¶ 52 n.27) (1987); *see also Consolidated Partial Order*, 16 FCC Rcd at 12139 (¶ 70).

field conditions can change over that time period."[346] Nor can FPL's new data rebut the Commission's presumptions for future years. FPL's contractor reviewed just 0.5% of FPL's joint use poles, substantially below even the 45% of poles that the Commission has previously considered "incomplete" and insufficient to rebut the presumptive inputs.[347] FPL also improperly developed the project and collected the data without "coordination with" AT&T.[348] And it did not collect complete data: FPL collected data about space occupied by AT&T *without* collecting data about space occupied by FPL,[349] and it collected data about governmental attachers *without* collecting data about all other attachers on the same poles.[350] FPL's proposed input for the average number of attaching entities thus reflects a mishmash of selective data—some collected this year about 2,000 poles and some collected up to 4 years ago about different poles.[351] None of it reflects the "actual" number of entities on any specific pole.[352] And most of it is outdated, collected years ago in "a fast-growing state" with significant ongoing

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[346] Answer Ex. E at FPL00168 (Murphy Decl. ¶ 12); Answer Ex. F at FPL00262 (Davis Aff. ¶ 4). Indeed, those conditions did change as the contractor found fewer joint use poles in the field than FPL's records showed. *See* Answer Ex. E at FPL00168 (Murphy Decl. ¶ 12).

[347] *Nevada State Cable Television Ass'n v. Nevada Bell*, 13 FCC Rcd 16774 (¶¶ 12-13) (1998); *see also* Reply Ex. C at ATT00975-76 (Peters Reply Aff. ¶ 27).

[348] *See Nevada State Cable Television Ass'n*, 13 FCC Rcd at 16774 (¶ 13); *see also* Answer Ex. E at FPL00168 (Murphy Decl. ¶ 10) (poles were "selected by FPL"); Answer Ex. F at FPL00262 (Davis Decl. ¶ 5) ("I developed a plan....").

[349] *See* Answer Ex. E at FPL00173 (Murphy Decl., Ex. A). In addition, the information about space occupied by AT&T is only accurate to "within one inch," which is material given that FPL asserts that AT&T's facilities deviate just 2 inches from the presumptive input. *See id.* at FPL00169 (Murphy Decl. ¶¶ 14, 16).

[350] *Id.* at FPL00173 (Murphy Decl., Ex. A).

[351] *See, e.g.*, Answer Ex. A at FPL00016 (Kennedy Decl. ¶ 30) (explaining that he "[c]ombin[ed] the results" of the review of 2,000 poles with "results of the five-year rolling survey"); Answer Ex. E at FPL00167 (Murphy Decl. ¶ 6).

[352] *See Consolidated Partial Order*, 16 FCC Rcd at 12139 (¶ 70).

deployment[353] that can increase the number of attaching entities. FPL, therefore, has not rebutted the Commission's presumptive inputs for average number of attaching entities or space occupied.[354]

Third, FPL inappropriately uses the rate of return "applicable to ILECs" instead of its own rate of return.[355] It claims that it has the right to make the substitution because "FPL has no authorized rate of return approved by a Florida Public Service Commission [FPSC] order."[356] But "the weighted average cost of debt and equity is the proper cost of capital figure" even where those figures are no longer announced by a State commission.[357] And, in any event, FPL uses an actual cost of capital figure based on data "specified in settlements approved by the FPSC" and filed with the FPSC to calculate the rates it charges AT&T's competitors.[358] It must use its own rate of return to calculate the rates it charges AT&T.[359]

Fourth, FPL increases its rates by using a lower amount of pole accumulated depreciation than reported in its FERC Form 1.[360] FPL claims to draw the lower figures from an "FPSC Status Report,"[361] but the report is not publicly available, was not attached to FPL's Answer, and

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[353] Answer Ex. A at FPL00005 (Kennedy Decl. ¶ 9); *see also* Answer Ex. E at FPL00168 (Murphy Decl. ¶ 12) (stating that errors are understandable in survey data that is "3 to 4 years old" because "naturally field conditions can change over that time period").

[354] *See* Reply Ex. D at ATT00993-96 (Dippon Reply Aff. ¶¶ 27-32).

[355] *See* FPL Br. at 70 n.278.

[356] *Id.*; *but see* FPL's Resp. to AT&T's Interrog. No. 9 (stating that FPL's "rate of return for January – May 2014 is specified in the Florida Public Service Commission's (FPSC) order in Docket No. 080677-EI.").

[357] *Multimedia Cablevision, Inc.*, 11 FCC Rcd at 11215 (¶ 36).

[358] *See* FPL's Resp. to AT&T's Interrog. No. 9.

[359] *See* Reply Ex. A at ATT00918-19 (Rhinehart Reply Aff. ¶¶ 12-13).

[360] *See id.* at ATT00918 (¶ 11).

[361] Answer Ex. D at FPL00154, FPL00162 (Deaton Decl. ¶ 8 & Ex. RBD-1).

was not produced to AT&T in response to its interrogatories.[362] FPL, therefore, cannot use this unverifiable data to increase the rates it charges AT&T.[363]

Fifth, FPL asks the Commission to apply new telecom rates on a per-foot basis (*i.e.*, calculate a rate for one foot of space and multiply it by the number of feet of space occupied).[364] This is not the appropriate way to apply the Commission's rate formulas.[365] If valid data shows that a communications attacher occupies more than 1 foot of space, on average, the appropriate way to calculate the rate is to adjust the "space occupied" input in the rate formula to account for that additional space.[366] This manner of calculating the rate complies with the statutory requirement that unusable space on the pole be equally divided among attaching entities—without regard to the amount of pole space occupied.[367] In contrast, calculating rates in the manner suggested by FPL—multiplying a 1-foot rate by the amount of space occupied—overcharges the attacher being charged because it overallocates the unusable space to them. The

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[362] Reply Ex. A at ATT00918 (Rhinehart Reply Aff. ¶ 11).

[363] *Cf.* 47 C.F.R. § 1.1404(f).

[364] Answer ¶¶ 8, 37.

[365] *See* Reply Ex. A at ATT00923-24 (Rhinehart Reply Aff. ¶ 21). Indeed, FPL's own witness does not calculate rates in the manner that FPL requests. *See* Answer Ex. D at FPL00162, FPL00164 (Deaton Decl., Ex. RBD-1) (calculating rates using the "space occupied" input).

[366] See 47 C.F.R. § 1.1406(d); *see also* Reply Ex. A at ATT00923-24 (Rhinehart Reply Aff. ¶ 21).

[367] 47 U.S.C. § 224(e)(2) (requiring "equal apportionment of [unusable space] costs among all attaching entities"); *see also In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (¶ 57) (1998) (rejecting proposal "that entities using more than one foot be counted as a separate entity for each foot or increment thereof" because "[w]e are … convinced that the alternative proposal is inconsistent with the plain meaning of Section 224(e) which apportions the cost of unusable space 'under an equal apportionment of such costs among all attaching entities'"); *id.* at 6800 (¶ 45) ("Under Section 224(e)(2), the number of attaching entities is significant because the costs of the unusable space assessed to each entity decreases as the number of entities increases.")

appropriate new telecom rates for AT&T, therefore, are the $10.46, $11.12, $12.12, $13.32, and $15.80 per pole rates properly calculated "in accordance with [47 C.F.R.] § 1.1406(e)(2)."[368]

2. The Applicable Statute Of Limitations In This Case Is 5 Years.

FPL's statute of limitations arguments conflict with precedent as well. *First*, FPL argues that the Commission "expressly foreclosed" refunds in the *Third Report and Order*.[369] Not so. The Commission declined to create a "*right* to refunds," but it did not eliminate its authority to award refunds when appropriate.[370] And, as FPL learned two decades ago, refunds are appropriate when a pole owner charges "unjust and unreasonable" rates in violation of federal law.[371]

Second, FPL asks the Commission to ignore the 5-year statute of limitations that applies to actions involving a Florida contract[372] and instead apply the 2-year statute of limitations of 47 U.S.C. § 415, which bears no relation to this dispute.[373] Section 415 applies only to a carrier action to recover *lawful* charges and to an action against a carrier to recover damages and overcharges. This dispute is neither. And FPL does not explain why the 2-year statute of limitations under Section 415 is "applicable" to a refund of unjust and unreasonable pole

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[368] 47 C.F.R. § 1.1413(b); Compl. Ex. A at ATT00008 (Rhinehart Aff. ¶ 14); Reply Ex. A at ATT00923 (Rhinehart Reply Aff. ¶ 20).

[369] FPL Br. at 24; Answer ¶ 32.

[370] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.478); 47 C.F.R. § 1.1407(a)(3).

[371] *See Time Warner Entm't*, 14 FCC Rcd at 9154 (¶ 11) ("Therefore, we will order FPL to reimburse the Complainants for any charges over the amount of the maximum permitted annual pole attachment rate of $5.79 per pole, beginning April 13, 1998 through the present, plus interest.").

[372] *See* Fla. Stat. § 95.11(2)(b) (applying to "legal or equitable action[s] on a contract, obligation, or liability founded on a written instrument ...").

[373] *See* Answer ¶ 32.

attachment rentals, except to say that Section 415 is included in the Communications Act and has been applied to cases covered by its express terms.[374]

But the Commission did not incorporate Section 415 when it adopted a statute of limitations for disputes involving violations of the Pole Attachment Act, instead deciding that they should be treated consistently "with the way that claims for monetary recovery are generally treated under the law."[375] This followed a long line of precedent that "when there is no statute of limitations expressly applicable to a federal statute, ... 'the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim.'"[376] Section 415 is not "expressly applicable" to the Pole Attachment Act or to this case, which does not seek to recover "lawful" charges or to obtain damages from a "carrier."[377] But the federal claim in this case *does* involve a contract, and so "contract law provides the best analogy."[378]

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[374] Answer ¶ 32 n.65; *see also Am. Cellular Corp., et al. v. BellSouth Telecomms., Inc.*, 22 FCC Rcd 1083, 1088 (¶ 12) (2007) ("[C]laims (like [Complainant]'s) for recovery of damages from carriers are specifically governed by the limitations period set forth in section 415(b)."); *Michael J. Valenti, et al. v. Am. Tel. and Telegraph Co.,* No. FCC 97-26, 1997 WL 818519, at *3 (¶ 11) (OHMSV Feb. 26, 1997) (finding damages claim barred by Section 415(b) where "both defendants were 'common carriers'"); *Municipality of Anchorage d/b/a Anchorage Tel. Util. v. Alascom, Inc.*, 4 FCC Rcd 2472, 2474 (¶ 19) (1989) (finding Section 415(b) applicable because the action was against a "carrier[ ] for the recovery of damages").

[375] *See Pole Attachment Order*, 26 FCC Rcd at 5289-90 (¶¶ 110-12); *see also Pole Attachment Order NPRM,* 25 FCC Rcd at 11902 (¶ 88) ("Generally speaking, a plaintiff is entitled to recompense going back as far as the applicable statute of limitations allows. There does not appear to be a justification for treating pole attachment disputes differently.").

[376] *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018) (quoting *Cnty. of Oneida v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 240 (1985)); *see also Spiegler v. District of Columbia*, 866 F.2d 461, 463-64 (D.C. Cir. 1989) ("When Congress has not established a statute of limitations for a federal cause of action, it is well-settled that federal courts may 'borrow' one from an analogous state cause of action, provided that the state limitations period is not inconsistent with underlying federal policies.").

[377] *See* 47 U.S.C. § 415.

[378] *Hoang*, 910 F.3d at 1101.

The Commission should "adopt the general contract law statute of limitations,"[379] which is 5 years in Florida.[380]

F. FPL's Other Attempts To Avoid Or Delay Rate Reductions Fail.

1. AT&T Repeatedly And In Good Faith Tried To Settle This Dispute.

FPL argues that the Commission should dismiss the complaint for failure to satisfy the pre-complaint negotiation requirement of 47 C.F.R. § 1.722(g)[381]—an argument that FPL effectively waived when it did not file a motion on the issue.[382] The argument is also meritless.[383] The record shows that AT&T repeatedly and exhaustively explained its argument that FPL's rates are unjust and unreasonable, in good faith tried to negotiate with FPL for a just and reasonable rate, traveled to FPL's headquarters for an executive-level meeting, and participated in a private mediation in its effort to reach a settlement.[384] AT&T thus "notified [FPL] in writing of the allegations that form the basis of the complaint," "invited a response within a reasonable period of time," and "in good faith, discussed or attempted to discuss the possibility of settlement with [FPL]."[385] FPL has provided no valid basis for dismissing or

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[379] *Id.*

[380] Fla. Stat. § 95.11(2)(b).

[381] *See* FPL Br. at 14-20.

[382] *See* Letter from L. Griffin to Counsel (Aug. 21, 2019).

[383] Reply Ex. A at ATT00927-31 (Rhinehart Reply Aff. ¶¶ 30-38); Reply Ex. B at ATT00956-57 (Miller Reply Aff. ¶¶ 2-3); Reply Ex. A at ATT00963-65 (Peters Reply Aff. ¶¶ 3-4, 7).

[384] *See, e.g.*, Compl. Ex. A at ATT00003-4 (Rhinehart Aff. ¶¶ 4-5); Compl. Ex. B at ATT00054-57 (Miller Aff. ¶¶ 12-22); Compl. Exs. 4-29.

[385] 47 C.F.R. § 1.722(g).

staying this complaint for further negotiations—particularly when FPL has taken the position that further negotiations "would be an exercise in [f]utility."[386]

First, FPL argues that AT&T "never provided FPL the basis of its Complaint in writing,"[387] such that FPL had "no advance written notice of any of the ... allegations."[388] But this argument rings hollow. FPL was so prepared for AT&T's Complaint that it retained an outside consultant to obtain data for its Answer on June 22, 2019—9 days *before* AT&T filed the Complaint.[389] FPL also admits that AT&T challenged the invoiced rates under federal law in August 2018, almost 11 months before the Complaint was filed,[390] and "that the parties engaged in written communications" and "held face-to-face meetings" about issues raised in AT&T's Complaint.[391]

And throughout the months of negotiations, FPL was fully aware of the basis for AT&T's Complaint; it simply disagreed with AT&T on the merits.[392] Why else would FPL emphasize to

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[386] *See* ATT00843; *see also* FPL Br. at 19 ("FPL also emphasized to AT&T several times that FPL was unwilling to negotiate a new rate going forward.").

[387] *Id.* at 3, 15-18.

[388] *Id.* at 17.

[389] *See* Answer Ex. E at FPL00173 (Murphy Decl., Ex. A).

[390] Answer ¶¶ 20, 33, 40-41, 42.

[391] Answer ¶ 7; *see also, e.g.*, Compl. Ex. 5 at ATT00164 (Email from K. Hitchcock, AT&T, to T. Kennedy, FPL (Aug. 21, 2018)) (outlining AT&T's position that the new telecom rate should presumptively apply, that AT&T is not aware of any net material competitive advantage that would warrant a higher rate, and that, even if FPL could show otherwise, FPL could still not lawfully charge invoiced rates because they exceed the "hard cap" set by the pre-existing telecom formula).

[392] *See* Answer ¶ 14 ("At no time during the parties' negotiations did AT&T come close to making a compelling argument that either [FCC] order applied to the parties' relationship.").

AT&T that it was unwilling to negotiate a new rate?[393] In August 2018, FPL told AT&T it "believe[d] that AT&T is misinterpreting the FCC Pole Attachment orders and their application to our Agreement."[394] In January 2019, after the parties' executive-level meeting, FPL thought each company had "previously made our positions clear" about "the application of federal law to our longstanding written agreement."[395] And FPL now admits it "repeatedly explained to AT&T" FPL's meritless belief that because "the 1975 JUA pre-dates both the *2011 Pole Attachment Order* and the *2018 Third Report and Order*, ... neither order is applicable to such agreements."[396]

FPL is also incorrect in suggesting that it did not know what rental rates AT&T was seeking.[397] AT&T repeatedly asked FPL for a competitively neutral new telecom rate—and to share with AT&T the specific new telecom rates FPL charges AT&T's competitors.[398] FPL was the only party to the negotiations that knew those rates, but it refused to disclose or discuss them

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[393] *See, e.g.*, Compl. Ex. 10 at ATT00188 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 4, 2018)); *see also* Compl. Ex. 12 at ATT00197 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 20, 2018); FPL Br. at 19.

[394] Compl. Ex. 6 at ATT00173 (Notice of Default (Aug. 31, 2018)).

[395] Compl. Ex. 20 at ATT00222 (Letter from M. Jarro, FPL, to D. Miller, AT&T (Jan. 31, 2019)).

[396] Answer ¶ 14.

[397] *See, e.g.*, FPL Br. at 17.

[398] *See, e.g.*, Compl. Ex. 8 at ATT00179 (Email from D. Rhinehart, AT&T, to M. Jarro, FPL (Oct. 4, 2018)); Ex. 10 at ATT00188 (Email from D. Miller, AT&T, to M. Jarro, FPL (Dec. 3, 2018)); *id.* at ATT00187 (Email from D. Miller, AT&T, to M. Jarro, FPL (Dec. 6, 2018)); Compl. Ex. 12 at ATT00196 (Email from D. Bromley, FPL, to D. Miller, AT&T (Dec. 20, 2018)) (responding to questions from D. Miller, AT&T, to M. Jarro, FPL).

with AT&T[399]—something it could not lawfully do were it negotiating with one of AT&T's competitors.[400]

Second, FPL is wrong that "AT&T never proposed to discuss any of the issues which AT&T now alleges in its Complaint"[401] and that, had AT&T done so, FPL would have "presented AT&T with the same information ... that it now presents to the Commission."[402] AT&T asked FPL to discuss "federal law and its requirement for competitively neutral, just and reasonable rates" at the executive-level meeting,[403] including FPL's comparison of the JUA with "the rates, terms and conditions that apply to [AT&T's] competitors to assess whether the invoiced rates are 'just and reasonable.'"[404] AT&T also asked that the parties' dispute over "the 'just and reasonable' rental rates that AT&T is entitled to under the federal Pole Attachment Act" be submitted to non-binding mediation.[405] FPL thus had every opportunity to discuss the issues AT&T raised, and to offer evidence and argument in response. It simply chose not to.[406]

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[399] *See* Compl. Ex. A at ATT00004 (Rhinehart Aff. ¶ 5); Compl. Ex. B at ATT00058 (Miller Aff. ¶ 22); Reply Ex. A at ATT00929-30 (Rhinehart Reply Aff. ¶¶ 34-36).

[400] *See* 47 C.F.R. § 1.1404(f).

[401] FPL Br. at 18 n.64.

[402] *See* FPL Br. at 20; *see also* Answer ¶ 14.

[403] Compl. Ex. 8 at ATT00179 (Email from D. Rhinehart, AT&T, to M. Jarro, FPL (Oct. 4, 2018)).

[404] Compl. Ex. 10 at ATT00187 (Email from D. Miller, AT&T, to M. Jarro, FPL (Dec. 6, 2018)).

[405] Compl. Ex. 17 at ATT00212 (Email from D. Miller, AT&T, to M. Jarro, FPL (Jan. 24, 2019)).

[406] *See, e.g.*, Compl. Ex. 10 at ATT00188 (Email from M. Jarro, FPL, to D. Miller, AT&T (Dec. 4, 2018); Compl. Ex. 12 at ATT00196 (Email from D. Bromley, FPL, to D. Miller, AT&T (Dec. 20, 2018)); Compl. Ex. 22 at ATT00233 (Email from D. Bromley, FPL, to D. Miller, AT&T (Dec. 20, 2018)); *see also* Compl. Ex. A at ATT00004 (Rhinehart Aff. ¶ 5); Compl. Ex. B at ATT00058 (Miller Aff. ¶ 22).

Third, FPL argues that it was justified in refusing AT&T's efforts to negotiate because AT&T did not invoke a renegotiation provision in the JUA.[407] But AT&T did not have to invoke the provision. AT&T's federal statutory right to just and reasonable rates "may not be defeated by private contractual provisions"[408] and, in any event, the JUA expressly requires FPL to ensure "conformity with all applicable provisions of law."[409] AT&T also had a very good reason *not* to invoke the provision: doing so would have automatically terminated the JUA six months later and thereby prevented AT&T from attaching to new FPL pole lines.[410] But AT&T requested "just and reasonable" rates because "greater rate parity between [I]LECs and their telecommunications competitors 'can energize and further accelerate broadband deployment.'"[411] There was no good reason to trigger an inapplicable provision that would have the opposite effect.[412]

2. AT&T Did Not Engage In Any Unlawful "Self-Help," But Paid FPL's Invoices In Full And At The Time FPL Demanded.

FPL's argument that AT&T engaged in "self-help" by failing to pay the disputed rates while challenging them through the dispute resolution process is false and irrelevant.[413] For

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[407] *See* FPL Br. at 19-20; Answer ¶¶ 17, 23, 24, 27.

[408] *See Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50) (citation omitted).

[409] Compl. Ex. 1 at ATT00119 (Art. VI). FPL admits the JUA requires compliance with "federal law," Answer ¶ 26, but argues that compliance is limited to the National Electric Safety Code, *id.* n.41. But the JUA requires compliance with both: "Joint use of poles covered by this Agreement shall at all times be in conformity with all applicable provisions of law *and* the terms and provisions of the Code ...." *See* Compl. Ex. 1 at ATT00119 (Art. VI) (emphasis added).

[410] Compl. Ex. 1 at ATT00124 (JUA, § 11.2).

[411] *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) (citation omitted); *see also, e.g.*, Compl. Ex. B at ATT00054 (Miller Aff. ¶ 12).

[412] *See, e.g.*, Reply Ex. A at ATT00928-29 (Rhinehart Reply Aff. ¶¶ 32-33); Reply Ex. B at ATT00956-57 (Miller Reply Aff. ¶ 3); Reply Ex. C at ATT00963-64 (Peters Reply Aff ¶¶ 4-5).

[413] *See, e.g.*, FPL Br. at 20-22.

while FPL falsely states that "the last time AT&T made a payment to compensate FPL for the use of its pole network was for the 2016 calendar year," FPL ultimately admits that AT&T paid the entire "outstanding principal balance" FPL claimed was "due for the calendar years 2017 and 2018."[414] "Self-help" is a non-issue.

And, indeed, AT&T did *not* engage in "self-help." It instead proceeded exactly as the parties intended when an invoice is disputed: by seeking to settle the amount that is due through a mandatory dispute resolution process.[415] FPL recognized as much, threatening AT&T with operational restrictions throughout the negotiations, but stating that it would "not take any immediate adverse action" provided AT&T paid the disputed invoices "at the close of the mediation process."[416] And so, when it became clear that the rental rate dispute was not going to be resolved at the end of the dispute resolution process, AT&T processed payment of the disputed amounts as FPL requested.[417] AT&T has, therefore, paid "the disputed rates while simultaneously challenging them."[418] But why AT&T sought to resolve the amount due *before* paying the disputed invoices is now clear: because FPL, having received the full payment it demanded, now argues that refunds are "foreclosed."[419]

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[414] *See id.* at 2.

[415] Compl. Ex. 1 at ATT00136-37 (JUA Art. XIIIA). There was also no "over two year" period involved. *See* FPL Br. at 9. According to FPL, its 2017 invoice was dated March 5, 2018, and was promptly disputed by April 3, 2018. *See id.* The 2018 invoice was dated February 1, 2019 and it was paid in full, along with the 2017 invoice, on July 1, 2019. *See id.* at 12, 13.

[416] Compl. Ex. 23 at ATT00250 (Notice of Termination).

[417] Reply Ex. B at ATT00957-58 (Miller Reply Aff. ¶ 5).

[418] FPL Br. at 21 (citations omitted).

[419] *See* Answer ¶ 32.

And contrary to FPL's argument, AT&T's conduct did not violate the Communications Act.[420] One case that FPL cites is "not good law" because the FCC has since clarified that nonpayment of disputed charges does *not* violate federal law.[421] FPL cites another case that does "not rule on the lawfulness of ... self-help."[422] Other decisions FPL cites deal with distinguishable issues, such as those presented when parties seek injunctive relief.[423] And one even recognizes that it could "be unjust to require a party, who is entitled to withhold payment for charges that are the subject of a good faith dispute, to simply pay those charges anyway."[424]

3. FPL's Affirmative Defenses Lack Merit.

FPL concludes its Answer with a series of 13 defenses that lack merit on the facts and the law and that improperly seek to relitigate matters that "already fully have been considered and rejected by the Commission" in prior rulemakings.[425]

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[420] *See* FPL Br. at 21.

[421] *See id.* at 21 n.74 (citing *MGC Commc'ns, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999), *aff'd*, 15 FCC Rcd 308 (1999)); *but see All Am. Tel. Co. v. AT&T Corp.*, 26 FCC Rcd 723, 732 (¶ 20) (2011) ("To the extent the Commission's decision in *MGC* can be read to stand for the proposition that a carrier's failure to pay access charges violates the Act, we hold that it is not good law."); *see also Line Sys., Inc. v. Sprint Nextel Corp.*, No. 11-6527, 2012 WL 3024015, at *6 (E.D. Pa. July 24, 2012) (dismissing claim because "failure to pay ... tariffed charges ... does not give rise to a claim ... for breach of the [Communications] Act" (quotation omitted)).

[422] *In the Matter of Communique Telecomms., Inc.,* Declaratory Ruling and Order, 10 FCC Rcd 10399, 10405 (¶ 31) (1995) (cited at FPL Br. at 21 n.74).

[423] *In the Matter of MCI Telecomms. Corp.*, Memorandum Opinion and Order, 62 FCC 2d 703 (1976) (cited at FPL Br. at 21 n.74); *see also Nat'l Commc'ns Ass'n, Inc. v. Am. Tel. & Tel. Co.*, No. 93 CIV. 3707(LAP), 2001 WL 99856, at *5 (S.D.N.Y. Feb. 5, 2001) (relying on *Communique Telecomms*, 10 FCC Rcd ¶¶ 1, 36; *MCI Telecomms. Corp.*, 62 FCC 2d at 705-06 (¶¶ 6-7)) (cited at FPL Br. at 21 n.74).

[424] *Level 3 Commc'ns, LLC v. Tel. Operating Co. of Vermont, LLC*, No. 5:11-CV-280, 2011 WL 6291959, at *12 (D. Vt. Dec. 15, 2011) (cited at FPL Br. at 21-22).

[425] *In the Matter of Improving Pub. Safety Commcns in the 800 Mhz Band New 800 Mhz Band Plan for Puerto Rico & the U.S. Virgin Islands*, 26 FCC Rcd 1058, 1063 (¶¶ 12-13) (2011). Four of the affirmative defenses have already been addressed. *See* Answer, Affirmative Defenses B

First, FPL argues that AT&T should be estopped from receiving a refund due to "unclean hands" because the 1975 JUA was "in place for several decades" without complaint and was then challenged during "months of discussion" that FPL found unsatisfactory.[426] Whether an estoppel or unclean hands defense is available in a pole attachment complaint proceeding is doubtful.[427] But if it were available, it fails. AT&T is statutorily entitled to "just and reasonable" rates for use of FPL's poles; that AT&T paid and challenged rates charged by FPL that were in violation of federal law "is of no consequence."[428]

Second, FPL argues that the Commission should forbear from enforcing its rules, claiming that "the Commission's justifications for the assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles are not supported by the facts in this case."[429] This case presents *worse* facts: AT&T has been paying rates under the JUA that far exceed the average $26.12 per-pole rate that, in part, led the Commission to adopt the new

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(good-faith negotiations), C (applicability of the new telecom rate presumption), J (statute of limitations), K (retroactivity and Takings Clause); *see also* Sections II.F(1), II.B(2), II.E(2), II.B(1), and "market" rates analyses above.

[426] Answer, Affirmative Defense A.

[427] *See Marzec v. Power*, 15 FCC Rcd 4475, 4480, n.35 (2000) ("[T]he Commission has expressed doubt that the unclean hands defense is available in [formal complaint] proceedings.").

[428] *AT&T Servs. Inc. v. Great Lakes Comet, Inc.*, 30 FCC Rcd 2586, 2597 (¶ 36) (2015) ("[T]he doctrines of waiver, estoppel, laches, and ratification do not preclude AT&T from challenging [the] rates .... AT&T is entitled to receive Defendants' services at rates no higher than what the Commission has determined to be just and reasonable. That AT&T ordered and paid for Defendants' services for a period of time, therefore, is of no consequence."); *Qwest Commc'ns Co. v. Sancom, Inc.*, 28 FCC Rcd 1982, 1993-94 (¶ 27) (2013) ("We also are unpersuaded by Sancom's argument that Qwest has 'unclean hands,' in that Qwest did not first pay Sancom amounts owing under the Tariff. Even if this defense were available in a section 208 formal complaint proceeding, it would fail in this case. As discussed above, Sancom unlawfully charged Qwest for tariffed switched access services. Accordingly, Qwest cannot have violated any alleged equitable principle by failing to pay the charges before disputing them.").

[429] Answer, Affirmative Defense D.

telecom rate presumption in order to accelerate rate relief to ILECs.[430] FPL also has not filed a proper forbearance request and the Commission cannot forbear from applying its rules only to one ILEC's attachments on one electric utility's poles.[431] Forbearance is also precluded by statute because enforcement of AT&T's right to just and reasonable rates is (1) "necessary to ensure that the ... regulations ... in connection with ... telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory," (2) "necessary for the protection of consumers," and (3) "consistent with the public interest."[432]

Third, FPL argues that the Commission should waive the applicability of its rules under 47 C.F.R. § 1.3.[433] FPL's request is facially invalid as FPL has not demonstrated "good cause" or "plead with particularity the facts and circumstances which warrant such action."[434] Nor could FPL meet the applicable standard because "a party seeking waiver of a rule's requirements must demonstrate that 'special circumstances warrant a deviation from the general rule' and 'such deviation will serve the public interest.'"[435] "In order to demonstrate the required special circumstances, [the party seeking waiver] must show that the application of the ... rule would be inequitable, unduly burdensome or contrary to the public interest or that no reasonable

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[430] *See Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125); *see also* Compl. ¶ 13.

[431] 47 C.F.R. §§ 1.53-1.59.

[432] *See* 47 U.S.C. § 160(a); *see also Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) (finding "just and reasonable" rates for ILECs "will promote broadband deployment and serve the public interest [because] greater rate parity between [ILECs] and their telecommunications competitors can energize and further accelerate broadband deployment").

[433] Answer, Affirmative Defense E.

[434] 47 C.F.R. § 1.3; *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

[435] *See In the Matter of Results Broad. Rhinelander, Inc. Pet. for Waiver of Final Payment Deadline for Winning Bids in Auction 94*, No. DA19-1002, 2019 WL 4942573, at *3 (Oct. 3, 2019) (citing case law interpreting 47 C.F.R. § 1.3).

alternative existed which would have allowed it to comply with the rule."[436] FPL has not and cannot meet that standard. A "just and reasonable" rate for AT&T's use of FPL's pole cannot be "inequitable."[437] Collection of a "fully compensatory" new telecom rate cannot be "unduly burdensome."[438] And application of the Commission's rules to ensure just and reasonable rates *will "serve the public interest* [because] greater rate parity between [ILECs] and their telecommunications competitors can energize and further accelerate broadband deployment."[439]

Fourth, FPL inappropriately tries to reopen the Commission's rulemaking by again arguing that the Commission cannot lawfully put the burden of proof on FPL to rebut the new telecom rate presumption.[440] To the contrary, the burden *should* be on the party that seeks to benefit from an exception to a general rule.[441] The Commission, therefore, has regularly and correctly placed the burden on the party that seeks a rate different from the "just and reasonable"

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[436] *Id.*

[437] *See id.*; *see also FPL Order*, 30 FCC Rcd at 1146 (¶ 18) ("'Just and reasonable' and 'arbitrary and capricious' are mutually exclusive concepts.").

[438] *See Rhinelander*, 2019 WL 4942573, at *3; *see also Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (quoting National Broadband Plan at 110).

[439] *See id.*; *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *see also, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5241 (¶ 1) ("Th[is] Order is designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation."). For this same reason, FPL cannot show that no reasonable alternative existed which would have allowed it to comply with the "just and reasonable" rate requirement.

[440] Answer, Affirmative Defense F; *see also* Comments of FPL at 27-30 (June 14, 2017); *In Re Applications of Shaw Commc'ns, Inc.*, 27 FCC Rcd 6995, 6996-97 (2012) (rejecting argument that "merely re-argues points" presented to the Commission before it issued the relevant Order).

[441] *See, e.g.*, *United States v. Taylor*, 686 F.3d 182, 190 n.5 (3d Cir. 2012) ("[N]umerous Supreme Court decisions ... dating back at least to 1841, held that the party who wishes to rely on an exception ... must raise it and establish it.") (citing cases); *see also FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) ("[T]he general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.").

rate that is calculated using the Commission's presumptive inputs.[442] This presumption is no different.[443] Indeed, the only two cases FPL cites to support this defense explain that "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims ... admits of exceptions,"[444] including by administrative regulation.[445]

Fifth, FPL asks the Commission to change its longstanding sign-and-sue rule, arguing that it is arbitrary and capricious because AT&T should have been required to take exception to the rates in the JUA when it was negotiated.[446] But "the rule is a reasonable exercise of the agency's duty under the statute to guarantee fair competition in the [pole] attachment market,"[447] and this is not the time or the appropriate vehicle to reconsider the sign and sue rule.[448] The Commission is required to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and ... to hear and resolve

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[442] *See, e.g.*, *Ala. Cable Telecomms. Ass'n*, 16 FCC Rcd at 12236 (¶ 59) ("[I]n any individual complaint proceeding, the pole height presumption may be overcome with credible evidence that the utility's poles have a different average height."); *Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, 2 FCC Rcd 4387, 4390 (¶ 19) (1987) ("These [appurtenance factor] ratios shall be rebuttable presumptions to be utilized in the event no party chooses to present probative, direct evidence on the actual investment in non-pole-related appurtenances.").

[443] *See, e.g.*, *S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 584-85 (D.C. Cir. 2002) ("The possibility that a utility can present information [rebutting the presumption] makes it clear that the rule is not facially unreasonable.").

[444] *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005) (cited at Answer p. 31 n.82).

[445] *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 295 (1994) (cited at Answer p. 31 n.82).

[446] Answer, Affirmative Defense G.

[447] *S. Co. Servs.*, 313 F.3d at 583-84.

[448] *See, e.g.*, *In the Matter of Am. Tel. & Tel. Co.*, 8 FCC Rcd 1767, 1771-74 (1993) (rejecting "arguments that were previously considered and rejected by the Commission" in a prior Order).

complaints concerning such rates, terms, and conditions."[449] The FCC, therefore, must ensure "just and reasonable" rates even if "the attacher has agreed, for one reason or another, to pay a rate above the statutory maximum or otherwise relinquish a valuable right to which it is entitled under the Pole Attachments Act and the Commission's rules."[450] Any other standard "would subvert the supremacy of federal law over contracts."[451]

Sixth, FPL argues that the Commission's assertion of jurisdiction over the rates charged ILECs is "unlawful, ultra vires, arbitrary, capricious and unreasonable" because the statutory term "providers of telecommunications service" should be read as "synonymous with 'telecommunications carrier,'" a term that excludes ILECs.[452] The Commission correctly rejected this argument in its 2011 *Pole Attachment Order* when it found that ILECs, including AT&T, are "providers of telecommunications service" that are statutorily entitled to just and reasonable pole attachment rates.[453] The D.C. Circuit affirmed.[454]

Seventh, FPL argues that the Commission's new telecom rate presumption reflects arbitrary and capricious rulemaking because it reflects "continually shifting positions with respect to the regulatory treatment of ILECs."[455] But the Commission's 2018 *Order* reasonably

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[449] 47 U.S.C. § 224(b).

[450] *S. Co. Servs.*, 313 F.3d at 583 (citation omitted).

[451] *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50) (internal quotation and alteration omitted); *see also Pole Attachment Order NPRM*, 25 FCC Rcd at 11908 (¶ 105) ("The Commission would not be fulfilling [its statutory] duty if it were to substitute the requirements of contract law for the dictates of section 224.").

[452] Answer, Affirmative Defense H.

[453] *See Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 211).

[454] *See Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 188 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 18 (2013).

[455] Answer, Affirmative Defense I.

and incrementally built upon the approach adopted in the 2011 *Order* in an effort to accelerate the rate reductions that should have taken effect then.[456] The same principle of competitive neutrality applies, but the Commission clarified that an electric utility cannot charge ILECs rates higher than the competitively neutral new telecom rate unless it can back up its allegations with more than its own, self-serving say-so.[457] It also sought to narrow disputes by clarifying maximum "just and reasonable" rates that may be charged where an electric utility can do so.[458] These refinements to the approach adopted in 2011 were lawful, reasonable, correct, within the Commission's authority, and are effective pending appeal.[459]

Eighth, FPL argues that the Commission should apply laches to postpone rate relief until the date it issues an Order in this case.[460] Were laches an available defense in a pole attachment complaint proceeding,[461] it would fail here. Equity does *not* support non-compliance with federal law.[462] And, in any event, rate relief has never been appropriate only as of the date of the

[456] *See, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7706 (¶ 1) ("Today, we continue our efforts to promote broadband deployment by speeding the process and reducing the costs of attaching....").

[457] *Id.* at 7770-71 (¶ 128).

[458] *Id.* at 7771 (¶ 129) ("This conclusion builds on and clarifies the Commission's determination in the *2011 Pole Attachment Order* that the pre-2011 telecommunications carrier rate should serve "as a reference point in complaint proceedings" where a joint use agreement was found to give net advantages to an [I]LEC as compared to other attachers.").

[459] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Final Rule, 84 Fed. Reg. 2460-01 (Feb. 7, 2019).

[460] Answer, Affirmative Defense L.

[461] *But see Air Touch Cellular v. Pac. Bell*, 16 FCC Rcd 13502, 13508 (¶ 17) (2001) (questioning whether equitable defenses, including laches, are available in formal complaint proceedings); *see also AT&T Servs. Inc.*, 30 FCC Rcd at 2597 (¶ 36 & n.123) (same).

[462] *See, e.g.*, *AT&T Servs. Inc.*, 30 FCC Rcd at 2597 (¶ 36); *Qwest Commc'ns Co.*, 28 FCC Rcd at 1993-94 (¶ 27); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

Commission's Order in a pole attachment complaint proceeding. The Commission's pre-2011 rule provided rate relief as of the date a Pole Attachment Complaint was filed. The Commission decided that filing-date approach "fails to make injured attachers whole," rejected an interim approach that would "preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge," and adopted the current approach that authorizes rate relief as far back as the statute of limitations allows.[463] The D.C. Circuit affirmed, finding it "hard to see any legal objection to the Commission's selection" of this "reasonable period for accrual of compensation for overcharges or other violations of the statute or rules."[464] FPL cannot escape liability for violations of federal law during the applicable statute of limitations.

Finally, FPL argues that the case should be dismissed as moot based on the incredible assertion that "there is no ongoing contractual relationship between the parties" because FPL terminated the JUA.[465] But notwithstanding such termination, the JUA "shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."[466] In other words, the JUA was "terminated and the parties continue to operate under an 'evergreen' clause" following the effective date of the *Third Report and Order*.[467] The new telecom rate presumption applies,[468] and it should be promptly enforced to ensure the "just and reasonable" rates required by law.

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[463] *Pole Attachment Order*, 26 FCC Rcd at 5289-90 (¶¶ 110-12); 47 C.F.R. § 1.1407(a)(3).

[464] *Am. Elec. Power Serv. Corp.*, 708 F.3d at 190.

[465] Answer, Affirmative Defense M.

[466] Compl. Ex. 1 at ATT00128 (JUA, Art. XVI).

[467] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475).

[468] *Id.*

III. CONCLUSION

For the foregoing reasons, and those detailed in AT&T's Pole Attachment Complaint and Reply and the Affidavits and Exhibits in support of AT&T's Pole Attachment Complaint and Reply, AT&T respectfully requests that the Commission find that FPL charged and continues to charge AT&T unjust and unreasonable pole attachment rates in violation of federal law. AT&T further respectfully requests that the Commission set the just and reasonable rate, effective as of the 2014 rental year, as the rate that is properly calculated in accordance with the new telecom rate formula,[469] and order FPL to refund all amounts paid in excess of a just and reasonable rate with interest,[470] beginning with the 2014 rental year.

Respectfully submitted,

By:____________________

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[469] *See* Compl. Ex. A at ATT00008, ATT00016-25 (Rhinehart Aff. ¶ 14 & Ex. R-1); Reply Ex. A at ATT00923, ATT00937-48 (Rhinehart Reply Aff. ¶ 20 & Ex. R-5). Alternatively, in the unlikely event that the Commission concludes that FPL has met its burden to prove by clear and convincing evidence that the JUA provides AT&T a net material advantage over its competitors, AT&T respectfully requests that the Commission set the just and reasonable rate, effective as of the 2014 rental year, at a rate that is no higher than the rate that is properly calculated in accordance with the pre-existing telecom rate formula. *See* Compl. Ex. A at ATT00012, ATT00016-25 (Rhinehart Aff. ¶ 23 & Ex. R-1); Reply Ex. A at ATT00923, ATT00937-48 (Rhinehart Reply Aff. ¶ 20 & Ex. R-5).

[470] *See* Compl. Ex. A at ATT00046-47 (Rhinehart Aff., Ex. R-4). Interest should be awarded at "the current interest rate for Federal tax refunds and additional tax payments." *Cavalier Tel.*, 15 FCC Rcd at 17964 (¶ 4 n.16).

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Dated: March 30, 2020

Attorneys for BellSouth Telecommunications, LLC d/b/a AT&T Florida

INFORMATION DESIGNATION

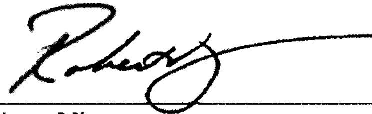
1. The AT&T employees and former employees with relevant information about this rental rate dispute are identified in AT&T's Pole Attachment Complaint, Pole Attachment Complaint Reply, and their supporting Affidavits and Exhibits.

2. Attached to this Pole Attachment Complaint Reply are Affidavits from AT&T employees involved in the rate negotiations and an Affidavit from outside expert Christian M. Dippon, Ph.D.

3. AT&T reserves the right to rely on information that is not appended to this Pole Attachment Complaint Reply as additional information becomes available.

RULE 1.721(M) VERIFICATION

I, Robert Vitanza, as signatory to this submission, hereby verify that I have read this Pole Attachment Complaint Reply and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.



Robert Vitanza

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2020, I caused a copy of the foregoing Amended Pole Attachment Complaint Reply, Affidavits, and Exhibits in support thereof, to be served on the following (service method indicated):

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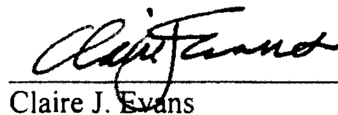

Claire J. Evans