PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. DUKE ENERGY FLORIDA, LLC, Defendant.	Proceeding No. 20-276 Bureau ID No. EB-20-MD-003

REDACTED

REPLY LEGAL ANALYSIS IN SUPPORT OF POLE ATTACHMENT COMPLAINT

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* Certain information in this Pole Attachment Complaint Reply Legal Analysis and its supporting Affidavits 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

Duke Florida's Answer confirms that the Commission should apply its new telecom rate presumption to force Duke Florida to reduce its egregiously high pole rental rates. Duke Florida admits that it has been charging AT&T rental rates that are over [redacted] *times* the approximately $5 new telecom rental rate that applies to AT&T's competitors. And it does not come close to rebutting the Commission's presumption that that same new telecom rate should be charged to AT&T, let alone provide clear and convincing evidence that AT&T receives net material benefits under the JUA that advantage AT&T over its competitors.

Lacking any legal or factual basis for its exceptionally high pole attachment rates, Duke Florida tries to sow confusion, obscure the facts, and re-argue settled precedent. Duke Florida's Answer takes issue with the presumption itself (arguing that it can never apply to existing attachments made to existing poles under existing agreements); claims that the 1969 Joint Use Agreement ("JUA") between AT&T and Duke Florida is not a "pole attachment contract" even though it governs each party's pole attachments; attributes to AT&T space on the pole that AT&T does not use, such as safety space and unused space below AT&T's facilities; and calculates its proposed "new telecom" rate by multiplying a 1-foot new telecom rate by both the space occupied and constructively occupied by AT&T. The Commission has already rejected each of these arguments and rate formula manipulations to eliminate "outdated rate disparities" that persist under existing joint use agreements.

Duke Florida seeks to rebut the new telecom rate presumption by offering hypotheticals that are not grounded in fact or supported by any actual data, factual claims riddled with error, and its own stated preference that AT&T should pay the JUA rates until AT&T removes its facilities from more than 62,000 poles, regardless of Commission rulings. Indeed, Duke Florida

offered a single cherry-picked and redacted license agreement as purported "evidence" of AT&T's competitive advantages, while it hides more than [redacted] license agreements that have governed AT&T's competitors over the last decade. It provides no source data to substantiate its claims, questions why it was not enough during the parties' negotiations to simply allege without support or quantification that "advantages" exist, and accuses AT&T of bad faith because AT&T held firm in its request for a just and reasonable rate that would set it on par with its competitors.

But all its writing and revisionist history cannot conceal that Duke Florida is trying to turn back the clock on the Commission's deployment and competition initiatives. For 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."[1] Duke Florida argues that AT&T should instead pay about [redacted] more per pole than its competitors, amounting to a [redacted] million annual impact. Duke Florida defends this extraordinary premium with dubious attempts to quantify: (1) the difference between a hypothetical world in which Duke Florida shares poles with communications attachers and one in which it does not and (2) pole space that AT&T does not occupy and that cannot be assigned to communications attachers under longstanding FCC precedent. Each of these arguments is contrary to the Commission's objectives and the principle of competitive neutrality that has motivated its rate reforms. Neither differentiates AT&T from its competitors nor detracts in any way from the fundamental principle that an approximately $5 new telecom rate will "fully compensate [Duke Florida] for costs caused by third-party attachments," including AT&T's.[2]

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

[2] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5321 (¶ 183 n.569) (2011) ("*Pole Attachment Order*") (quoting National Broadband Plan at 110).

The Commission should soundly reject Duke Florida's arguments, enforce the new telecom rate presumption, and refund the excess amounts Duke Florida has unlawfully collected since 2015. In so doing, the Commission will take a valuable step forward in its decade-long effort to promote deployment through competitively neutral rates.

II. ARGUMENT

A. Duke Florida Seeks To Reverse the 2018 *Third Report and Order* and Undo Decades of Precedent.

Duke Florida's Answer disregards a decade of Commission rate reforms and even argues the rate reforms are unlawful and unreasonable—recalling the hobgoblin of little minds.[3] The Commission's new telecom rate presumption was adopted for precisely this reason: to ensure that "similarly situated attachers … pay similar pole attachment rates for comparable access" in spite of the intransigence of electric utilities.[4] Duke Florida's Answer confirms that the new telecom rate presumption applies, and that Duke Florida cannot lawfully charge its far higher rental rates.

1. The Commission's New Telecom Rate Presumption Applies to Existing Agreements, Including the JUA.

Duke Florida tries to avoid application of the new telecom rate presumption to the JUA with three specious arguments that would require the Commission to reverse almost a decade of precedent. *First*, Duke Florida argues that the JUA is not a "newly-renewed" agreement entitled to the presumption because it "cannot be 'renewed'" and cannot be placed "in 'evergreen'

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[3] *See, e.g.*, Answer ¶ 35 (still challenging the lawfulness of the 2011 *Pole Attachment Order* that was affirmed on appeal); Affirmative Defense 13; *see also* Ralph Waldo Emerson ("A foolish consistency is the hobgoblin of little minds…").

[4] *In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order, 33 FCC Rcd 7705, 7768 (¶ 123) (2018) ("*Third Report and Order*").

status."[5] This argument fails quickly.[6] The new telecom rate presumption applies to "newly-renewed" agreements, including "agreements that are automatically… *extended*…" following the *[Third Report and] Order*'s effective date.[7] The JUA automatically "extended" *after* the effective date of the Commission's *Third Report and Order*.[8] Its initial term expired on January 1, 1979. Its terms provide it "*shall continue* in force thereafter" until it is terminated upon 6 months written notice.[9] The words "continue" and "extend" are synonyms.[10] And Duke Florida admits that the JUA "continues in effect today."[11] Thus, after the JUA automatically renewed on January 1, 1979, because it has not been terminated, it automatically extends each day.[12]

Also, Duke Florida is wrong that the JUA cannot renew.[13] The JUA *renewed* when its initial term expired in 1979[14] and it continues to automatically renew each day that it is extended.[15] Duke Florida is also wrong that the JUA cannot be "placed in evergreen status"

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[5] *See* Answer ¶¶ 11, 21.

[6] Memorandum Opinion and Order at 6-7 (¶ 15), *Verizon Md. v. The Potomac Edison Co.*, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (Nov. 23, 2020) ("*Potomac Edison Order*").

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

[8] Compl. ¶ 11.

[9] *See id.*; Compl. Ex. 1 at ATT00103 (JUA, Art. XVI).

[10] *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).

[11] Answer ¶ 21.

[12] At a minimum, the JUA automatically extends every 6 months, as it requires 6 months written notice of termination. *See* Compl. Ex. 1 at ATT00103 (JUA, Art. XVI).

[13] *See id.* ¶¶ 11, 21.

[14] *Id.* ¶ 11 (admitting that the JUA may have "renewed" in 1979); *see also* Compl. Ex. 1 at ATT00103 (JUA, Art. XVI) (stating that the JUA's initial term expired in 1979).

[15] *See* Compl. ¶ 11 & n.18 ("Renew" means to "repeat so as to reaffirm" or "begin again") (citations omitted).

because it includes an "evergreen" provision.[16] The Commission found to the contrary—that the presumption *applies* in "circumstances where an agreement has been terminated and the parties continue to operate under an 'evergreen' clause," meaning a clause that gives "electric utilities … no right to demand removal of attachments upon termination."[17] The JUA is squarely covered by the new telecom rate presumption.

Second, Duke Florida argues that the JUA is not entitled to the presumption because it is an "infrastructure cost sharing arrangement" with "cost-sharing provisions,"[18] not a "pole attachment contract."[19] This argument should be dismissed summarily. This re-labeling of the JUA is a distinction without a difference and merely recasts electric utilities' stale and rejected argument that the Commission should not apply the presumption to existing JUAs.[20] The JUA is a contract that governs the parties' attachments to each other's poles and sets the "annual rates"

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[16] *See* Answer ¶¶ 11, 21, 27 (arguing that the presumption should not apply because the JUA includes an evergreen provision).

[17] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475); *see also* Compl. Ex. 1 at ATT00102-103 (JUA, Art. XVI).

[18] *See id.*, Executive Summary; *see also* Answer ¶¶ 9, 32, 33, 36.

[19] Answer ¶ 9.

[20] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127) ("We disagree with utilities that argue that we should not apply the presumption to any existing agreements because existing joint use agreements were negotiated at a time of more equal bargaining power between the parties and because [I]LECs receive unique benefits under joint use agreements."). Duke Florida has tried unsuccessfully to recharacterize joint use agreements for more than a decade in its effort to avoid the Commission's rate reforms. *See, e.g.*, Reply Comments of Progress Energy Florida n/k/a Duke Florida, et al. at 16, *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245 (Apr. 22, 2008) (arguing that ILECs are not entitled to just and reasonable rates because joint use agreements reflect "infrastructure cost sharing"); Reply Brief of Petitioners at 16, *Am. Elec. Power Serv. Co. v. FCC*, No. 11-1146 (D.C. Cir. Apr. 9, 2012) (arguing that "joint use agreements … are infrastructure cost sharing agreements").

for that use.[21] Regardless of Duke Florida's characterizations, the JUA is a newly-renewed joint use agreement that the Commission has rightly found is presumptively entitled to a just and reasonable, new telecom rate.[22]

Third, Duke Florida argues that JUA rates should *always* govern existing poles.[23] Again, Duke Florida takes issue with the Commission and again is plainly wrong.[24] The Commission explained that the 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.[25] Duke Florida would instead require AT&T to pay the egregiously high JUA rates on more than 62,000 poles in perpetuity—or incur the cost to deploy an unnecessary, unwanted, and duplicative pole network.[26] Nothing could be more contrary to the Commission's goal of

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[21] *See, e.g.*, Compl. Ex. 1 at ATT00108-109 (JUA, § 10.4).

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

[23] *See, e.g.*, Answer ¶ 31 ("DEF denies that AT&T is entitled to the new telecom rate with respect to any existing joint use poles at any time in the past or on a going-forward basis.").

[24] *Third Report and Order*, 33 FCC Rcd at 7767, 7770 (¶ 127 & n.479) (rejecting argument "that we should not apply the presumption to existing agreements"); *see also id.* at 7731 (¶ 50) (a federal statutory right "may not be defeated by private contractual provisions").

[25] *Id.* at 7770 (¶ 127 & n.475). The Commission thus again rejected Duke Florida's argument that "just and reasonable rates" for existing poles "would be tantamount to forced access at regulated rates" contrary to the absence of a right of access for ILECs in the Pole Attachment Act. *See* Answer ¶ 11. In 2011, the Commission explained that "[a]lthough [I]LECs have no right of access to utilities' poles pursuant to section 224(f)(1) of the Act, … where [I]LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)." *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202).

[26] *See, e.g.*, Answer ¶ 11 ("AT&T … can remove its facilities from any or all of those 62,000 poles whenever it chooses and it will no longer be required to pay [the JUA] 'rate' with respect to such poles.").

reducing infrastructure costs to promote deployment.[27] As a result, the new telecom rate presumption does not, and cannot, have an exception for existing poles.

2. Duke Florida Disregards Commission Rulings that Require that Rates Be Set Based on the Space Occupied on the Pole.

Because the presumption applies, AT&T should be charged a properly calculated new telecom "rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2)."[28] Duke Florida admits it has been charging AT&T's competitors a new telecom rate of about $5.[29] But it argues that if it is forced to charge AT&T a new telecom rate, that rate should be multiplied by [redacted] to account for the allegedly greater space AT&T uses on the pole as compared to its competitors.[30] Duke Florida is wrong on many counts.

Duke Florida claims that AT&T occupies [redacted] feet of pole space by combining 3.33 feet of safety space "constructively occupied" on the pole with [redacted] feet of space purportedly "physically occupie[d]."[31] Neither part of Duke Florida's calculation is accurate.

First, the safety space is attributable to Duke Florida, not to AT&T. Commission rules permit Duke Florida to charge attachers only for the physical space occupied by their attachments on the pole,[32] which is the "Space Occupied" input to the "Space Factor" in each

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[27] Reply Ex. E at ATT00315-318, ATT00348 (Aff. of C. Dippon, Nov. 23, 2020 ("Dippon Reply Aff.") ¶¶ 10-17, 76).

[28] 47 C.F.R. § 1.1413(b).

[29] Answer ¶ 12.

[30] *Id.*

[31] *See* Answer, Executive Summary at ii; *see also id.* ¶¶ 12, 15, 22, 25, 31; *see also* Answer Ex. A at DEF000130, DEF000132 (Freeburn Decl. ¶¶ 8, 12).

[32] *BellSouth Telecommunications LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, 35 FCC Rcd 5321, 5330 (¶ 16) (EB 2020) ("*FPL 2020 Order*") (emphasis added) ("[Safety] space should *not* be attributed to AT&T because … AT&T's attachments do not actually occupy the communications safety space.").

FCC rate formula.[33] Consistent therewith, "the Commission has long held that the communication safety space is for the benefit of the electric utility, not communications attachers."[34] Duke Florida concedes as much when it comes to AT&T's competitors, acknowledging that it cannot charge them for the safety space because it "is usable and used *by the electric utility.*"[35] Yet, somehow Duke Florida argues that AT&T is the cause of and should be allocated that space, despite the Enforcement Bureau's contrary ruling.[36] The Commission should disregard Duke Florida's plea to ignore its prior rulings.

Second, Duke Florida argues that AT&T should be charged for unoccupied space *below* its facilities if they are not attached at the absolute lowest point possible on the poles.[37] But under the Commission's rate formula, 'space occupied' means space 'actually occupied' on—

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[33] 47 C.F.R. § 1.1406(d)(2) (calculating new telecom rates based on "Space Occupied"); *see also* 47 C.F.R. § 1.1406(d)(1) (calculating cable rates based on "Space Occupied"); 47 C.F.R. § 1.1409(e)(2) (2010) (calculating preexisting telecom rates based on "Space Occupied").

[34] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16).

[35] Answer ¶ 12 n.34 ("Given that the Commission has already determined that CATV and CLEC attachers should not bear this cost, this cost must fall to AT&T ...."); *see also In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("*Consolidated Partial Order*") (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").

[36] *See* Answer ¶¶ 12, 16, 25, 31. 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 Duke Florida's facilities from the highest communications attachments on the pole. *See* Reply Ex. C at ATT00283-284 (Reply Aff. of M. Peters, Nov. 23, 2020 ("Peters Reply Aff.") ¶ 17); Reply Ex. E at ATT00320-321 (Dippon Reply Aff. ¶ 22).

[37] *See* Answer ¶ 12, 16, 25, 31; Answer Ex. A at DEF000130 (Freeburn Decl. ¶ 8); *id.* at DEF000132 (Freeburn Decl. ¶ 12) (stating that [redacted] feet was the difference between the "average height of AT&T's highest attachment" on a set of 941 unidentified poles and 18 feet, which Duke Florida says is "generally" the "lowest point of attachment" on a pole).

i.e., the "actual physical attachment" to—the poles.[38] AT&T's attachments do not "actually occupy" space *below* its attachments.[39] This remains true even if the AT&T's facilities are placed at a height to permit sag in AT&T's cable mid-span (*i.e.*, midway between two poles).[40] Mid-span sag, which can be 50 or more feet from the pole[41] cannot be used to allocate more space to the attacher or charge a higher rental rate.[42] Sag is endemic to all aerial facilities, but it "does not increase the amount of space actually occupied by the attachment" on the pole.[43]

At a minimum, Duke Florida seeks to attribute to AT&T's use, and charge AT&T for, the full 3 feet of space that AT&T is *allocated* under the JUA, even if AT&T does not occupy the space.[44] But to charge AT&T a rate based on 3 feet of allocated pole space is also contrary to the Commission's rate formulas, which are based on "space *occupied*," not space allocated.[45] This

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[38] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); *Television Cable Serv.*, 88 FCC.2d at 68 (¶ 11).

[39] *Potomac Edison Order* at 18 (¶ 37) (rejecting assumption that an ILEC occupies space below its attachments).

[40] *See* Answer Ex. A at DEF000133 (Freeburn Decl. ¶ 14).

[41] Reply Ex. C at ATT00287 (Peters Reply Aff. ¶ 25).

[42] *Consolidated Partial Order*, 16 FCC Rcd at 12142-43 (¶¶ 77-78); *see also Implementation of Section 703(e) of the Telecommunications Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, 6807-08 (¶ 64) (1998) ("[O]verlashing one's own pole attachment should be permitted without additional charge. To the extent that the overlashing does create an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices.").

[43] *Consolidated Partial Order*, 16 FCC Rcd at 12143 (¶ 78); *id.* (¶ 77) ("The statutory language prescribes that we allocate costs based on space occupied, not load capacity."). Duke Florida's claims about the sag experienced by AT&T's facilities is also outdated, and do not account for AT&T's transition to lightweight fiber facilities that are essentially identical to its competitors' facilities. *See, e.g.*, Reply Ex. C at ATT00288-289 (Peters Reply Aff. ¶¶ 27-28).

[44] *See* Answer ¶¶ 8, 12, 15, 22, 25, 31; *see also* Compl. Ex. 1 at ATT00090 (JUA, § 1.1.6(B)).

[45] 47 C.F.R. § 1.1406(d) (emphasis added); *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) ("[U]nder the Commission's rate formula, 'space occupied' means space that is 'actually occupied'"); *Consolidated Partial Order*, 16 FCC Rcd at 12143 (¶ 78) ("determination of the amount of space occupied" is based on "the amount of space actually occupied"); *see also, e.g.*,

makes sense, as allocated space typically diverges substantially from used space,[46] and electric utilities cannot lawfully reserve extra space for ILECs.[47] Calculating rates based on space *physically* occupied thus ensures that attachers are charged for their actual use and avoids the potential for overcharging, undercharging, and double recovery.

Absent statistically valid survey data about the actual average space occupied, the presumption is that communications attachers occupy 1 foot of space.[48] And Duke Florida provided no data whatsoever to rebut the presumption. Rather than facts, it relies instead on a presumption that the average minimum ground clearance for a utility pole is 18 feet[49] and its declarant's unsupported word that a contractor said some AT&T's facilities were placed at about

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Pole Attachment Order, 26 FCC Rcd at 5337 (¶ 218 n.662) (expecting that ILECs and electric utilities would pay "the same proportionate rate … given [their] relative usage of the pole (such as the same rate per foot of *occupied space*)") (emphasis added).

[46] *See, e.g.*, Compl. Ex. C at ATT00043 (Peters Aff. ¶ 25). This is particularly apparent in the JUA's allocation of 8.5 feet of space to Duke Florida on a 40-foot pole, when Duke Florida says its "typical vertical three-phase construction … requires 181 inches (15'1") from the pole top to the neutral," which is additional to the 3.33 feet of safety space that the Commission has found "usable and used by the electric utilities." *See* Compl. Ex. 1 at ATT00090 (JUA, § 1.1.6(A)); Answer Ex. C at DEF000165, DEF000168 (Burlison Decl. ¶ 14 & Ex. C-1); *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) (citation omitted).

[47] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16079 (¶ 1170) (1996) ("*1996 Implementation Order*").

[48] 47 C.F.R. § 1.1410; *see also Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19866 (¶ 18) (2002).

[49] *In re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6465 (¶ 16) (2000) (cited at Answer ¶ 12); *see also id.* at 6468 (¶ 23) (noting that electric utilities argued that "the lowest attachment on a pole must be at least 19'8" from the ground" and finding an average 18 foot figure accounts for site-specific variables, "such as differing pole heights, … whether the wires or cables cross over railroad tracks, roads, or driveways and the amount of voltage transferred through the cables").

[redacted] above ground on a small number of unidentified poles.[50] Mere conjecture is not evidence sufficient to rebut the Commission's presumption. New telecom rates for AT&T must be calculated—as they are for AT&T's competitors—based on the Commission's presumptive 1-foot input for pole space occupied.

Duke Florida further inflates the rates it relies on by *multiplying* its new telecom rates by the alleged [redacted] feet of pole space used.[51] This would be improper even if Duke Florida had valid survey data showing that AT&T occupied more than 1 foot of space, on average, on Duke Florida's poles.[52] If a pole owner has sufficient survey data to show that an attacher occupies more than 1 foot of space, on average, it may adjust the "space occupied" input in the rate formula to account for that additional space.[53] It may not calculate a 1-foot rate and multiply it by the amount of space occupied.[54] Doing so would violate the statutory requirement that the unusable space on the pole be *equally* divided among attaching *entities*—without regard to the amount of pole space occupied and allow the pole owner to substantially over-recover.[55]

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[50] Duke Florida's alleged measurements relate to 941 unidentified poles when AT&T uses about 62,363 poles owned by Duke Florida. *See* Compl. ¶ 3; Answer Ex. A at DEF000132 (Freeburn Decl. ¶ 12). At best, then, the data reflects just 1.5% of the Duke Florida poles AT&T uses, which is substantially below the 45% of poles that the Commission previously considered "incomplete" and insufficient to rebut the presumptive inputs. *See Nev. State Cable Tel. Ass'n v. Nev. Bell*, 13 FCC Rcd 16774 (¶¶ 12-13) (1998); *see also* Reply Ex. E at ATT00322-323 (Dippon Reply Aff. ¶ 26).

[51] *See, e.g.*, Answer ¶ 12.

[52] *See* Reply Ex. A at ATT00246 (Reply Aff. of D. Rhinehart, Nov. 23, 2020 ("Rhinehart Reply Aff.") ¶ 13); Reply Ex. E at ATT00319-320 (Dippon Reply Aff. ¶ 20).

[53] *See* 47 C.F.R. § 1.1406(d); *see also* Reply Ex. A at ATT00246 (Rhinehart Reply Aff. ¶ 13); Reply Ex. E at ATT00319-320 (Dippon Reply Aff. ¶ 20).

[54] *See* Answer ¶ 12.

[55] 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, 6805 (¶ 57) (1998) (rejecting proposal "that

3. Duke Florida Cannot Rebut the New Telecom Rate Presumption with Unrealistic Hypotheticals and Alleged Advantages that AT&T's Competitors Also Enjoy.

Duke Florida attempts to rebut the new telecom rate presumption based primarily on its own word—questioning why AT&T did not simply accept its self-serving claim that alleged advantages exist,[56] failing to provide any source data to substantiate its allegations or quantifications,[57] and hiding over [redacted] of its license agreements.[58] Duke Florida also effectively abandons advantages its executives asserted throughout negotiations, admitting they are not advantages or stating that it does not intend to quantify a value for them.[59] These efforts do not provide "clear and convincing evidence" that AT&T receives net benefits under the JUA that

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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.'"); *see also 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."); Reply Ex. A at ATT00246 (Rhinehart Reply Aff. ¶ 13).

[56] *See, e.g.*, Answer ¶¶ 9, 15, 28.

[57] *See, e.g.*, Answer Ex. A at DEF000130, DEF000132-133, DEF000139 (Freeburn Decl. ¶¶ 8, 12-14, 28) (alleging measurements from "field surveys" without providing survey data); *id.* at DEF000135, DEF000142 (Freeburn Decl. ¶ 18 & Ex. A-1) (alleging "costs" without substantiation and admitting "some of the charges do not apply to every attachment"); *id.* at DEF000139-140 (Freeburn Decl. ¶¶ 29-30) (alleging pole replacement and pole construction costs obtained "from our plant accounting department"); Answer Ex. E at DEF000212, DEF000214 (Metcalfe Aff. ¶¶ 19, 26) (basing quantifications on "discussions" with Mr. Freeburn, rather than source data).

[58] Answer ¶ 30 n.123 (describing 1 recent license agreement as an "exemplar"); *see also* Duke Florida Response to Interrogatories at DEF000007-8 (Ex. 2).

[59] *See, e.g.*, Answer ¶ 17 (admitting DEF requires AT&T, like its competitors, to permit new attachments); Answer ¶ 19 ("DEF does not intend to quantify those costs or [alleged] benefits…").

materially advantage it over other telecommunications attachers.[60] Therefore, by law, the new telecom rate applies.[61]

Duke Florida bases its defense of the JUA rates on "three issues of consequence"[62] that fail under Commission precedent. *First*, Duke Florida claims that AT&T is competitively advantaged because Duke Florida installed 40-foot joint use poles when it could have installed 30- or 35-foot non-joint use poles to meet its own service needs.[63] This argument is specious. Duke Florida "did not build its poles just to accommodate AT&T. By 1978, cable attachments were so common that Congress saw fit to regulate their rates, and, by 1996, section 224 of the Act was amended to provide cable and [C]LECs a statutory right of access."[64] AT&T *and* its competitors require Duke Florida's joint use poles.[65]

Duke Florida tries to salvage this alleged benefit by claiming that AT&T "gained access [to Duke Florida's poles] through a built-to-suit network, rather than expensive make-ready."[66] Duke Florida reasons that, if it had not installed joint use poles, AT&T would have been the first

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[60] *See Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125); *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.").

[61] 47 C.F.R. § 1.1413(b); *Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125).

[62] Answer ¶ 15; *see also* Answer ¶¶ 8, 10.

[63] *See* Answer ¶ 16 (arguing that "DEF … has always installed poles taller and stronger than necessary to meet only DEF's service needs."); *see also* Answer Ex. C at DEF000164-165 (Burlison Decl. ¶ 12) ("In other words, where Florida Power Corp [now DEF] installed 40-foot poles to meet the [JUA]'s requirements, in the absence of the [JUA], it could have installed 30 or 35-foot poles.").

[64] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *see also Potomac Edison Order* at 13-14 (¶ 32).

[65] *See, e.g.*, Reply Ex. C at ATT00278 (Peters Reply Aff. ¶ 8).

[66] *See* Answer ¶ 10.

communications attacher seeking to attach—and so AT&T would have had to "pay make-ready costs to replace virtually all of Duke Energy Florida's poles with taller poles."[67] Duke Florida then relies on a flawed and discredited replacement cost methodology to allege that the value associated with its installation of joint use poles is [redacted] per pole per year—the amount it thinks it would have cost if AT&T had replaced all of Duke Florida's poles with taller poles at current day prices.[68]

But Duke Florida cannot charge AT&T higher rates solely because AT&T was the first communications attacher seeking to attach to Duke Florida's poles. Alleged advantages must "derive from the terms and conditions of the joint use agreement rather than [AT&T]'s historical status as an [I]LEC."[69] Moreover, Duke Florida's argument is disingenuous. One of Duke Florida's exhibits shows that, by 1972 (*i.e.*, 3 years after the JUA) [redacted][70] Even the JUA recognizes that AT&T could

[67] Answer Ex. E at DEF000239 (Metcalfe Aff., Ex. E-3.1); *see also* Answer ¶ 15 (defining benefit as the "make-ready costs AT&T avoided through DEF's construction of a built-to-suit network of poles").

[68] *See* Answer ¶ 8; Answer Ex. E at DEF000216, DEF000239 (Metcalfe Aff. ¶ 30 & Ex. E-3.1) (assuming replacement of 100% of Duke Florida poles to which AT&T is attached at 2019 costs). Of course, AT&T, cable companies, and CLECs have been attaching to Duke Florida's poles for decades, making use of current costs entirely inappropriate. *Ala. Cable Telecommunications Ass'n v. Ala. Power Co.*, 16 FCC Rcd 12209, 12234 (¶ 57) (2001) ("Respondent's final attempt at appraisal, using replacement costs … also fails."); *see also* Reply Ex. A at ATT00254 (Rhinehart Reply Aff. ¶ 28); Reply Ex. E at ATT00332 (Dippon Reply Aff. ¶ 48).

[69] *See* Letter Order at 4, *Verizon Md. v. The Potomac Edison Co.*, Proceeding No. 19-355 (EB May 22, 2020); *see also Potomac Edison Order* at 14 (¶ 32) (rejecting alleged benefits that "relate to the date the JUA was entered into and not to any specific terms and conditions in the JUA").

[70] *See* Answer Ex. 6 at DEF000278.

attach to shorter 35-foot poles without replacing them.[71] And Duke Florida depicts a 45-foot pole as a "typical" Duke Florida pole without AT&T attached.[72] It is mere fiction to claim that AT&T would have had to rebuild Duke Florida's network absent the JUA, let alone rebuild it using modern-day materials at current-day costs.[73] The height of Duke Florida's poles does not competitively advantage AT&T.[74]

Second, Duke Florida claims that AT&T is advantaged because it has a "contractual right to remain attached" to Duke Florida's poles after the JUA terminates.[75] This is not a competitive advantage—Duke Florida admits that AT&T's competitors have an "extracontractual" right to remain attached.[76] Indeed, this statutory right of access post-termination that AT&T's competitors enjoy is *more valuable* than AT&T's contractual right.[77]

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[71] *See* Compl. Ex. 1 at ATT00090 (JUA, § 1.1.5(B)); *see also* Reply Ex. E at ATT00335 (Dippon Reply Aff. ¶ 51).

[72] Answer Ex. C at DEF000168 (Burlison Decl., Ex. C-1).

[73] *See FPL 2020 Order*, 35 FCC Rcd at 5329-30 (¶ 15) (rejecting "assum[ption] that, without the JUA, AT&T would have built a duplicate pole network. But, as Congress has found, owing to a variety of factors, including environmental and zoning restrictions, there is "often no practical alternative except to utilize available space on existing poles.'") (citation omitted); Reply Ex. A at ATT00254 (Rhinehart Reply Aff. ¶ 28); Reply Ex. C at ATT00282 (Peters Reply Aff. ¶ 14); Reply Ex. E at ATT00331-337 (Dippon Reply Aff. ¶¶ 46-55).

[74] *See* Reply Ex. E at ATT00335 (Dippon Reply Aff. ¶ 52). It is also pure fantasy to imply that AT&T's competitors needed to replace Duke Florida's poles each time they attached. Reply Ex. C at ATT00279 (Peters Reply Aff. ¶ 9); Reply Ex. E at ATT00335 (Dippon Reply Aff. ¶ 52).

[75] Answer ¶ 10.

[76] Answer ¶ 30 n.128.

[77] *See* Answer Ex. E at DEF000208 (Metcalfe Aff. ¶ 9) ("Duke Energy Florida is required by the FCC to provide mandatory access to CLECs and CATVs, but is not required to provide mandatory access to AT&T, which is an ILEC. This represents a fundamental difference between CLECs or CATVs, as compared to ILECs. Without a contractual obligation for a utility to provide access, … ILECs are at a material disadvantage compared to CLECs and CATVs."); *see also* Reply Ex. A at ATT00253 (Rhinehart Reply Aff. ¶ 27); Reply Ex. C at ATT00282-283 (Peters Reply Aff. ¶ 15); Reply Ex. E at ATT00329-330 (Dippon Reply Aff. ¶ 42).

For if Duke Florida terminates a license agreement, AT&T's competitor still has a federally protected right to deploy on new Duke Florida pole lines.[78] If Duke Florida terminates the JUA, AT&T will have no right of access and will need to identify, fund, and deploy alternate infrastructure going forward—and can do so only if the governmental entity will permit.[79]

Third, Duke Florida repeats its claims that AT&T occupies space on the pole that AT&T does not use (such as 3.33 feet of safety space and unused space below AT&T's attachments) and argues that this constructive occupation of space advantages AT&T over its competitors. AT&T's purported use of this space is not an advantage because, as explained above, it is purely contrived by Duke Florida. AT&T does not "physically occupy" any of the safety space or space below its attachments. Duke Florida's third alleged "advantage" is simply another attempt to justify charging AT&T for space AT&T does not occupy, once again contrary to longstanding Commission precedent.[80]

Although Duke Florida primarily relies on these 3 flawed alleged advantages,[81] it peppers its Answer with 6 other similarly meritless allegations. *First*, Duke Florida suggests that AT&T

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[78] 47 U.S.C. § 224(f). Indeed, electric utilities, including Duke Energy Corporation, argued that rental rates should *increase* when pole access became statutory versus via contract. *See Ala. Power Co. v. FCC*, 311 F.3d 1357, 1365 (11th Cir. 2002) (rejecting attempt to increase cable rate from $7.47 to $38.81 per pole to reflect the higher value of mandatory statutory access).

[79] *See, e.g.*, Answer ¶ 11 n.25 ("incumbent LECs have no right of access to utilities' poles) (citation omitted). Duke Florida claims the value of this alleged advantage is the current cost to build a duplicative network of poles, which it says is [redacted] per pole. *See* Answer Ex. E at DEF000212-213, DEF000235 (Metcalfe Aff. ¶ 20 & Ex. E-2). This attempted replacement cost valuation is just as flawed as Duke Florida's alleged [redacted] per pole valuation of the current cost to replace each of Duke Florida's poles with taller poles. *See Ala. Power Co.*, 16 FCC Rcd at 12234 (¶ 57) ("Respondent's final attempt at appraisal, using replacement costs … also fails."); *see also* Reply Ex. A at ATT00253 (Rhinehart Reply Aff. ¶ 27); Reply Ex. E at ATT00328-331 (Dippon Reply Aff. ¶ 41-45).

[80] *See* Section II.A.2.

[81] Answer ¶¶ 8, 10, 15.

is advantaged because it pays a per-pole rate.[82] Not so. The Commission's rate formulas "determine the maximum just and reasonable rate *per pole*," so AT&T cannot be competitively advantaged by per-pole rates to which it is legally entitled.[83] And if Duke Florida is charging AT&T's competitors per-foot or per-attachment rates that violate the law,[84] the solution is to correct their rates—not to charge AT&T more.

Second, Duke Florida argues that AT&T is advantaged because it is "almost always the lowermost wireline attaching entity" on the pole, but denies any intention to ascribe value to that position.[85] For good reason. AT&T provided ample evidence that its position increases AT&T's costs as compared to its competitors[86] and Duke Florida agrees there are "costs and risks attendant to the lowest position on the pole."[87] And although Duke Florida questions why AT&T did not try to change its position on the pole, it admits AT&T *has* done just that—it has asked the Commission to stop electric utilities from barring the placement of other company's communications facilities *below* AT&T's facilities on utility poles.[88]

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[82] Answer ¶ 17 (alleging that a "new attachment does not alter the per pole rate paid by AT&T").

[83] *Consolidated Partial Order*, 16 FCC Rcd at 12122 (¶ 31) (emphasis added); *see also id.* at 12173-74 (App'x D-1, D-2) (showing calculation of "maximum rate per pole" under cable formula). This argument also fails for reasons detailed above. *See* Section II.A.2.

[84] *See* Answer Ex. A at DEF000131 (Freeburn Decl. ¶ 9).

[85] Answer Ex. C at DEF000166 (Burlison Decl. ¶ 17); Answer ¶ 19 ("DEF does not intend to quantify those costs or [alleged] benefits…").

[86] *See, e.g.*, Compl. Ex. C at ATT00041-43 (Peters Aff. ¶¶ 21-23); Compl. Ex. 17 at ATT00206-209 (Damage Reports).

[87] Answer ¶ 19.

[88] Answer ¶ 18. Duke Florida speculates that AT&T would benefit from its location on a pole if it does not "need to work through the lines of other attaching entities," *id.* ¶ 19, but because AT&T encourages the placement of communications facilities *below* its attachments, AT&T *does* have to work "through" the equipment of other attaching entities, *see* Compl. Ex. C at ATT00041-42 (Peters Aff. ¶¶ 20-21); Reply Ex. C at ATT00290 (Peters Reply Aff. ¶ 30). Duke Florida also speculates that AT&T's location on a pole allows its cable to sag, Answer ¶ 19, but

Third, Duke Florida argues that it "absorbs the costs of permitting, engineering and inspections in connection with AT&T's attachments."[89] This makes no sense. AT&T completes its own make-ready, engineering, and survey work, or pays Duke Florida at cost for the work it asks Duke Florida to perform.[90] Duke Florida tries to create the illusion of value where none exists by (1) asking the Commission to ignore "internal costs incurred by AT&T" and focus *only* on "the costs that AT&T is required (or not required) to pay" to Duke Florida and (2) claiming that it double-checks AT&T's inspections.[91] But Duke Florida cannot "charge a higher rate" because an ILEC "performs a particular service itself and incurs costs comparable to its competitors in performing that service."[92] This is true even if Duke Florida decides to double-check AT&T's work, as this is work Duke Florida need not perform under the JUA and does not perform because of it.[93]

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there is no evidence that AT&T's facilities sag any more than the comparable facilities its competitor's use, *see* Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 25); Reply Ex. C at ATT00287-288 (Peters Reply Aff. ¶¶ 25-26).

[89] Answer ¶ 8; *see also id.* ¶¶ 14, 17.

[90] Compl. Ex. C at ATT00039-40 (Peters Aff. ¶¶ 16-17).

[91] *See* Answer ¶¶ 14, 17.

[92] *Verizon Va. v. Va. Elec. and Power Co.*, 32 FCC Rcd 3750, 3759 (¶ 18 & n.67) (EB 2017) ("*Dominion Order*"); *see also* Reply Ex. E at ATT00341-342 (Dippon Reply Aff. ¶ 64).

[93] *See* Compl. Ex. 1 at ATT00092 (JUA §§ 3.2, 3.3). It is not clear what uncompensated work Duke Florida claims to perform for AT&T, particularly when it admits that it does not perform "pre-construction and post-construction inspections" out of "deference" to ILECs. Answer ¶ 14. Duke Florida also inflates its alleged valuation by using unsubstantiated current day costs that "do not apply to every attachment" and are not clearly authorized by its license agreements and by ignoring the exceptionally high JUA rates, which **have imposed a [redacted] per pole premium on AT&T for decades that has more than covered Duke Florida's claimed [redacted] per pole charge for** AT&T's use of existing poles. *See* Answer Ex. A at DEF000153 (Freeburn Decl. ¶ 18); Answer Ex. E at DEF000240 (Metcalfe Aff., Ex. E-3.2); Answer Ex. 7 at DEF000296-341 (License Agreement); *see also* Compl. Ex. A at ATT00007 (Rhinehart Aff. ¶ 12); Reply Ex. E at ATT00341 (Dippon Reply Aff. ¶ 63).

Fourth, Duke Florida argues that AT&T benefits because it may "use space in excess of its allocated space, without additional charge."[94] But AT&T does not even use all the space it is allocated. If AT&T cannot benefit from unused allocated space, it certainly cannot benefit from unused additional space—particularly when it cannot sublet that space to others.[95] And AT&T is no different from its competitors because they are not limited in the amount of space they may occupy on Duke Florida's poles.[96] AT&T's competitors, however, are entitled to a per-pole new telecom rate calculated using a 1-foot presumptive space occupied input.[97] There is no good reason, much less and evidentiary basis, to treat AT&T differently.

Fifth, Duke Florida says AT&T is advantaged because "CATVs and CLECs are often required to pay for pole replacements—even to accommodate an attachment that presumptively occupies only one foot."[98] But AT&T *also* pays for pole replacements it requires when an existing Duke Florida pole does not accommodate its facilities.[99] And the number of times Duke Florida would need to replace a pole to provide additional space for any communications

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[94] Answer ¶ 12.

[95] Compl. Ex. 1 at ATT00090 (JUA, § 1.1.6); Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 25).

[96] *See* Answer Ex. 7 at DEF000296-341 (License Agreement).

[97] 47 C.F.R. §§ 1.1406(d)(2), 1.1410.

[98] Answer ¶ 16.

[99] Compl. Ex. 1 at ATT00094-95 (JUA, § 4.4.3).

attacher must be few.[100] Duke Florida says its typical joint use poles are [redacted]-feet tall, when a 37.5-foot pole can accommodate 4 communications attachers.[101]

Finally, Duke Florida claims AT&T is advantaged when Duke Florida replaces an AT&T pole following an emergency.[102] But Duke Florida "admits that AT&T pays for these pole replacements" and that AT&T's competitors do not incur similar costs because they "are not required to own any poles at all."[103] AT&T is thus *disadvantaged* as compared to its competitors, not advantaged.

Duke Florida's attempt to rebut the Commission's new telecom rate presumption fails. Even if it could rebut the presumption, Duke Florida admits that the JUA rates it charges AT&T are *higher* than the pre-existing telecom rates,[104] which are the maximum permissible rates. And Duke Florida's admission rests on *inflated* pre-existing telecom rates.[105] The pre-existing

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[100] *See* Initial Comments of Duke Energy Corp., et al. at 16-17, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17-84 (Sept. 2, 2020) (arguing that 0.024% of electric utility poles were replaced in 2019 to accommodate an additional communications attacher).

[101] *See* Answer Ex. C at DEF000166, DEF000168 (Burlison Decl. ¶ 15 & Ex. C-1); *see also* 47 C.F.R. §§ 1.1409(c), 1.1410 (presuming a 37.5-foot pole can hold 5 attaching entities); *Pole Attachment Order*, 26 FCC Rcd at 5341 (¶ 232) ("capacity is not insufficient where a request can be accommodated using traditional methods of attachment"); *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11872 (¶ 16) (2010) ("*Pole Attachment Order NPRM*") (traditional methods of attachment include "line rearrangement, overlashing, boxing, and bracketing").

[102] Answer ¶ 20.

[103] *Id.* Duke Florida claims that AT&T benefits because it can "rely on DEF crews, equipment, etc. in times of need" to "replac[e] a pole in the middle of the night at a moment's notice." *Id.* ¶ 20. But Duke Florida does not dispute that AT&T covers Duke Florida's reasonable costs, *id.*, or that AT&T's competitors do not bear comparable costs. *Id.*; *see also* Reply Ex. C at ATT00293 (Peters Reply Aff. ¶ 35).

[104] Answer ¶ 22.

[105] Reply Ex. A at ATT00241-247 (Rhinehart Reply Aff. ¶¶ 5-16).

telecom rate for use of Duke Florida's poles can only be about $7.50 per pole, at most, because by rule the pre-existing telecom rate is about 1.5 times the approximately $5 per pole new telecom rate that Duke Florida charged AT&T's competitors.[106] In comparison, the [redacted] per pole rates that Duke Florida charges AT&T are exorbitant.[107] There is no set of circumstances under which the rates Duke Florida has charged AT&T are lawful.

B. Even Apart from the 2018 *Third Report and Order*, the New Telecom Rate Was the Just and Reasonable Rate as of July 2011.

Duke Florida takes issue with AT&T's argument that, even without the rate presumption, AT&T has been entitled to a just and reasonable new telecom rate since the July 12, 2011 effective date of the *Pole Attachment Order*.[108] Its arguments, which largely duplicate arguments made in its unsuccessful attempt to rebut the presumption, are rife with error and should be rejected.

First, Duke Florida argues that the JUA rates are "just and reasonable" because they were agreed upon.[109] The Commission has previously found that "pole attachment rates cannot be held reasonable simply because they have been agreed to."[110] Duke Florida also questions why

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[106] *See* Reply Ex. A at ATT00241 (Rhinehart Reply Aff. ¶ 5).

[107] *See* Compl. Ex. 3 at ATT00155-159 (Invoices).

[108] Answer ¶¶ 23-30. Duke Florida suggests that the Commission, in the 2018 *Third Report and Order*, created some "temporal categor[y]" of old agreements that escape the Commission review that was extended to them in the 2011 *Pole Attachment Order*. *See id.* ¶ 21. Not so. The FCC does not "depart from a prior policy *sub silentio*." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). It must at least "display awareness that it *is* changing position" and "must show that there are good reasons for the new policy." *Id.* (emphasis in original). The Commission certainly showed no such intention here. To the contrary, the Commission took the next step forward to eliminate the outdated rate disparities that persisted despite the 2011 *Pole Attachment Order*. *See Third Report and Order*, 33 FCC Rcd at 7767-68 (¶ 123).

[109] Answer ¶ 23.

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

AT&T did not challenge the rates immediately after the 2011 *Pole Attachment Order*.[111] AT&T did not have to immediately challenge the rates.[112] It is and was Duke Florida's responsibility to comply with the law. Indeed, it was the lack of voluntary action by electric utilities that led the Commission took further action in 2018 to eliminate the persisting rate disparities.[113]

Duke Florida also claims that the rates are reasonable because the JUA rate formula divides 100% of the pole cost between AT&T and Duke Florida.[114] But this makes the JUA rate formula *particularly unjust and unreasonable*. Duke Florida has more than a half million CLEC and cable company attachments on its poles, and yet has never reduced AT&T's share of the pole costs.[115] Duke Florida, as a result, continues to collect [redacted] of its pole cost from AT&T and additional rent from AT&T's competitors, while requiring far more space on the pole than all the communications attachers combined.[116]

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[111] Answer ¶ 23.

[112] *Dominion Order*, 32 FCC Rcd at 3763 (¶ 28) ("the Commission declined to impose time limits on the filing of pole attachment complaints"); *see also* Pet'rs Br., *Southern Co. Servs. v. FCC*, 2002 WL 34246009, at *40 (D.C. Cir. Apr. 9, 2002) (emphasis added) (admitting that "attaching entities can *always* seek Commission revision of a term" in a pole attachment agreement") (emphasis added); *see also* Reply Ex. B at ATT00271 (Reply Aff. of D. Miller, Nov. 20, 2020 ("Miller Reply Aff.") ¶ 8).

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

[114] Answer ¶ 25.

[115] *See* Answer ¶ 12 n.35 (stating that Duke Florida has "approximately 575,292 non-ILEC attachments on DEF's poles"); *see also* Reply Ex. A at ATT00256 (Rhinehart Reply Aff. ¶ 31); *see also* Reply Ex. E at ATT00344-345 (Dippon Reply Aff. ¶ 70).

[116] Compl. ¶ 25 n.59; *see also* Compl. Ex. D at ATT00064-65 (Dippon Aff. ¶ 35-36); *see also Dominion Order*, 32 FCC Rcd at 3760 (¶ 21 n.78) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662)) (stating that the Commission expected that ILECs and electric utilities would pay "roughly the same proportionate rate given the parties' relative usage of the pole").

Second, Duke Florida argues that "the notion that relative pole ownership affects the ability to negotiate is not merely incorrect—it is foundational error."[117] The Commission concluded otherwise. In 2011, it explained that because "electric utilities appear to own approximately 65-70 percent of poles," "market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates" for ILECs.[118] In 2018, the Commission again found that a decline in ILEC pole ownership necessitated further action to ensure just and reasonable rates for ILECs.[119] And in 2017 and 2020, the Enforcement Bureau confirmed that an electric utility's relatively high rates coupled with its "nearly two-to-one pole ownership advantage" supported an inference of bargaining leverage that justified rate relief for the ILEC.[120] Duke Florida's pole ownership advantage when the current rate provision was adopted in 1990 was much greater, at 9-to-1 (90% vs. 10%), and has only increased further during the last 3 decades (92% vs. 8%).[121]

Duke Florida also argues that its pole ownership advantage should be ignored because it unearthed an old Bell System Practice from the 1970s stating that [redacted]

[117] Answer ¶ 26.

[118] *Pole Attachment Order*, 26 FCC Rcd at 5327, 5329 (¶¶ 199, 206); *see also* Reply Ex. E at ATT00394-396 (Dippon Reply Aff. ¶¶ 22-26).

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

[120] *Dominion Order*, 32 FCC Rcd at 3757 (¶ 13); *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 18) (finding rate relief required where the electric utility owns 66% of the jointly used poles); *see also Potomac Edison Order* at 11-12 (¶¶ 25-26) (finding rate relief required where the electric utility has a 4-to-1 pole ownership advantage).

[121] *See* Compl. Ex. B at ATT00025 (Miller Aff. ¶¶ 6-7); Compl. Ex. 3 at ATT00159 (2019 Invoice); Compl. Ex. 5 at ATT00172 (1990 Invoice).

[122] Answer ¶ 26 (quoting Answer Ex. 6 at DEF000294).

[redacted][125] The old document thus evidences a resignation to unjust and unreasonable rates—and not an endorsement of them.[126]

Third, Duke Florida claims that AT&T does not "genuinely lack the ability to terminate" the contract rates because it can remove its facilities from over 62,000 Duke Florida poles.[127] This argument is a microcosm of Duke Florida's position—pay extraordinarily high pole attachment rates under the JUA or get off Duke Florida's poles. Thankfully, that is not required

[123] *See* Reply Ex. A at ATT00256 (Rhinehart Reply Aff. ¶¶ 30-31); Reply Ex. E at ATT00342-345 (Dippon Reply Aff. ¶¶ 66-70).

[124] Answer Ex. 6 at DEF000280-283.

[125] *Id.* at DEF000280. The Practice explained that [redacted]

[126] *See* Reply Ex. E at ATT00344-345 (Dippon Reply Aff. ¶ 70).

[127] Answer ¶ 27 ("If AT&T were to remove its facilities from some or all of DEF's poles, it would no longer be bound to [pay the JUA rates]."); *see also id.*, Executive Summary at iii ("AT&T … can choose at any time to remove its facilities from DEF's poles."); *id.* ¶ 11 ("AT&T … can remove its facilities from any or all of those 62,000 poles whenever it chooses and it will no longer be required to pay [the JUA] 'rate' with respect to such poles.").

by federal statute or Commission rules. Instead, "where [I]LECs have … access" to an electric utility's poles, "they are entitled to rates … that are 'just and reasonable.'"[128] They need not disrupt their network or rebuild a duplicative one in order to obtain the just and reasonable rates required by law.[129] The Enforcement Bureau thus twice relied 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."[130]

Duke Florida also argues that AT&T has not shown that it cannot obtain new just and reasonable rates for the JUA through negotiations.[131] Duke Florida's conduct and arguments prove otherwise. Duke Florida thumbed its nose at relevant precedent,[132] refused to make an offer for over 15 months,[133] took the position that AT&T should forever pay the JUA rates for

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[128] *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202).

[129] *See, e.g.*, Reply Ex. E at ATT00325-328 (Dippon Reply Aff. ¶¶ 33-38).

[130] *See FPL 2020 Order*, 35 FCC Rcd at 5326 (¶ 11); *Verizon Fla. LLC v. Fla. Power and Light Co.*, Memorandum Opinion and Order, 30 FCC Rcd 1140, 1150 (¶ 25) (EB 2015) ("*FPL 2015 Order*") (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216)).

[131] *See Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216); *see also* Answer ¶ 27.

[132] *See, e.g.*, Answer Ex. B at DEF000157 (Hatcher Decl. ¶ 16) (stating that any rate proposal that required Duke Florida to "bear[ ] the entire cost of the safety space … was a nonstarter" even though the "FCC had already said that the safety space was excluded from the CATV and CLEC rate formula"); Answer Ex. 5 at DEF000273 (Letter from S. Freeburn, Duke, to D. Miller, AT&T (Sept. 10, 2020)) [redacted]

[133] *See* Compl. Ex. B at ATT00026-30 (Miller Aff. ¶¶ 10-17); *see also* Answer Ex. 5 at DEF000273 (Letter from S. Freeburn, Duke, to D. Miller, AT&T (Sept. 10, 2020)) [redacted]

existing attachments,[134] and accused AT&T of bad faith merely because AT&T asked Duke Florida to substantiate its cost-based claims in an effort to *avoid* the need for litigation.[135] When Duke Florida was then forced to make an offer, it [redacted].[136] AT&T is "not required to engage in extended negotiations where the parties apparently are far apart in their analysis of the issues."[137] That is particularly true here, where Duke Florida has now been "clear" that it will "never … negotiate[ ] an agreement like [the JUA] if the most it could recover was the one-foot CATV or telecom rate (old or new)."[138]

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[134] *See, e.g.*, Answer ¶ 9 ("In two separate face-to-face meetings between representatives of the parties, DEF offered numerous valid reasons to retain the existing cost-sharing relationship ...."); Answer Ex. B at DEF000156 (Hatcher Decl. ¶ 15) (during negotiations, Duke Florida would consider the new telecom rate *only* for "poles that are not already in joint use").

[135] Duke Florida seeks to convert negotiations into mere posturing until a pole attachment complaint is filed, the exact opposite of what the Commission intended. *See, e.g.*, Answer ¶ 9 ("Though DEF had not, at the time of those face-to-face meetings, endeavored to perform any kind of precise economic quantification of those competitive advantages, it made clear to AT&T that it would do so if the parties were unable to reach an amicable resolution."); Answer ¶ 15 ("Though we never provided AT&T with any sort of precise quantification of those net benefits, we do not think such an undertaking is … an efficient use of resources outside of a litigated dispute.").

[136] *See* Answer Ex. 5 at DEF000276 (Letter from S. Freeburn, Duke, to D. Miller, AT&T (Sept. 10, 2020)) [redacted]; *see also Pole Attachment Order*, 26 FCC Rcd at 5297 (¶ 131 n.399) (stating an attacher pays about 7.4% of a pole owner's annual pole costs under the new telecom and cable rate formulas and about 11.2% of a pole owner's annual pole costs under the old telecom rate formula in urbanized areas); *see also* Reply Ex. A at ATT00250-251 (Rhinehart Reply Aff. ¶ 22).

[137] *Nev. State Cable Tel. Ass'n v. Nev. Bell*, 13 FCC Rcd 16774 (¶ 4) (1998).

[138] Answer ¶ 21.

Finally, Duke Florida argues that AT&T can never be "similarly situated" to its competitors because of two "irreversible" characteristics: AT&T owns poles and is the incumbent provider.[139] The Commission has rejected these arguments time and again, finding in 2011 that ILECs *can be* "comparably situated to telecommunications carriers or cable operators," and presuming in 2018 that they *are* "similarly situated to other telecommunications attachers."[140] AT&T should be paying the new telecom rate.[141]

C. AT&T Should Be Awarded a Properly Calculated Per-Pole New Telecom Rate Effective as of the 2015 Rental Year.

Because Duke Florida has not identified any material advantages that AT&T enjoys over its competitors, AT&T should be charged a properly calculated new telecom "rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2)."[142] These applicable new telecom rates for AT&T's use of Duke Florida's poles during the 2015 through 2019 rental years are $4.56, $4.46, $4.51, $4.78, and $4.54 per pole, respectively.[143]

Duke Florida argues that different new telecom rates apply, but failed to support them with rate calculations.[144] It is nonetheless clear that Duke Florida's rates were not calculated "in

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[139] Answer ¶¶ 29-30. *But see* Letter Order at 4, *Verizon Md. v. The Potomac Edison Co.*, Proceeding No. 19-355 (EB May 22, 2020) (rejecting claim that "alleged … advantages associated with Verizon's historical status as an [I]LEC are relevant to determine whether Potomac Edison's rates are just and reasonable under the Commission's orders and rules.").

[140] *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217).

[141] *See* Compl. Ex. D at ATT00049 (Dippon Aff. ¶ 5); Reply Ex. E at ATT00311 (Dippon Reply Aff. ¶ 3).

[142] 47 C.F.R. § 1.1413(b).

[143] Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 13 & Ex. R-1); Reply Ex. A at ATT00241, ATT00247, ATT00259 (Rhinehart Reply Aff. ¶¶ 4, 16 & Ex. R-5).

[144] *See* 47 C.F.R. § 1.726(b) (requiring Duke Florida to "advise the complainant and the Commission fully and completely of the nature of any defense").

accordance with [47 C.F.R.] § 1.1406(e)(2)" as required.[145] Duke Florida admits that it has been charging AT&T's competitors a new telecom rate in the $5 range.[146] But it argues that if forced to charge AT&T a new telecom rate, it should be up to $[redacted] higher.[147] Duke Florida's tailor-made rates for AT&T must be rejected.[148] 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."[149] These new just and reasonable rates should take effect as of the 2015 rental year.[150]

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[145] 47 C.F.R. § 1.1413(b); *see also* Reply Ex. A at ATT00241-247 (Rhinehart Reply Aff. ¶¶ 6-16).

[146] *See* Answer ¶ 31; *see also* Duke Florida's Resp. to AT&T's Interrog., Ex. 2 at DEF000007-8.

[147] Duke Florida claims that AT&T should pay new telecom rates of [redacted] per pole for the 2015 to 2019 rental years. Answer ¶¶ 12, 31, 37. Duke Florida also inflates its pre-existing telecom rates, claiming that AT&T should pay up to [redacted] per pole for the 2015 to 2019 rental years, even though the approximately $5 new telecom rates Duke Florida charged convert into pre-existing telecom rates of about $7.50. *See* Answer ¶ 38; *see also* Reply Ex. A at ATT00241 (Rhinehart Reply Aff. ¶ 5).

[148] The primary source of the error is Duke Florida's attempt to multiply the new telecom rates it calculates for AT&T's competitors by [redacted] *See* Section II.A.2. Duke Florida also appears to depart from the presumption that there are 5 attaching entities on its poles, Answer ¶ 22, but did not provide any data to support a different value. *See, e.g.*, *Teleport Commc'ns Atlanta*, 17 FCC Rcd at 19869 (¶ 25) (requiring "statistically valid survey" data that "reflect[s] only those poles in areas where [the attacher] is actually affixed"); *see also id.* at 19866 (¶ 18) (stating that the "survey should be submitted"); Reply Ex. A at ATT00243, ATT00245 (Rhinehart Reply Aff. ¶¶ 10, 12).

[149] 47 C.F.R. § 1.1413(b); *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) (emphasis added; internal quotation omitted).

[150] *See Potomac Edison Order* at 22 (¶ 46) (holding the "applicable statute of limitations" is the "statute of limitations for contract actions" under State law); *see also* Fla. Stat. § 95.11(2)(b) (applying a 5-year statute of limitations to "[a] legal or equitable action on a contract, obligation, or liability founded on a written instrument").

Duke Florida does not challenge the Commission's authority to award refunds, but argues that a shorter refund period should apply.[151] It should not.[152]

First, Duke Florida asks the Commission to ignore the 5-year statute of limitations that applies to actions involving a Florida contract[153] and instead apply the 2-year statute of limitations under 47 U.S.C. § 415, which bears no relation to this dispute. 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.[154]

Duke Florida does not explain why the 2-year statute of limitations under Section 415 is "applicable" to a refund of unjust and unreasonable pole attachment rentals, except to argue that other options are not "applicable."[155] But, as Duke Florida explains, "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."[156] As a result, where, as here, the federal claim involves a contract, "contract law provides the best

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[151] Duke Florida correctly acknowledges that, although the Commission declined to create a "right to refunds," but it did not eliminate its authority to award refunds when appropriate. *See* Answer ¶ 32; *see also* 47 C.F.R. § 1.1407(a)(3).

[152] Duke Florida fails to note that a refund would negate one of its complaints—specifically, that it paid JUA rates from 2015-2019 that were about [redacted]% of AT&T's annual pole cost as calculated under the FCC's rate formula. *See* Answer ¶¶ 22, 33. AT&T has asked for a *net* refund calculated by applying properly calculated and proportional FCC rates to AT&T's use of Duke Florida's poles *and* to Duke Florida's use of AT&T's poles. *See* Compl. ¶ 37; Compl. Ex. A at ATT00021 (Rhinehart Aff., Ex. R-4).

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

[154] *See* Answer ¶ 32 (relying on 47 U.S.C. § 415) (emphasis added).

[155] *Id.*

[156] *Id.* (quoting Compl. ¶ 32) (emphases added).

analogy" and the Commission should apply "the general contract law statute of limitations."[157] That statute of limitations in Florida is 5 years.[158]

Second, Duke Florida asks the Commission to limit refunds to the period following AT&T's May 2019 request for rate negotiations.[159] The Commission, however, has "decline[d] the invitation … to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge."[160] Doing so "runs counter to the very idea of a statute of limitations."[161] And regardless, Duke Florida was on notice beginning in 2011 that it was obligated to conform the contract rates to the just and reasonable level as required by law. It should not be rewarded for its failure and refusal to do so.

Third, Duke Florida argues that a refund award should not include years before the *Third Report and Order* took effect because, had AT&T then sought relief, it would have had the burden to prove the rates were "unjust and reasonable."[162] But AT&T *has* satisfied that burden. It presented far more than a *prima facie* case that the JUA rates are unjust and unreasonable—it provided lengthy factual, legal, and economic evidence that "even apart from the 2018 *Third*

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[157] *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018); *see also Potomac Edison Order* at 20 (¶¶ 41-43). Moreover, the Commission could have, but did not, specify a one-size-fits-all federal statute of limitations, further reinforcing that the "applicable statute of limitations" is drawn from state law.

[158] *See* Fla. Stat. § 95.11(2)(b). Duke Florida points to a 4-year statute of limitations applicable to an "action to rescind a contract." *See* Answer ¶ 32 (citing Fla. Stat. § 95.11(l)). But AT&T does not seek to *rescind* the JUA; it has asked the Commission to set the lawful rates that will apply as the parties continue to operate under the JUA going forward.

[159] Answer ¶ 32.

[160] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

[161] *See id.*

[162] Answer ¶ 32.

Report and Order, AT&T was entitled to just and reasonable rates back to 2011."[163] The burden is thus on Duke Florida to justify its rates for all time periods in dispute.[164] That it has not done.[165]

D. Duke Florida's Affirmative Defenses Are Meritless.

Duke Florida concludes its Answer with a series of redundant defenses that lack merit on the facts and the law and improperly seek to relitigate matters that "already fully have been considered and rejected by the Commission" in prior rulemakings.[166] Duke Florida "also fails to adequately to explain in its Answer the factual or legal basis for these defenses and their applicability to this dispute, as the Commission's rules require."[167] They should be rejected.

First, Duke Florida argues that AT&T is barred by estoppel and waiver from seeking a refund for periods prior to May 22, 2019, the date when AT&T asked Duke Florida to negotiate

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[163] *See* Compl. Section III.C; *see also Cable Television Ass'n of Ga. v. Ga. Power Co.*, 18 FCC Rcd 16333, 16337 (¶ 8) (2003) (finding burden to make a *prima facie* showing satisfied where complaint "could have been more detailed," but "identifie[d] the factual basis of the allegations"); *Selkirk Commc'ns*, 8 FCC Rcd at 389 (¶ 17) (finding burden to make a *prima facie* showing satisfied where complaint alleged that attacher was "required to pay a rate … that is higher than the regulated rate").

[164] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 19 n.70) ("Once a *prima facie* showing has been made by the complainant, the Commission's pole attachment complaint rules require the respondent to 'set forth justification for the rate, term or condition alleged in the complaint not to be just and reasonable.'") (quoting 47 C.F.R. § 1.1407(a) (2018)); *see also Marcus Cable Assocs. 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.").

[165] *See, e.g.*, Reply Ex. C at ATT00294 (Peters Reply Aff. ¶ 37); Reply Ex. E at ATT00314 (Dippon Reply Aff. ¶ 9).

[166] *In the Matter of Improving Pub. Safety Commc'ns in the 800 Mhz Band*, 26 FCC Rcd 1058, 1063 (¶¶ 12-13) (2011).

[167] *AT&T Servs. v. 123.net*, 35 FCC Rcd 6401, 6414 (¶ 29) (2020) (citing 47 C.F.R. § 1.721(b), (d), (e) and 1.726(b), (c)).

a just and reasonable rate.[168] Whether estoppel and waiver defenses are available in a pole attachment complaint proceeding is doubtful.[169] But if they were available, they fail. The Commission "decline[d] the invitation … to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge" because it would "run[ ] counter to the very idea of a statute of limitations."[170]

Second, Duke Florida argues that AT&T is barred by accord and satisfaction, acquiescence, and waiver from seeking a refund for periods prior to 2019 because AT&T paid Duke Florida's invoices in full and agreed that the invoiced rates complied with the JUA's rate formula.[171] Even if these defenses were available in a pole attachment complaint proceeding,[172] they too would fail. AT&T is statutorily entitled to "just and reasonable" rates for use of Duke Florida's poles; that AT&T paid rates charged by Duke Florida that were in violation of federal

[168] Answer, Affirmative Defenses 1, 2.

[169] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29) ("[Defendant] has cited no authority establishing that a party may assert equitable defenses in a formal complaint proceeding before the Commission."); *Air Touch Cellular v. Pac. Bell*, 16 FCC Rcd 13502, 13508 (¶ 17) (2001) (questioning whether equitable defenses, including waiver and estoppel, are available in formal complaint proceedings); *see also AT&T Servs. v. Great Lakes Comet, Inc.*, 30 FCC Rcd 2586, 2597 (¶ 36 & n.123) (2015) (same).

[170] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

[171] Answer, Affirmative Defenses 5, 6, 7.

[172] *But see AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

law "is of no consequence."[173] Any other standard "would subvert the supremacy of federal law over contracts."[174]

Third, Duke Florida argues that AT&T's claims are barred in whole or in part by laches or a 2-year or 4-year statute of limitations.[175] The doctrine of "laches … do[es] not preclude AT&T from challenging [the] rates."[176] And the applicable statute of limitations is 5 years, not 2 or 4 years.[177] The statute of limitations also does not and cannot bar relief or limit the Commission's broad statutory authority to "take such action as it deems appropriate and necessary" to ensure just and reasonable rates,[178] but instead sets the effective date of just and reasonable rates under the Commission's remedies rule.[179]

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[173] *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36) ("[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."); *see also S. Co. Servs. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002) (The FCC 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.").

[174] *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.").

[175] Answer, Affirmative Defenses 3 and 4 (citing Fla. Stat. § 95.11(l); 47 U.S.C. § 415(c)); Answer, Affirmative Defense 14 (citing laches); Answer, Affirmative Defense 15 (citing the "applicable statute of limitations").

[176] *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36).

[177] *See* Section II.A.C.

[178] 47 U.S.C. § 224(b)(1); *AEP v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013) ("Under this broad authorization [of 47 U.S.C. § 224(b)(1)], it is hard to see any legal objection to the Commission's selection of any reasonable period for accrual of compensation for overcharges or other violations of the statute or rules.").

[179] 47 C.F.R. § 1.1407(a)(3).

Fourth, Duke Florida argues that it would be inequitable and unconscionable to grant the relief AT&T seeks because it would "unjustly enrich AT&T at the expense of DEF."[180] If these equitable defenses were available in a pole attachment complaint proceeding,[181] they too would fail. "The Commission made clear in the *Pole Attachment Order* that applying Section 224(b)(1) to [I]LEC attachments will not result in unreasonably low rates."[182] Instead, the new telecom "rate is just, reasonable, and fully compensatory."[183]

Fifth, Duke Florida argues AT&T's claim "fails to state a claim upon which relief can be granted" under 47 C.F.R. § 1.1413(b) because the JUA "was not 'entered into or renewed' after the effective date of the rule."[184] The new telecom rate presumption codified at 47 C.F.R. § 1.1413(b) applies to "new and newly-renewed joint use agreements," including agreements "that are automatically renewed, extended, or placed in evergreen status."[185] As stated, the JUA's initial term expired on January 1, 1979, and it "*shall continue* in force thereafter" until terminated upon six month's written notice.[186] "Continue" and "extend" are synonyms, meaning

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[180] Answer, Affirmative Defenses 8, 9.

[181] *But see AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[182] *FPL 2015 Order*, 30 FCC Rcd at 1146 (¶ 19).

[183] *Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137); *id.* at 531 (¶ 182) ("The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers.... The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate."); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987); *City of Portland v. United States*, 969 F.3d 1020, 1053 (9th Cir. 2020); *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002).

[184] Answer, Affirmative Defense 10.

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

[186] Compl. Ex. 1 at ATT00103 (JUA, Art. XVI).

that the JUA has "automatically … extended" after the effective date of the new rule. The new telecom rate presumption applies.[187]

Sixth, Duke Florida asks the Commission to forbear from exercising jurisdiction even though the Enforcement Bureau recently rejected this defense.[188] It should do so again here. The "facts that gave rise to the Commission's assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles"[189] *are* present in this case because "AT&T is, in fact, in an inferior bargaining position and … the JUA rate is neither just nor reasonable."[190] Duke Florida 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.[191] 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."[192]

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[187] *Potomac Edison Order* at 6-7 (¶ 15); *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475); *see also* Section II.A.1.

[188] *FPL 2020 Order*, 35 FCC Rcd at 5331-32 (¶ 19).

[189] Answer, Affirmative Defense 11.

[190] *See FPL 2020 Order*, 35 FCC Rcd at 5332 (¶ 19); *see also* Section II.A-B.

[191] *See* 47 C.F.R. §§ 1.53-1.59; *see also FPL 2020 Order*, 35 FCC Rcd at 5332 (¶ 19 n.83).

[192] *See* 47 U.S.C. § 160(a); *FPL 2020 Order*, 35 FCC Rcd at 5331-32 (¶ 19 & n.83); *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").

Seventh, Duke Florida asks the Commission to waive the applicability of its rules as they apply to ILECs under 47 C.F.R. § 1.3.[193] Duke Florida's request is facially invalid as it has not demonstrated "good cause" or "plead with particularity the facts and circumstances which warrant such action."[194] Nor could Duke Florida 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.'"[195] "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 alternative existed which would have allowed it to comply with the rule."[196] Duke Florida has not and cannot meet that standard. A "just and reasonable" rate for AT&T's use of Duke Florida's pole cannot be "inequitable."[197] Collection of a "fully compensatory" new telecom rate cannot be "unduly burdensome."[198] And application of the Commission's rules to ensure just and reasonable rates *will "serve the public interest* [because]

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[193] Answer, Affirmative Defense 12.

[194] 47 C.F.R. § 1.3; *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

[195] *See In the Matter of Results Broad. Rhinelander, Inc. Pet. for Waiver of Final Payment Deadline for Winning Bids in Auction 94*, 34 FCC Rcd 8520, 8522 (¶ 7) (2019) (citing case law interpreting 47 C.F.R. § 1.3).

[196] *Id.*

[197] *See id.*; *see also FPL 2015 Order*, 30 FCC Rcd at 1146 (¶ 18) ("'Just and reasonable' and 'arbitrary and capricious' are mutually exclusive concepts.").

[198] *See Rhinelander*, 34 FCC Rcd at 8522 (¶ 7); *see also Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (quoting National Broadband Plan at 110).

greater rate parity between [ILECs] and their telecommunications competitors can energize and further accelerate broadband deployment."[199]

Finally, Duke Florida argues that "[t]he rule upon which AT&T's complaint is premised is unlawful, *ultra vires*, arbitrary, capricious and unreasonable."[200] The U.S. Courts of Appeals for the D.C. Circuit and Ninth Circuit disagreed.[201]

III. CONCLUSION

For the foregoing reasons, and those detailed in AT&T's other pleadings, affidavits, and exhibits, AT&T respectfully requests that the Commission grant AT&T's Pole Attachment Complaint, set the just and reasonable rate, effective as of the 2015 rental year, as the rate that is properly calculated in accordance with the new telecom rate formula,[202] and order Duke Florida

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[199] *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, Duke Florida cannot show that no reasonable alternative existed which would have allowed it to comply with the "just and reasonable" rate requirement.

[200] Answer, Affirmative Defense 13.

[201] *See Potomac Edison Order* at 6, 23 (¶¶ 14 n.43, 50); *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 19); *see also City of Portland*, 969 F.3d at 1052-53; *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 18 (2013).

[202] *See* Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11, Ex. R-1). Alternatively, in the unlikely event that the Commission concludes that Duke Florida 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 2015 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 id.* at ATT00009, ATT00013-14 (Rhinehart Aff. ¶ 17, Ex. R-1).

to refund all amounts paid in excess of a just and reasonable rate with interest,[203] beginning with the 2015 rental year.

Respectfully submitted,

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Dated: November 24, 2020

[203] *See id.* at ATT00021 (Rhinehart Aff., Ex. R-4). Interest should be awarded at "the current interest rate for Federal tax refunds and additional tax payments." *Cavalier Tel., LLC v. Va. Elec. & Power Co.*, 15 FCC Rcd 17962, 17964 (¶ 4 n.16) (2000).

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 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 Legal Analysis 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 November 24, 2020, I caused a copy of the foregoing Pole Attachment Complaint Reply Legal Analysis and Affidavits in support thereof to be served on the following (service method indicated):

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9050 Junction Drive
Annapolis Junction, MD 20701
(confidential version of Reply Legal Analysis and Affidavits by hand delivery; public version of Reply Legal Analysis and Affidavits by ECFS)

Eric B. Langley
Robin F. Bromberg
Robert R. Zalanka
Langley & Bromberg LLC
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Birmingham, AL 35223
(confidential and public versions of Reply Legal Analysis and Affidavits by email)

Rosemary H. McEnery
Michael Engel
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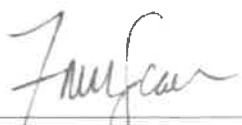

Frank Scaduto

PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. DUKE ENERGY FLORIDA, LLC, Defendant.	Proceeding No. 20-276 Bureau ID No. EB-20-MD-003

Reply Affidavits

A. Reply Affidavit of Daniel P. Rhinehart (November 23, 2020).

B. Reply Affidavit of Dianne W. Miller (November 20, 2020).

C. Reply Affidavit of Mark Peters (November 23, 2020).

D. Reply Affidavit of Timothy R. Davis (November 20, 2020).

E. Affidavit of Christian M. Dippon, Ph.D. (November 23, 2020).

Reply Exhibit A

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. DUKE ENERGY FLORIDA, LLC, Defendant.	Proceeding No. 20-276 Bureau ID No. EB-20-MD-003

REPLY AFFIDAVIT OF DANIEL P. RHINEHART
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF TEXAS)
) ss.
COUNTY OF WILLIAMSON)

I, Daniel P. Rhinehart, being sworn, depose and say:

1. I am employed by AT&T Services, Inc., a services affiliate of Complainant BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T"). As Director – Regulatory, I support AT&T and AT&T-affiliated entities with respect to the development of pole attachment rates pursuant to Federal Communications Commission ("FCC") and state formulas. I executed a prior Affidavit dated August 24, 2020 in support of AT&T's Pole Attachment Complaint against Duke Energy Florida, LLC ("Duke Florida").[1] I am executing this Reply Affidavit to correct and respond to certain statements made by Duke Florida's witnesses in declarations and an affidavit submitted with its October 30, 2020 Answer. I know

[1] Compl. Ex. A at ATT0001-21 (Aff. of D. Rhinehart, Aug. 24, 2020).

the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

A. Duke Florida's Answer Confirms the Validity of My Rate and Overpayment Calculations.

2. Duke Florida did not include any FCC rate calculations or overpayment calculations in its Answer, provided only a high-level criticism of my rate calculations,[2] and advocated for grossly inflated new telecom rates calculated by its attorneys.[3] Having reviewed the rate analysis in Duke Florida's Answer[4] and the Declaration submitted by its Director of Rates and Regulatory Planning, Marcia Olivier,[5] I confirm that my prior calculations were correct, and that Duke Florida has proposed inflated rates that do not comply with FCC methodology.

3. In addition, because Ms. Olivier included a new telecom rate for the 2020 rental year in her Declaration,[6] I calculated the per-pole rental rates that result from the new telecom and pre-existing telecom rate formulas for AT&T's use of Duke Florida's poles during the 2020 rental year. I completed these calculations in the same manner described in my opening Affidavit.[7] A complete set of my rate calculations for the 2015 through 2020 rental years is

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[2] Answer Ex. D at DEF000174 (Olivier Decl. ¶¶ 11-12).

[3] *See* Answer ¶ 12 (calculating "new telecom rates" by multiplying its declarant's rates by [redacted]).

[4] *Id.* ¶¶ 12, 22, 31, 37, 38.

[5] Answer Ex. D at DEF000169-201 (Olivier Decl.).

[6] *Id.* at DEF000173 (Olivier Decl. ¶ 10). Ms. Olivier displays "CATV" and CLEC" rates. I assume the "CLEC" rate for 2020 is Duke Florida's new telecom rate.

[7] Compl. Ex. A at ATT00003-06, ATT00009 (Rhinehart Aff. ¶¶ 4-11, 16-17).

attached as Exhibit R-5 (rate development) and Exhibit R-6 (weighted average cost of capital).[8] They show that the properly calculated new telecom rate for AT&T's use of Duke Florida's poles during the 2020 rental year is $5.08 per pole and the properly calculated pre-existing telecom rate for AT&T's use of Duke Florida's poles during the 2020 rental year is $7.70 per pole.

1. Duke Florida Incorrectly Calculates the New and Pre-Existing Telecom Rates for AT&T's Use of Duke Florida's Poles.

4. Duke Florida miscalculates new telecom rates for AT&T that are up to [redacted] times the new telecom rates permitted by Commission rules and up to [redacted] per pole higher than the new telecom rates Duke Florida calculated for AT&T's competitors:

Comparison of Per-Pole New Telecom Rate Calculations					
Rental Year	2015	2016	2017	2018	2019
Properly calculated new telecom rate[9]	$4.56	$4.46	$4.51	$4.78	$4.54
New telecom rate Duke Florida calculated for AT&T's competitors[10]	$7.74	$7.81	$5.37	$5.00	$4.99
Duke Florida's proposed new telecom rate to charge AT&T[11]	[redacted]				

[8] My calculations for the 2015 through 2019 rental years are the same as those attached to my prior Affidavit. My calculation of Duke Florida's rate of return for the 2020 rental year is based on information provided in the excerpt of Duke Florida's filing at the Florida Public Service Commission attached to Ms. Olivier's Declaration at DEF000201.

[9] Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1).

[10] Answer Ex. D at DEF000173 (Olivier Decl. ¶ 10); *see also* Duke Florida's Resp. to AT&T's Interrogs., Ex. 2 at DEF000007-08. These rates show that Duke Florida inappropriately delayed implementation of the Commission's 2015 revisions to the new telecom formula to bring "parity to pole attachment rates at the cable rate formula level." *See In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 30 FCC Rcd 13731, 13739 (¶ 19) (2015). In 2015 and 2016, Duke Florida charged $5.14 and $5.20 cable rates, respectively, but $7.74 and $7.81 telecom rates. *See* Answer ¶ 31.

[11] Answer ¶¶ 12, 31, 37.

5. Duke Florida also miscalculates pre-existing telecom rates for AT&T that are far higher than permitted by Commission rules. Because the pre-existing telecom rate is by rule about 1.51 times a new telecom rate,[12] I converted the rates Duke Florida calculated for AT&T's competitors into pre-existing telecom rates. My analysis shows that Duke Florida's calculation of pre-existing telecom rates for AT&T are up to [redacted] times the pre-existing telecom rates permitted by Commission rules and up to [redacted] per pole higher than the pre-existing telecom rates converted from the rates Duke Florida calculated for AT&T's competitors:

Comparison of Per-Pole Pre-Existing Telecom Rate Calculations					
Rental Year	2015	2016	2017	2018	2019
Properly calculated pre-existing telecom rate[13]	$6.91	$6.76	$6.83	$7.25	$6.89
Pre-existing telecom rate converted from rates Duke Florida calculated for AT&T's competitors[14]	$7.76	$7.85	$8.11	$7.55	$7.53
Duke Florida's proposed pre-existing telecom rate to charge AT&T[15]	[redacted]				

6. Duke Florida's rate calculations violate Commission rules and the Commission's principle of competitive neutrality, as they would charge AT&T far more than its competitors.

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[12] A properly calculated new telecom rate for use of Duke Florida's poles using the FCC's presumptive inputs is 0.66 times the pre-existing telecom rate. *See* 47 C.F.R. § 1.1406(d); Compl. Ex. A at ATT00006 (Rhinehart Aff. ¶ 10). This means that the pre-existing telecom rate is about 1.51 times the properly calculated new telecom rate (1 / 0.66 = 1.51). The 1.51 ratio is an approximation of the actual calculation result, which yields 1.515151… In practice, the pre-existing telecom rate can simply be derived by dividing the new telecom rate by 0.66.

[13] Compl. Ex. A at ATT00009, ATT00013-14 (Rhinehart Aff. ¶ 17 & Ex. R-1).

[14] For the 2017 through 2019 rental years, this row converts the "CLEC" rates Ms. Olivier provides into pre-existing telecom rates. For the 2015 and 2016 rental years, because Duke Florida's new telecom rates should have approximated its cable rates, this row converts the "CATV" rates Ms. Olivier provides into pre-existing telecom rates. *See* Answer Ex. D at DEF000173 (Olivier Decl. ¶ 10) (listing "CATV" and "CLEC" rates); *see also* Answer ¶ 12 n.36 (using 2015 and 2016 "CATV" rates for comparative purposes).

[15] Answer ¶¶ 22, 38; Answer Ex. D at DEF000175 (Olivier Decl. ¶ 13).

The errors result in grossly and artificially inflated rental rates, which would overcompensate Duke Florida by capturing far more than the 7.4% of pole costs covered by a properly calculated and fully compensatory new telecom rate and the 11.2% of pole costs covered by a properly calculated pre-existing telecom rate in Duke Florida's urban service area.[16]

7. There are four main differences between the rates that Duke Florida calculated and the rates that I calculated for AT&T's use of Duke Florida's poles. In each instance, my calculation is correct under FCC methodology.

8. *First*, Ms. Olivier criticizes my deduction of accumulated deferred income taxes ("ADITs") from net plant figures when calculating net pole investment, but admits my calculation is "consistent with the FCC formula."[17] Net pole investment is calculated under the FCC's methodology by reducing the gross investment shown in FERC Form 1 for Account 364 (Poles, Towers & Fixtures), by the depreciation and deferred tax reserves assigned or allocated to this account.[18] By failing to deduct the accumulated deferred taxes, Ms. Olivier inappropriately computes a higher net pole investment than permitted. Moreover, she criticizes my adherence to the FCC formula based only on the claim that the Florida Public Service Commission ("FPSC") includes ADITs as "a zero-cost item in the capital structure."[19] She fails to note, however, that I did *not* include deferred taxes as a zero cost item in my calculation of Duke Florida's weighted

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[16] *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, 5299, 5305 (¶¶ 137, 150 n.453) (2011) ("*Pole Attachment Order*").

[17] Answer Ex. D at DEF000174 (Olivier Decl. ¶ 11) ("One method is for ADITs to be included as a reduction to rate base. This is consistent with the FCC formula.").

[18] *Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Order on Reconsideration, 16 FCC Rcd 12103, 12122-123 (¶ 32), 12161 (¶ 121), 12176 (App'x E-2) (2001) ("*Consolidated Partial Order*").

[19] Answer Ex. D at DEF000172 (Olivier Decl. ¶ 8).

average cost of capital.[20] Accordingly, I was consistent in my calculation of net pole investment and weighted average cost of capital by excluding deferred taxes from each.

9. *Second*, Ms. Olivier provided a different calculation of Duke Florida's weighted average cost of capital that includes deferred taxes as costless capital.[21] I used the same data that Ms. Olivier provided to calculate a weighted average cost of capital that does not include deferred taxes as costless capital (consistent with FCC methodology).[22] In theory, Ms. Olivier's approach of developing net investment without deducting deferred taxes combined with cost of capital reflecting inclusion of deferred taxes as costless capital, should produce a similar outcome as mine where deferred taxes are included as a reduction to investment and excluded from the computation of cost of capital.[23] Regardless, Ms. Olivier's approach is inconsistent with FCC methods.

10. *Third*, Ms. Olivier apparently departs from the presumptive input for space occupied by a communications attacher (1 foot) and average number of attaching entities (5).[24] The use of the presumptive value, however, is required for all communications attachers, including AT&T, because Duke Florida has offered no data to support a different value, let alone credible, statistically reliable data that rebuts the presumption.

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[20] Compl. Ex. A at ATT00016 (Rhinehart Aff., Ex. R-2).

[21] Answer Ex. D at DEF000172 (Olivier Decl. ¶ 8).

[22] *Compare* Compl. Ex. A at ATT00016 (Rhinehart Aff., Ex. R-2) *and* Compl. Ex. 19 at ATT00213-236 *with* Answer Ex. D at DEF000190-201 (Olivier Decl., Ex. D-2).

[23] Answer Ex. D at DEF000174 (Olivier Decl. ¶ 11) ("It is a common principal of rate making that either method produces the same revenue requirement and cost-based rates.").

[24] *See* Answer ¶ 22; Answer Ex. D at DEF000175 (Olivier Decl. ¶ 13).

11. With respect to space occupied by AT&T, Ms. Olivier uses a [redacted]-foot value as the "space occupied" input when calculating pre-existing telecom rates,[25] apparently relying on Duke Florida's flawed argument that, contrary to established Commission precedent, AT&T should be assigned 3.33 feet of safety space and [redacted] feet of space based on where AT&T's facilities are placed on a pole instead of how much space they occupy.[26] The Commission already found that the 3.33 feet of safety space is "usable and used by the electric utility."[27] Duke Florida concedes that it cannot lawfully charge AT&T's competitors for use of that safety space, and for the same reason, it cannot lawfully charge AT&T for the space.[28] And the [redacted] foot measurement is wholly unreliable and insufficient to rebut the presumption. It is the result of a mathematical calculation that pairs a presumptive value with a measurement Mr. Freeburn, Duke Florida's Joint Use Manager, says he obtained from a contractor who, as part of Duke Florida's "third-party pole attachment process," performed "field surveys" on 941 Duke Florida poles to which AT&T is attached.[29] This hearsay based on a sample of unidentified poles, reflecting about 1.5 percent of the Duke Florida poles to which AT&T is attached, is neither

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[25] Answer ¶ 22 and Answer Ex. D at DEF000175 (Olivier Decl. ¶ 13).

[26] *See* Answer ¶ 12.

[27] *Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51) ("the 40-inch safety space … is usable and used by the electric utility"); *see also BellSouth Telecommunications LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, 35 FCC Rcd 5321, 5330 (¶ 16) (EB 2020) ("*FPL 2020 Order*") ("The communication space should not be attributed to AT&T because … AT&T's attachments do not actually occupy the communications safety space."); *see also* Reply Ex. C at ATT00283-284 (Peters Reply Aff. ¶ 17).

[28] *See* Answer ¶ 12 n.34 (admitting that "the Commission has already determined that CATV and CLEC attachers should not bear this cost").

[29] Answer Ex. A at DEF00132 (Freeburn Decl. ¶ 12).

random nor verifiable.[30] The purported [redacted] feet also includes more space than AT&T "actually occupied."[31] Duke Florida explains that it reflects the difference between a presumptive average minimum ground clearance height of 18 feet[32] and the unsubstantiated claim that AT&T's facilities were placed at about [redacted] above ground on the 941 poles.[33] Duke Florida has thus not provided statistically valid data that rebuts the presumption that a communications attacher occupies, on average, 1 foot of space.[34]

12. With respect to the average number of attaching entities input, Ms. Olivier apparently used a [redacted] input in place of the FCC's presumption that there are 5 attaching entities on Duke Florida's poles.[35] Duke Florida provides no support for its alternate number except to state that it is "based on survey data collected by VentureSum, our contractor, during a 2017 survey of all DEF poles."[36] It is impossible to verify this claim because Duke Florida did not provide the survey data as required by Commission rules.[37] The Commission's rules thus require use of the presumptive input.

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[30] *See also Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19866, 19869 (¶¶ 18, 25) (2002) (requiring that survey data be "statistically valid" and submitted).

[31] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) ("[U]nder the Commission's rate formula, 'space occupied' means space that is 'actually occupied ....'").

[32] *See* Answer ¶ 12 (citing *In re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6465 (¶ 16) (2000)).

[33] Answer Ex. A at DEF000132 (Freeburn Decl. ¶ 12).

[34] 47 C.F.R. § 1.1410.

[35] Answer ¶ 22 and Answer Ex. D at DEF000175 (Olivier Decl. ¶ 13); *see* 47 C.F.R. § 1.1409(c); Compl. Ex. A at ATT00004-05 (Rhinehart Aff ¶ 7).

[36] Answer Ex. A at DEF000139 (Freeburn Decl. ¶ 28).

[37] *See Teleport Commc'ns Atlanta*, 17 FCC Rcd at 19866, 19869 (¶¶ 18, 25) (requiring that survey data be "statistically valid" and submitted); *see also* 47 C.F.R. § 1.726(b).

13. *Fourth*, Duke Florida's attorneys (but not Ms. Olivier) incorrectly state that a new telecom rate for use of 1 foot of space can be "multiplied by the … usable space occupied" to calculate a new telecom rate for an attacher that occupies more than one foot of space.[38] This is incorrect. The Commission has held that multiple-foot occupancy by an attacher cannot be assessed as a simple multiple of a one-foot new telecom rate.[39] Rather, the new telecom formula includes a "space occupied" input that can be adjusted if reliable, actual data show that a communications attacher occupies, on average, more than the presumptive one foot of space on a utility's poles.[40] Adherence to the formula is crucial because proper application of the formula ensures that the unusable space on the pole is equally divided among the attaching entities as required.[41] The multiplication approach advocated by Duke Florida's lawyers would instead allow Duke Florida to significantly over-recover for the unusable space by double-collecting (or more) from certain attachers.

14. For example, my prior Affidavit calculates proportional new telecom rates for Duke Florida's use of AT&T's poles using 10.5 feet as the space occupied input consistent with the Commission's regulations.[42] For the 2019 rental year, the correct proportional new telecom rate is $10.31 per pole.[43] Had I instead calculated a 1-foot rate and multiplied it by 10.5 feet as

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[38] Answer ¶ 12.

[39] *Consolidated Partial Order*, 16 FCC Rcd at 12122 (¶ 31) (the Commission's rate formulas "determine the maximum just and reasonable rate *per pole*") (emphasis added).

[40] *See* 47 C.F.R. § 1.1406(d)(2).

[41] *See* Compl. Ex. A at ATT00005 (Rhinehart Aff. ¶ 6) (showing space factor calculation); *see also* 47 U.S.C. § 224(d)(2) (requiring "equal apportionment of [unusable space] costs among all attaching entities").

[42] Compl. Ex. A at ATT00007, ATT00021 (Rhinehart Aff., ¶ 14 & Ex. R-4); *see also* Compl. Ex. C at ATT00037 (Peters Aff. ¶ 12 n.5).

[43] Compl. Ex. A at ATT00007, ATT00021 (Rhinehart Aff., ¶ 14 & Ex. R-4).

Duke Florida advocates, Duke Florida's rate for use of AT&T's pole would be $33.18 per pole—almost $23 higher per pole.

15. Ms. Olivier, who is Duke Florida's Director of Rates and Regulatory Planning, apparently recognizes the flaw in the multiplication approach because she does not defend it in her Declaration and uses the "space occupied" input to calculate rates under the pre-existing telecom rate formula.[44] This is evident from the fact that she calculates pre-existing telecom rates that are about [redacted] *lower* than the multiplied new telecom rates Duke Florida proposes.[45] But by regulation, properly calculated pre-existing telecom rates are about 1.5 times properly calculated new telecom rates.[46]

16. Because Duke Florida's and Ms. Olivier's criticisms are misplaced, I continue to conclude that the properly calculated new telecom rates for AT&T's use of Duke Florida's poles during the 2015 through 2019 rental years are $4.56, $4.46, $4.51, $4.78, and $4.54 per pole, respectively.[47] And, as noted above, the properly calculated new telecom rates for AT&T's use of Duke Florida's poles during the 2020 rental year is $5.08 per pole.[48]

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[44] *See* Answer Ex. D at DEF000175 (Olivier Decl. ¶ 13). Mr. Metcalfe acknowledges this as well, as he states that a new telecom rate for one foot of space occupied is 7.39% of the pole cost, and that a new telecom rate for two feet of space occupied is 9.15% of the pole cost—and not double the 7.39% one-foot rate. *See* Answer Ex. E at DEF000219 (Metcalfe Aff. ¶ 34).

[45] *Compare* Answer Ex. D at DEF000175 (Olivier Decl. ¶ 13) (alleging pre-existing telecom rates ranging from [redacted] to [redacted] per pole) *with* Answer ¶ 12 (alleging new telecom rates ranging from [redacted] to [redacted] per pole).

[46] *See* 47 C.F.R. § 1.1406(d); Compl. Ex. A at ATT00006 (Rhinehart Aff. ¶ 10).

[47] Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1).

[48] *See* Ex. R-5.

2. Duke Florida Did Not Dispute My Overpayment Calculations.

17. In my prior Affidavit, I calculated AT&T's overpayments as compared to just and reasonable rates by comparing the net rental amount that AT&T has paid Duke Florida to the net rental amount that AT&T would have paid if both companies paid proportional new telecom rates. My overpayment calculation showed that AT&T overpaid Duke Florida by [redacted] in net pole rent for the 2015 through 2019 rental years using proportional new telecom rates.[49] Duke Florida has not criticized any aspect of my calculation (aside from the new telecom rates that I calculated for AT&T's use of Duke Florida's poles), and it remains the correct valuation of AT&T's overpayment for the 2015 through 2019 rental years.

18. I also calculated AT&T's overpayments as compared to the net rental amount that AT&T would have paid if both companies paid proportional rates calculated using the FCC's pre-existing telecom rate formula, meaning the telecom rate formula in effect prior to the 2011 *Pole Attachment Order*.[50] I completed that calculation because the FCC set pre-existing telecom rates as a "hard cap" under the 2018 *Third Report and Order*, and as a "reference point" under the 2011 *Pole Attachment Order*, on the rental rate that may be charged an ILEC that has net benefits under a joint use agreement that materially advantage the ILEC over its competitors.[51] Duke Florida has not criticized any aspect of my [redacted] overpayment calculation (aside from the pre-existing telecom rates that I calculated for AT&T's use of Duke Florida's poles),

[49] Compl. Ex. A at ATT00007-08, ATT00021 (Rhinehart Aff. ¶¶ 13-15 & Ex. R-4).

[50] *Id.* at ATT00010, ATT00021 (Rhinehart Aff. ¶¶ 19-20 & Ex. R-4).

[51] *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7771 (¶ 129) (2018) ("*Third Report and Order*"); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

and it remains the correct valuation of AT&T's overpayment at proportional pre-existing telecom rates for the 2015 through 2019 rental years.

19. It is worth noting that Duke Florida did not challenge the pre-existing telecom rates I calculated for Duke Florida's use of AT&T's poles to calculate this overpayment.[52] The fact that Duke Florida did not challenge my proper application of the Commission's rate formula when calculating rates to be charged Duke Florida for the 2015 through 2019 rental years, coupled with the far lower FCC rates that Ms. Olivier calculated for AT&T's competitors,[53] strongly suggests that Duke Florida's changes to the rate formulas when calculating rates for AT&T are opportunistic and designed to artificially increase rental rates in an effort to try to justify Duke Florida's overcharges under the parties' Joint Use Agreement ("JUA").

B. Duke Florida Has Misrepresented AT&T's Good Faith Negotiations.

20. As I stated in my prior Affidavit, I have personal knowledge of AT&T's good faith negotiations with Duke Florida for a just and reasonable pole attachment rate. I attended two face-to-face meetings with executives from Duke Florida, the first on July 26, 2019 and the second on October 24, 2019. I disagree totally and completely with the allegation of Duke Florida's attorneys that I, or any other member of the AT&T team, approached and conducted the negotiations in bad faith.[54] This self-serving assertion is simply untrue. AT&T participated in the entire process in good faith and with a sincere desire to avoid the need for this complaint proceeding.

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[52] Answer ¶ 38.

[53] Answer Ex. D at DEF000173 (Olivier Decl. ¶ 10); Duke Florida's Resp. to AT&T's Interrogs., Ex. 2 at DEF000007-08.

[54] Answer ¶¶ 7, 9.

21. Throughout the negotiations, AT&T and Duke Florida had diametrically opposed views about AT&T's right to a just and reasonable rate for use of Duke Florida's poles under the JUA, grounded largely in Duke Florida's refusal to acknowledge the applicability of prior Commission orders. That disagreement was present from the beginning of the negotiations. At the first executive-level meeting, Dianne Miller, Director – Construction & Engineering, with responsibility for the National Joint Utility Team, Mark Peters, Area Manager – Regulatory Relations, and I explained that AT&T's request was for just and reasonable rates based on the terms and conditions of the parties' JUA. Duke Florida saw things differently. Their representatives expressed the view that the JUA would first need to be converted to a license agreement in order to obtain any rate reductions and questioned why AT&T insisted on owning poles at all. At the second executive-level meeting, Duke Florida again expressed the view that the JUA would require amendment for AT&T to obtain lower rates. But even if amended, Duke Florida was still not willing to discuss a new telecom rate for AT&T's existing attachments to Duke Florida's poles.[55] As Mr. Hatcher confirms, certain topics were "nonstarters" for Duke Florida, including the new telecom rate formula for AT&T's existing attachments, assigning Duke Florida the cost of the safety space that the FCC has found "usable and used" by the electric utility, and refunds of AT&T's prior overpayments.[56]

22. Duke Florida's sole settlement offer confirms that these issues remain "nonstarters" for Duke Florida. Mr. Hatcher claims that the offer would have resulted in [redacted][57] This is not true, as Duke Florida [redacted]

[55] *See* Answer Ex. B at DEF000156 (Hatcher Decl. ¶ 15) (stating Duke Florida would discuss the new telecom rate *only* for "poles that are not already in joint use").

[56] *See id.* at DEF000157-158 (Hatcher Decl. ¶¶ 16-17).

[57] *Id.* at DEF000158 (Hatcher Decl. ¶ 18).

[redacted][58] But even if the offer would have produced [redacted] that does not speak to the only question that matters, which is whether Duke Florida was willing to negotiate a new rate *based on* the Commission's regulations and Orders.[59] It was not. Duke Florida [redacted][60]

23. As a result, the parties' disagreements on the merits, rather than bad faith on either side, caused negotiations to fail. I considered each of our meetings to be cordial, comprehensive, and business-like. Each party explained the merits of its position at length. And, although representatives for both parties were firm in the merits of their arguments, no one was discourteous or unprofessional. We simply did not see eye to eye.

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[58] *See* Ex. R-7. [redacted]

[59] *See FPL 2020 Order*, 25 FCC Rcd at 5327 (¶ 12) ("AT&T has shown that its attempts to negotiate a new rate with FPL in light of the *Pole Attachment Order* were unsuccessful.").

[60] *See, e.g.*, Answer Ex. 5 at DEF000273 [redacted] "the new telecom rate recovers approximately 7.4% of the fully allocated costs of the pole." [redacted] *See Pole Attachment Order*, 26 FCC Rcd at 5305 (¶ 150 n.453); *see also* Answer Ex. 5 at DEF000276.

24. One aspect of our negotiations that I found particularly frustrating was Duke Florida's refusal to provide any data or information to substantiate its claim that AT&T should continue to pay rates far higher than the new telecom rate. It was not unreasonable to ask for this information. By rule, Duke Florida is required to supply "all information necessary" to understand the rates it charges CLECs and cable companies within 30 days of a request.[61] And the Commission's 2011 *Pole Attachment Order*'s guidance and 2018 *Third Report and Order*'s presumption are both intended to encourage settlement through *informed* negotiations. In Duke Florida's view, it can rely on unsubstantiated allegations during negotiations because it does not think it is "an efficient use of resources outside of a litigated dispute" to conduct the analysis necessary to try to substantiate the rates it is charging.[62] Duke Florida thus forced AT&T to file a pole attachment complaint to obtain the information that should have been part of a good faith effort to resolve this dispute. Having seen the information it has now provided, it confirms that AT&T could never negotiate a competitively neutral rate through negotiations with Duke Florida. As I explain below, Duke Florida seeks to perpetuate the far higher JUA rates based on alleged valuations that are divorced from reality and premised on an irrelevant and hypothetical "'but for' world in which AT&T did not enter into the Joint Use Agreement."[63]

C. Mr. Metcalfe's Valuations Are Irrelevant and Fatally Flawed.

25. I have reviewed the affidavit submitted by Kenneth Metcalfe, which purports to demonstrate the value obtained by AT&T from the mere existence of the JUA. This, of course, does not speak to the only question that is relevant, which is whether the JUA provides AT&T a

[61] 47 C.F.R. § 1.1404(f).

[62] Answer ¶ 15.

[63] *See* Answer Ex. A at DEF000133 (Freeburn Decl. ¶ 15).

net material advantage over its competitors. But even beyond its irrelevance, each of Mr. Metcalfe's valuation theories is fatally flawed.

26. Mr. Metcalfe does not clarify whether he intends his valuation theories to be mutually exclusive or cumulative.[64] But they cannot be cumulative, as they are both redundant and conflicting. They also inappropriately seek to embed one-time non-recurring expenses into an ongoing recurring rate, lack any reasonable link to reality or common sense, count the same flawed costs multiple times, and flatly ignore and violate principles that have long been established by the Commission. They should be rejected.

27. *First*, Mr. Metcalfe alleges that the evergreen clause in the JUA provides AT&T a "benefit of the bargain" that lets each party continue to use joint use poles after termination. This, Mr. Metcalfe says, means AT&T does not have to stand ready to deploy a pole network—alongside Duke Florida's existing network—in the event Duke Florida were to terminate the JUA.[65] This hypothetical duplicative network is of course absurd. Mr. Metcalfe completely ignores the reality that dual pole lines are and have long been contrary to the public interest and the preference of state regulators, local jurisdictions and homeowners. Mr. Metcalfe nonetheless claims to value this spurious "benefit" by charging AT&T for "estimated avoided system replacement costs" that account for the cost "to procure and install poles."[66] All the while, Mr. Metcalfe admits that the evergreen clause does *not* competitively advantage AT&T because "Duke Energy Florida is required by the FCC to provide mandatory access to CLECs and

[64] Answer Ex. E at DEF000234 (Metcalfe Aff., Ex. E-1).

[65] *Id.* at DEF000212 (Metcalfe Aff. ¶¶ 17-18).

[66] *See, e.g., id.* at DEF000234 (Metcalfe Aff., Ex. E-1).

CATVs."[67] In recognizing that "ILECs are at a material disadvantage compared to CLECs and CATVs,"[68] Mr. Metcalfe concedes that his ridiculous theory is irrelevant.

28. *Second*, Mr. Metcalfe assumes that, without the JUA, Duke Florida would have constructed its own pole network or AT&T would, at unsourced and unproven present-day costs, pay "make-ready" to replace every Duke Florida pole on which AT&T is attached. This, of course, cannot be cumulative to Mr. Metcalfe's prior theory because here he assumes that Duke Florida would have built its pole lines and then AT&T would have come along right behind and paid make-ready costs, including the cost of replacement poles. The theory has numerous flaws that further divorce it from reality. Two are particularly striking. First, Mr. Metcalfe ignores that the network has developed over many decades, when pole costs were lower and when AT&T was paying far higher rental rates than its competitors. Mr. Metcalfe includes no offsets or adjustments to account for these realities. Instead, he posits that AT&T would invest [redacted] in pole replacement costs to replace less than 6% of Duke Florida's distribution network (62,323 poles of over 1.1 million distribution poles),[69] when that same amount totals nearly [redacted] of Duke Florida's entire investment in its 1.1 million distribution poles as of the end of 2018.[70] Second, Mr. Metcalfe assumes that every pole would require pole replacement make-ready—meaning that there would never be a case in which rearranging facilities within the communications space could accommodate AT&T.[71] But the Commission found that

[67] *Id.* at DEF000208 (Metcalfe Aff. ¶ 9).

[68] *Id.*

[69] *Id.* at DEF000239 (Metcalfe Aff., Ex. E-3.1).

[70] *See* Duke Florida 2018 FERC Form 1 at 207, line 64g.

[71] *See* Answer Ex. E at DEF000239 (Metcalfe Aff., Ex. E-3.1) (assuming 100% pole replacement make-ready).

"approximately 80 percent of current make-ready work is 'simple'" make-ready that does not require a pole replacement.[72] Mr. Metcalfe's valuation is thus not only fanciful, but grossly exaggerated.

29. *Finally*, Mr. Metcalfe seeks to charge AT&T for space in a manner that conflicts with the Commission's rate methodology that sets rates based on pole space occupied.[73] This theory is inconsistent with his first valuation, as AT&T would not need to pay for any space on Duke Florida's poles if AT&T deploys its own pole line. It is also wrong. Mr. Metcalfe ignores or is not aware of established FCC precedent that assigns the 3.33 feet of safety space to the electric utility.[74] He also departs from precedent in attempting to assign to AT&T 3 feet of space he says the JUA "reserves" for AT&T.[75] But "under the Commission's rate formula, 'space occupied' means space that is 'actually occupied'"[76]—not simply reserved. And, the Commission prohibits utilities from reserving pole space for attachers.[77] Mr. Metcalfe's space valuations are thus fatally flawed and should be afforded no weight.

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[72] *Third Report and Order*, 33 FCC Rcd at 7714-15 (¶¶ 17-18 & n.64).

[73] *See* Answer Ex. E at DEF00022-243 (Metcalfe Aff., Ex. E-4 – E-4A).

[74] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); *Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51) ("the 40-inch safety space … is usable and used by the electric utility"). *But see* Answer Ex. E at DEF000217-219 (Metcalfe Aff. ¶¶ 31-36).

[75] Answer Ex. E at DEF000219-220, DEF000225 (Metcalfe Aff. ¶¶ 37, 49).

[76] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); 47 C.F.R. § 1.1406(d)(2).

[77] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16079 (¶ 1170) (1996) ("*1996 Implementation Order*") ("Permitting an [I]LEC, for example, to reserve space for local exchange service … would favor the future needs of the [I]LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.").

D. Duke Florida's Claims about a 1972 Document Are Wrong and Outdated.

30. Duke Florida relies on an obsolete Bell System Practice, titled Division of Cost Methods in Formulation of Joint Use Agreements, and dated September 1972.[78] I disagree that this document establishes that the JUA rate methodology was ever just and reasonable. But it certainly cannot be disputed that the document does not establish that the JUA rate methodology is just and reasonable today. The document, which is 48 years old, could not possibly account for the significant business, regulatory, legal, and economic changes that have occurred since 1972. Many of the fundamental assumptions of that time have been superseded by statute and FCC rulings on costs and rates. Cable companies were not given the right to just and reasonable rates until 1978, CLECs did not enter the market until 1996, and the right of ILECs to just and reasonable rates was not recognized until 2011.

31. That the Bell System Practice is outdated is apparent from a review of Duke Florida's interrogatory responses in this complaint proceeding. Duke Florida relies on the Bell System Practice because it divides the entirety of the pole cost between just two attachers.[79] Duke Florida's Answer and interrogatory responses tell a different story. Duke Florida has agreements with [redacted] cable companies, [redacted] CLECS and [redacted] wireless providers[80] and 575,292 non-ILEC attachments on its poles.[81] The network of today bears little, if any, resemblance to the network on which Duke Florida relies when it seeks to perpetuate the outdated cost sharing methodologies of the pre-competition era.

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[78] Answer Ex. 6 at DEF000278-294.

[79] Answer ¶ 26.

[80] Duke Florida's Resp. to AT&T's Interrogs., Ex. 2 at DEF000007-08.

[81] *Id.*; *see also* Answer ¶ 21 n.35.

Daniel P. Rhinehart

Sworn to before me on
this 23rd day of November, 2020

Notary Public

ASHLEY GONZALEZ
My Notary ID # 125754879
Expires July 7, 2022

Exhibit R-5

Exhibit R-5 (Page 1 of 2)
Rate Calculation - AT&T Florida's Use of Duke Energy Florida's Poles

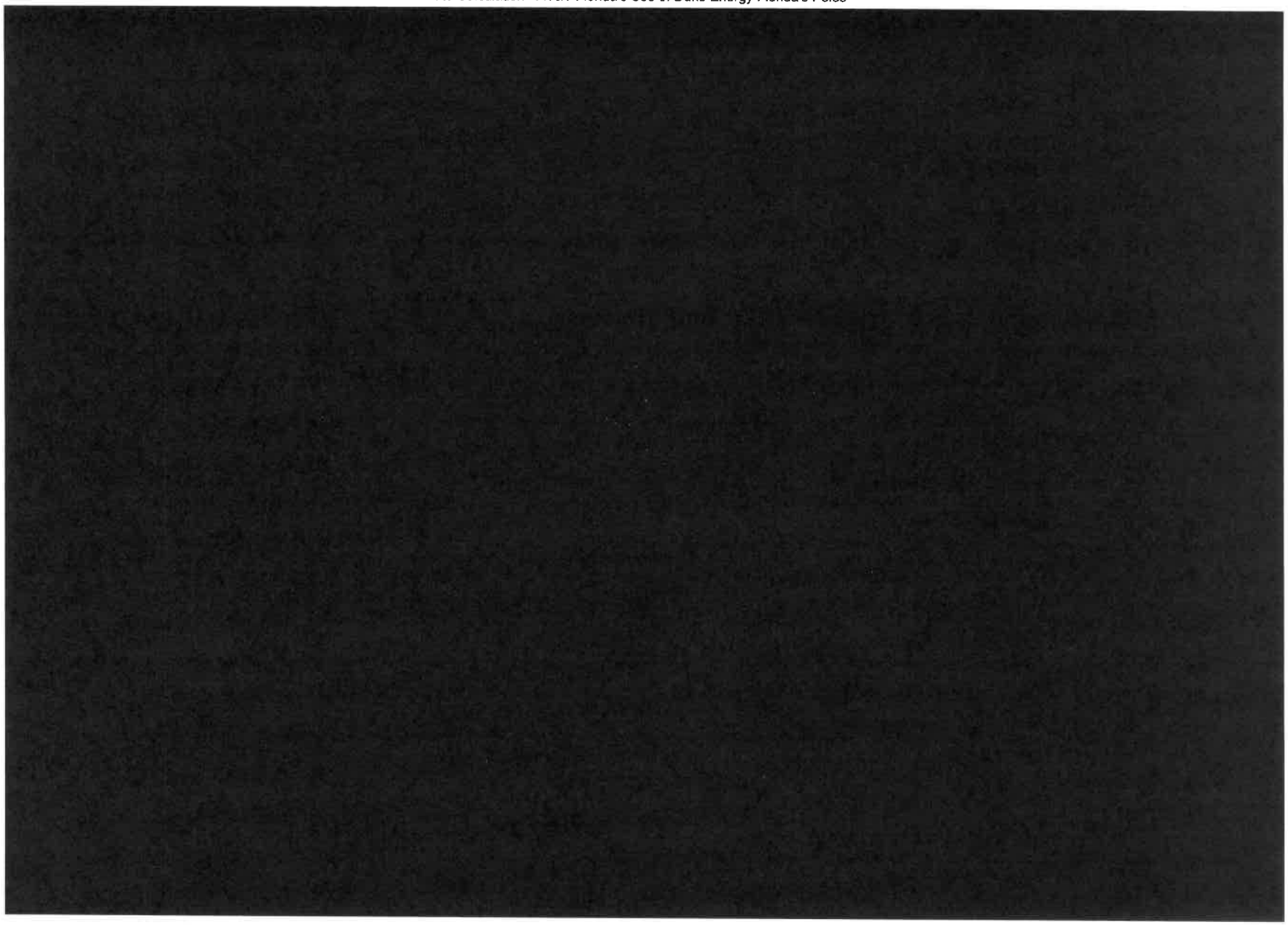


Exhibit R-5 (Page 2 of 2)
Rate Calculation - AT&T Florida's Use of Duke Energy Florida's Poles

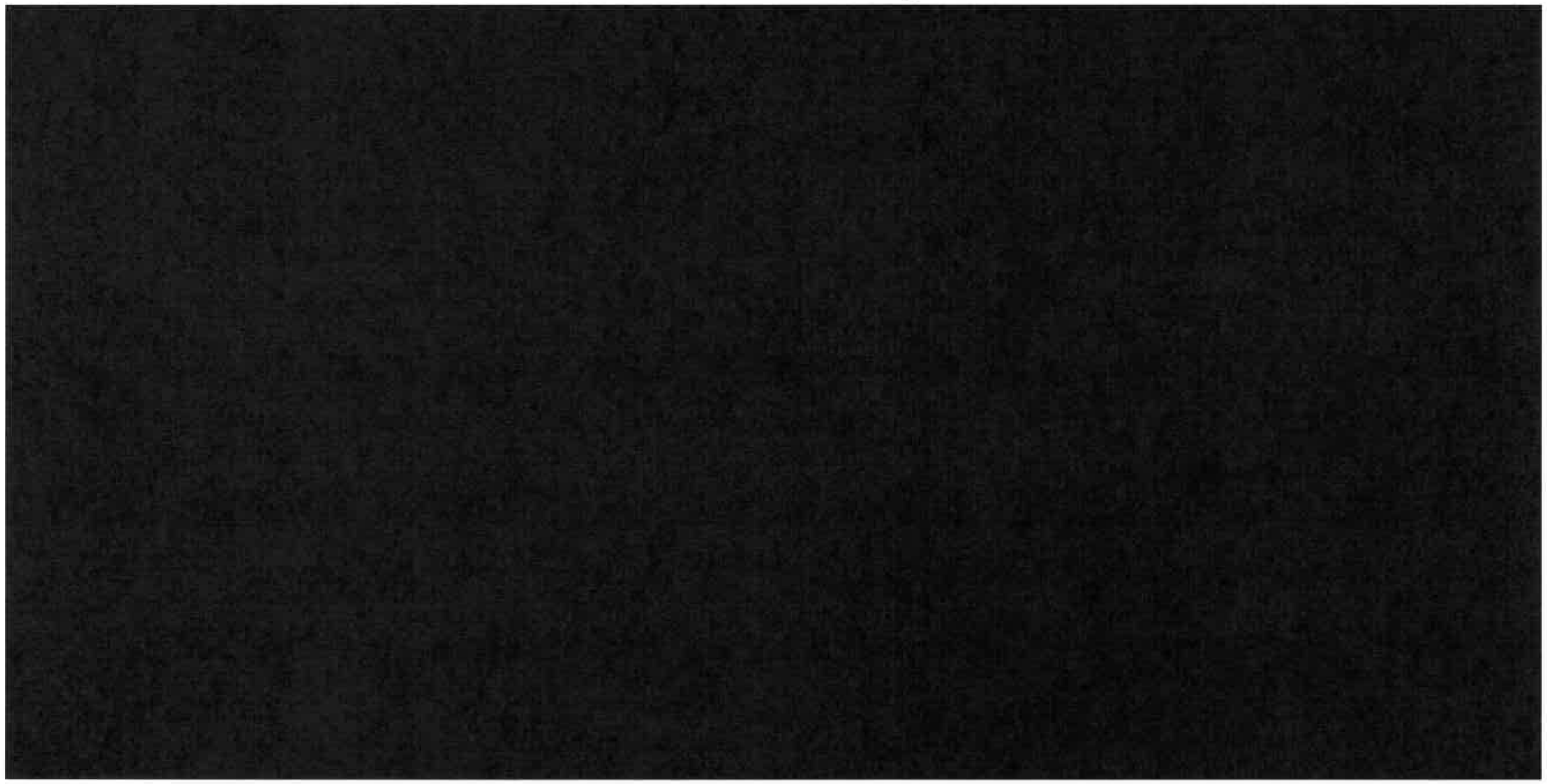


Exhibit R-6

Exhibit R-6

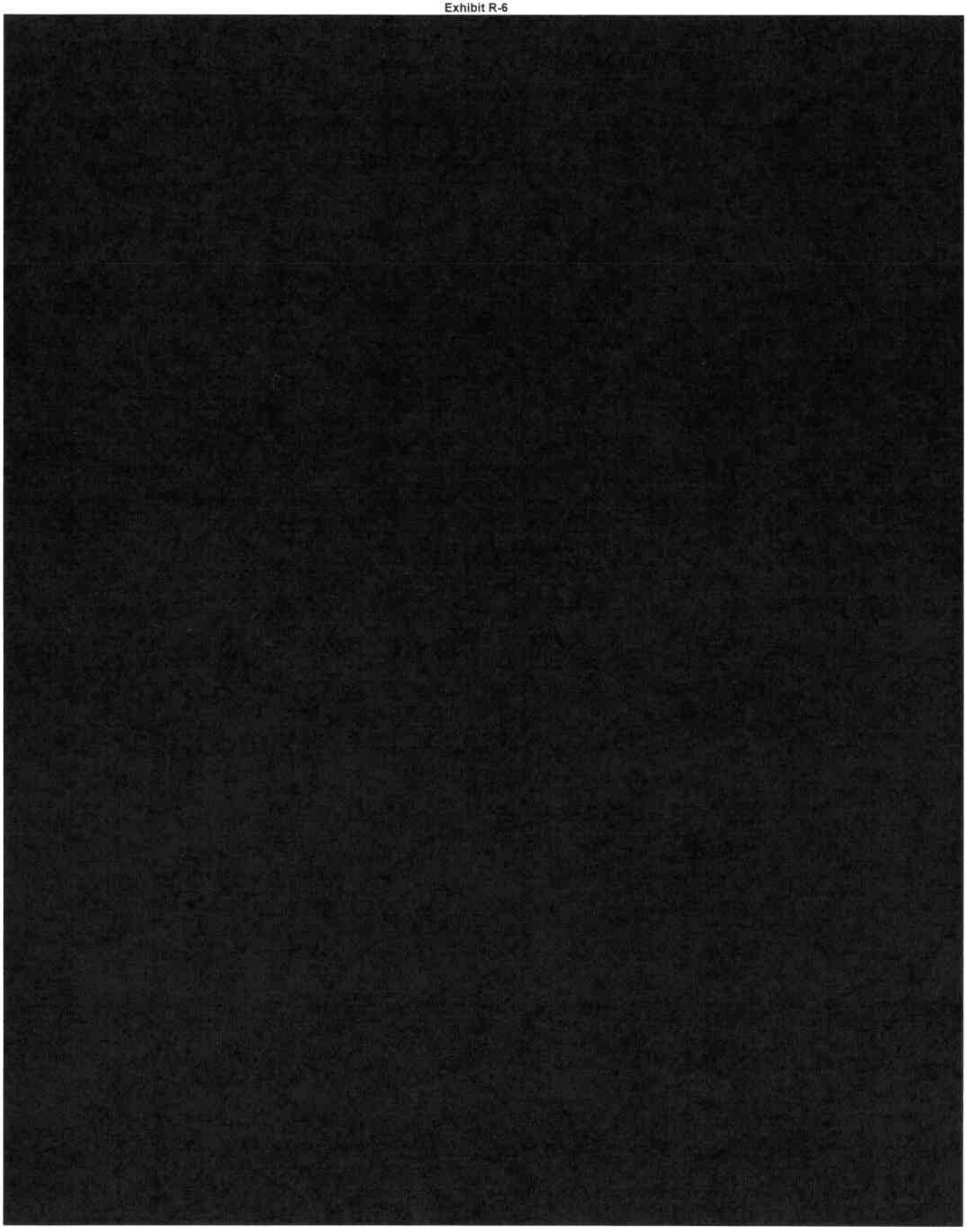
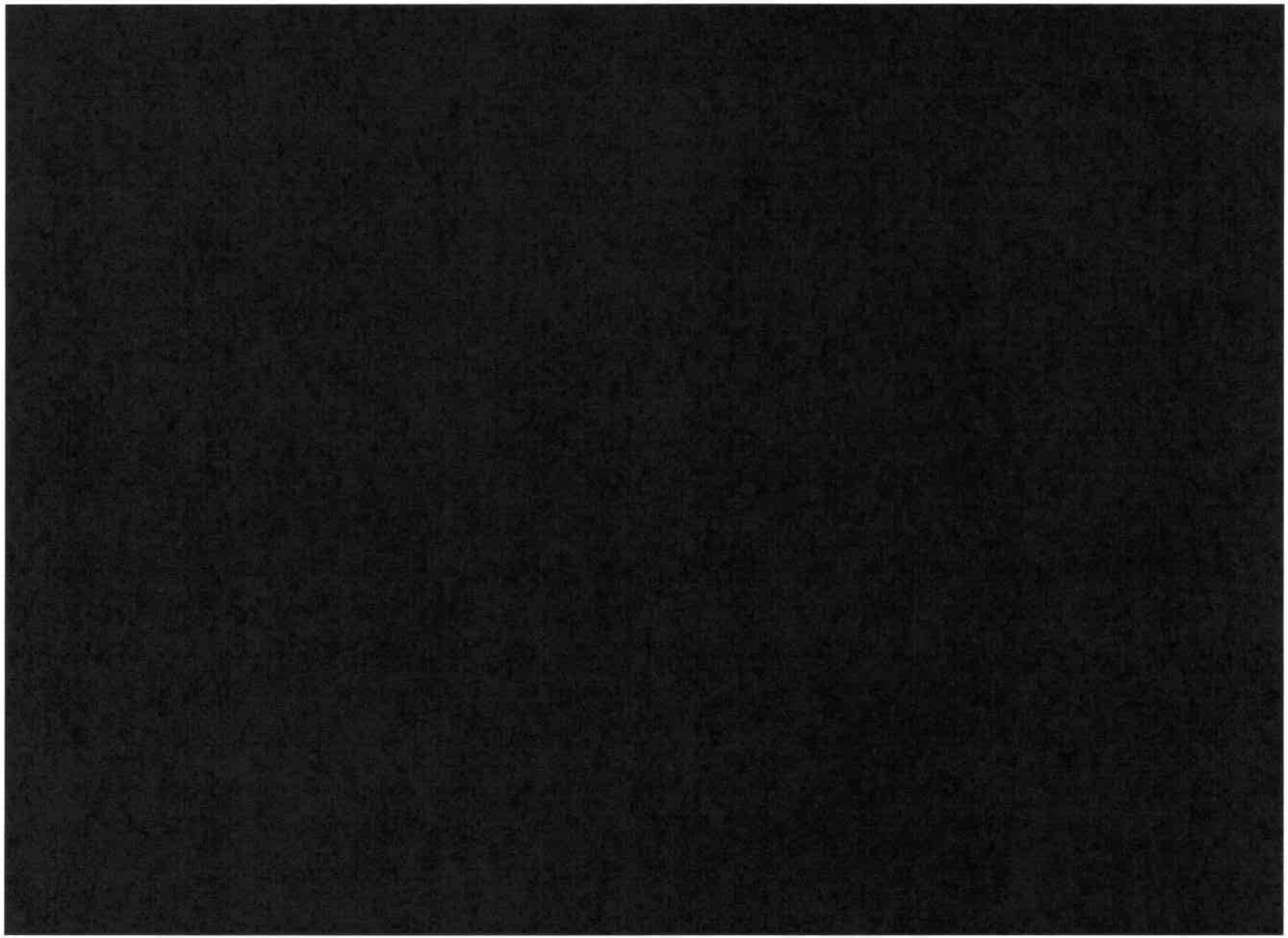


Exhibit R-7

Exhibit R-7
Assessment of Duke Energy Settlement Offer



Reply Exhibit B

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. DUKE ENERGY FLORIDA, LLC, Defendant.	Proceeding No. 20-276 Bureau ID No. EB-20-MD-003

REPLY AFFIDAVIT OF DIANNE W. MILLER
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF TENNESSEE)
) ss.
COUNTY OF SEVIER)

I, Dianne W. Miller, being sworn, depose and say:

1. I am employed by AT&T Services, Inc., a services affiliate of Complainant BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T"). As Director – Construction & Engineering with responsibility for the National Joint Utility Team, I support AT&T and AT&T-affiliated incumbent local exchange carriers ("ILECs") with respect to the negotiation and implementation of joint use agreements with investor-owned, municipal, and cooperative utilities. I executed a prior Affidavit dated August 24, 2020 in support of AT&T's Pole Attachment Complaint against Duke Energy Florida, LLC ("Duke Florida").[1] I am executing this Reply Affidavit to respond to certain statements about the parties' negotiations in

[1] Compl. Ex. B at ATT00023-30 (Aff. of D. Miller, Aug. 24, 2020)..

Duke Florida's October 30, 2020 Answer. I know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

2. I disagree with several statements Duke Florida made about our negotiations. *First*, I vehemently disagree with Duke Florida's unsupported claim that AT&T negotiated with Duke Florida in bad faith.[2] I think it is noteworthy that this allegation of bad faith is *only* in Duke Florida's Answer, and *not* mentioned in the Declarations filed by Mr. Freeburn and Mr. Hatcher, who attended both of our executive-level meetings. I approached, and at all times conducted, the negotiations with Duke Florida in good faith and I know that the rest of the AT&T negotiating team did as well. We were not able to reach a settlement, but I attribute that to Duke Florida's unwillingness to accept prior Commission precedent or ever proffer an offer promised for nearly nine months before this case was filed, and absolutely not to any bad faith or improper dealing by either party. Duke Florida's Answer is consistent with this conclusion, as it makes the same arguments on which it would not yield during our negotiations.

3. *Second*, Duke Florida is simply wrong when it claims that we approached the negotiations without the "level of vision and intellectual honesty that allows both parties an opportunity to achieve an efficient resolution of a dispute."[3] From the beginning of the negotiations, we tried to make the negotiations *more* efficient by ensuring that they were informed by the relevant data and information.[4] Understanding Duke Florida's costs and the

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[2] *See* Answer ¶ 9.

[3] *Id.*

[4] *See, e.g.*, Compl. Ex. 6 at ATT00174 ("To facilitate our discussions, we request that Duke Energy provide us its 2018 new telecom rate calculations … so that we can all be better informed

terms and conditions of its license agreements is essential to successful negotiations under the Commission's regulations and orders because they are designed to "reduce the number of disputes regarding pole attachment rates" by "enabl[ing] *better informed* pole attachment negotiations."[5] Duke Florida instead wanted us to accept Duke Florida's word that AT&T should continue paying the JUA rates and trust that Duke Florida would be able to support its claims if litigation were filed.[6] This is not the way to facilitate an informed settlement. And now having seen Duke Florida's Answer and supporting Declarations, Affidavit, and Exhibits, it is clear that its claims were unfounded.

4. Unfortunately, Duke Florida is not alone in its wait-and-see approach, and it has complicated negotiations for AT&T and its affiliates nationwide, requiring the filing of far more pole attachment complaints than we expected or would prefer. Electric utilities routinely posture during our negotiations and make claims without reference to cost data, relevant agreement language, or prior precedent. It is essentially impossible to reach a settlement that is consistent with the Commission's regulations and orders[7] when an electric utility withholds information

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about the rental rate that AT&T is entitled to under federal law. Also, if Duke Energy believes that a rate higher than the new telecom rate is justified by net competitive advantages, we request copies of Duke Energy's executed license agreements and all data and quantifications that support its claim.").

[5] *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7771 (¶ 129) (2018) ("*Third Report and Order*") (citation omitted) (emphasis added).

[6] *See, e.g.*, Answer ¶ 9 ("In two separate face-to-face meetings between representatives of the parties, DEF offered numerous valid reasons to retain the existing cost-sharing relationship .... Though DEF had not, at the time of those face-to-face meetings, endeavored to perform any kind of precise economic quantification of those competitive advantages, ... AT&T's 'not until you show me' approach is neither intellectually honest nor efficient.").

[7] *See BellSouth Telecommunications LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, 35 FCC Rcd 5321, 5327 (¶ 12) (EB 2020) ("*FPL 2020 Order*") ("AT&T has shown that its attempts to negotiate a new rate with FPL in light of *the Pole Attachment Order* were unsuccessful.").

during negotiations and requires a pole attachment complaint proceeding before it will make any attempt to collect much less disclose even a portion of the relevant information. Simply put, that is what happened here. (Duke Florida has still refused to provide more than 3 of its over [redacted] executed license agreements.)

5. Also like many electric utilities, Duke Florida scuttled our negotiations by refusing to honor, respect, and abide by the Commission's prior rulings on issues central to our discussions. For example, the Commission expressly applied its new telecom rate presumption to existing agreements,[8] but Duke Florida would only discuss a new telecom rate for "poles that are *not* already in joint use."[9] The Commission set the pre-existing telecom rate as a "hard cap" on rates that may be charged ILECs to help provide certainty during negotiations and "limit pole attachment litigation."[10] But Duke Florida argued that AT&T should continue paying the JUA rates,[11] which are up to [redacted] per pole *higher* than properly calculated pre-existing telecom rates—and about [redacted] per pole *higher* than the inflated pre-existing telecom rates Duke Florida calculated for its Answer.[12] The Commission amended its rules to ensure refunds would be available for prior overpayments and expressly "decline[d] the invitation … to preclude

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

[9] Answer Ex. B at DEF000156 (Hatcher Decl. ¶ 15) (emphasis added). To clarify, Duke Florida was only willing to *discuss* new telecom rates for poles that are not already in joint use. Despite its contrary allegations, Duke Florida never made a formal offer that included new telecom rates for future poles, so there was no "proposal" for AT&T to consider or reject. *See* Answer ¶ 31.

[10] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129).

[11] *See* Answer ¶ 9 (claiming Duke Florida "offered numerous … reasons to retain the existing cost-sharing relationship" during "two separate face-to-face meetings between representatives of the parties").

[12] *See* Answer ¶ 22; *see* Reply Ex. A at ATT00241 (Rhinehart Reply Aff. ¶ 5).

monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge."[13] But Duke Florida "made clear that retroactive refunds were a nonstarter." [14]

6. Duke Florida also refused to accept the Commission's rulings on issues related to the benefits it relied on. It claimed that it built "taller and stronger poles than necessary to meet its own service obligations" to accommodate AT&T,[15] but the Enforcement Bureau rightly recognized that electric utilities "did not build [their] poles just to accommodate AT&T" given that cable companies have required space on utility poles for more than 40 years and CLECs for nearly 25 years.[16] Duke Florida said it "was a nonstarter" for Duke Florida to "bear[ ] the entire cost of the safety space,"[17] even though the Commission has repeatedly held that "[t]he [safety] space is usable and used by the electric utilities."[18] And Duke Florida seeks to value AT&T's access to Duke Florida's poles at the cost of a full duplicative network,[19] when the Enforcement Bureau rejected a similar attempt to "calculate the monetary value of AT&T's guaranteed access by assuming that, without the JUA, AT&T would have built a duplicate pole network."[20]

7. Our negotiations with Duke Florida are a textbook example of why our efforts to negotiate just and reasonable rates have been so fruitless. We did not "merely dismiss[ ]"

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[13] *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, 5290 (¶ 112) (2011) ("*Pole Attachment Order*").

[14] Answer Ex. B at DEF000158 (Hatcher Decl. ¶ 17).

[15] *Id.* at DEF000152 (Hatcher Dec. ¶ 6).

[16] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15).

[17] Answer Ex. B at DEF000157 (Hatcher Decl. ¶ 16).

[18] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) (citation omitted).

[19] Answer Ex. E at DEF000212 (Metcalfe Aff. ¶ 18) ("To quantify this benefit, I have calculated the costs AT&T would incur to replace the network AT&T currently has in place on the joint use poles owned by Duke Energy Florida ….").

[20] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15).

alleged advantages Duke Florida raised during our meetings.[21] We instead discussed each issue raised and explained why we did not think it justified a rate higher than the new telecom rate under the Commission's regulations and orders. In response, Duke Florida insisted we accept arguments the Commission has already rejected, preventing the parties from establishing even the most basic foundation from which to negotiate. On these terms, a deal was clearly not possible.

8. *Third*, I disagree with Duke Florida's unsupported speculation that, "for all it appears, AT&T itself viewed the joint use agreement as just and reasonable until very recently."[22] AT&T has long sought relief from the unjust and unreasonable rates imposed by electric utilities, including in the rulemaking proceedings that resulted in the FCC's 2011 and 2018 Orders. Since those Orders were issued, AT&T gave the Enforcement Bureau time to decide some other cases and gave Duke Florida time to voluntarily conform its rates to the law. That is all. AT&T did not condone Duke Florida's exceptionally high rental rates, which require significant reductions to ensure just and reasonable and competitively neutral rates in Florida.

9. *Finally*, I disagree that our request for just and reasonable rates seeks "to undermine the Joint Use Agreement" or torpedo "the potential for the joint use network to … actually deploy wireline broadband to places that don't already have it."[23] As with so many of Duke Florida's arguments, the Commission has rejected this one as well. "By keeping pole attachment rates unified and low, [the Commission will] further [its] overarching goal to accelerate deployment of broadband by removing barriers to infrastructure investment and

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[21] *See* Answer Ex. B at DEF000154 (Hatcher Aff. ¶ 11).

[22] Answer ¶ 23.

[23] Answer Ex. B at DEF000159 (Hatcher Decl. ¶ 19).

promoting competition."[24] AT&T should pay the same fully compensatory new telecom rates its competitors are guaranteed.

Dianne W. Miller

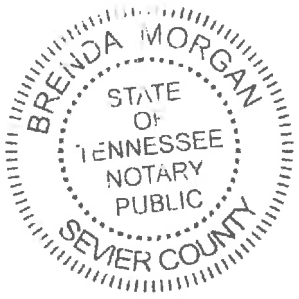
Dianne W. Miller

Sworn to before me on
this 20 day of November, 2020

Brenda Morgan

Notary Public

Exp aug 24-2021



[24] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 30 FCC Rcd 13731, 13733 (¶ 4) (2015).

Reply Exhibit C

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. DUKE ENERGY FLORIDA, LLC, Defendant.	Proceeding No. 20-276 Bureau ID No. EB-20-MD-003

REPLY AFFIDAVIT OF MARK PETERS
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF TEXAS)
) ss.
COUNTY OF TARRANT)

I, Mark Peters, being sworn, depose and say:

1. I am employed by AT&T Services, Inc., a services affiliate of Complainant BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T"). As Area Manager – Regulatory Relations, I support AT&T and AT&T-affiliated entities with respect to regulatory, legislative, and contractual matters involving joint use, utility poles, conduit, and ducts. I executed a prior Affidavit dated August 24, 2020 in support of AT&T's Pole Attachment Complaint against Duke Energy Florida, LLC ("Duke Florida").[1] I am executing this Reply Affidavit to correct certain statements made by Duke Florida in its October 30, 2020 Answer and by Mr. Freeburn, Mr. Hatcher, and Mr. Burlison in their Declarations. I know the following of

[1] Compl. Ex. C at ATT00032-45 (Aff. of M. Peters, Aug. 24, 2020).

my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

2. As I stated in my prior Affidavit, I have over two decades of experience with AT&T-affiliated entities, which I refer to collectively as the "Company." For the past decade, I have been a subject matter expert on issues relating to the Company's joint use relationships with electric companies and since 2013, I have also provided support on matters relating to third-party access to Company-owned utility poles and conduit.

A. Duke Florida Incorrectly Describes Our Negotiations.

3. As the subject matter expert on issues relating to AT&T's joint use relationships, I have supported AT&T's effort to negotiate just and reasonable rates with Duke Florida since the negotiations began. I attended both of AT&T's executive-level meetings with Duke Florida and strongly dispute the characterization in Duke Florida's Answer that my participation, and the participation of the other team members representing AT&T, was in bad faith.[2] I approached each meeting optimistic that we could have a productive discussion, particularly if Duke Florida provided an offer and the information we requested to inform our conversations. Instead, Duke Florida did not make an offer at either meeting and did not provide any license agreements or data to substantiate its claim that the JUA provides AT&T a net material competitive advantage relative to its license agreements. Duke Florida also remained resolute during the meetings that any negotiated settlement would need to ignore Commission precedent, such as the Commission's longstanding allocation of the "safety space" on a pole to electric utilities. Nonetheless, I found the discussions cordial, professional, and thorough. As a result, the

[2] *See* Answer ¶ 9.

allegation of Duke Florida's lawyers that we did not approach the negotiations with the "level of vision and intellectual honesty" that good faith negotiations require[3] is completely off base. AT&T's "vision" for a settlement did not need to include a willingness to ignore settled FCC rate-setting principles.

4. Duke Florida also claims that I "dogmatically contended" during our meetings that certain terms in the JUA were reciprocal terms that eliminated any "net" value to AT&T.[4] Not so. Instead, I made the simple point—which Duke Florida itself accepts—that reciprocal terms can "cancel each other out."[5] Duke Florida wants that cancellation to *always* be proportional to the number of poles owned by each party. But, as I explained during our meetings, many JUA terms have an equal effect on Duke Florida and AT&T irrespective of pole ownership numbers. For example, a provision that applies to each facility a company has on a joint use pole (for example, an insurance provision) has a complete canceling effect because, by definition, both parties have facilities on every joint use pole. In explaining this point, I did not "merely dismiss[ ]" anything Duke Florida's executives said "with unconsidered talking points."[6] I instead sought to move the conversation forward and ensure Duke Florida understood our position on each issue should a deal prove impossible.

5. Duke Florida's Answer has now confirmed that a deal was not possible during our executive-level meetings or in the nearly 9 months we waited (until September 2020) for a promised rate proposal after providing data in December 2019 that Duke Florida requested. Mr. Freeburn says that Duke Florida "would never have negotiated the Joint Use Agreement … if the

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[3] Answer ¶ 9.

[4] *See, e.g.*, Answer, Executive Summary at i; Answer Ex. B at DEF000154 (Hatcher Decl. ¶ 11).

[5] Answer, Executive Summary at i.

[6] Answer ¶ 28 n.118; Answer Ex. B at DEF000154 (Hatcher Decl. ¶ 11).

most [Duke Florida] could recover from AT&T in return was the one-foot CATV or telecom rate (old or new)."[7] But that is the exact range of rates required by federal law, with the new telecom rate the presumptive rate and the pre-existing (or old) telecom rate a "hard cap" where a utility can rebut the presumption. It is unfortunate that Duke Florida is unwilling to accept the Commission's regulations and orders, which were designed to facilitate negotiations and eliminate the need for this costly and time-consuming pole attachment litigation.

B. Duke Florida Has Not Identified, Let Alone Proven, a Net Material Competitive Advantage.

6. Nothing in Duke Florida's Answer changed my conclusion that the JUA does not include more advantageous terms and conditions for AT&T than those that apply to AT&T's competitive local exchange carrier ("CLEC") and cable competitors. Consequently, AT&T should pay the same pole attachment rate as its CLEC and cable competitors. Duke Florida attached just 1 cherry-picked and redacted license agreement to its Answer and quoted just 1 provision from it.[8] In reaching my conclusions, I also considered the terms and conditions in the other 2 license agreements Duke Florida produced in response to AT&T's interrogatories out of its set of more than [redacted] license agreements.[9]

7. Duke Florida does not focus on the terms and conditions of its license agreements because it instead defends the JUA based primarily on an argument that the JUA provides value to AT&T as compared to a hypothetical world in which companies did not jointly use utility

[7] Answer Ex. A at DEF000136 (Freeburn Decl. ¶ 20).

[8] *See* Answer Ex. 7 at DEF000296-341 (License Agreement); Answer ¶ 30 (quoting License Agreement § 17).

[9] *See* Resp. to AT&T's First Set of Interrog., Ex. 3 at DEF000010-120.

poles.[10] That comparison is not relevant, however, to whether AT&T enjoys net material benefits relative to AT&T's competitors that also use Duke Florida's poles. Much of Duke Florida's argument is, therefore, beside the point. It is also wrong and based on allegations the Commission has already rejected. This is particularly apparent in a review of the 3 alleged competitive "advantages" that Duke Florida thinks are "of consequence."[11]

8. *First*, Duke Florida argues that it "built a network of poles taller and stronger than necessary to provide electric service specifically to accommodate AT&T."[12] I supported AT&T's effort to rebut this same flawed claim in another dispute where the Enforcement Bureau agreed that the electric utility "did not build its poles just to accommodate AT&T."[13] Cable companies and CLECs have *also* required space on utility poles for decades. Duke Florida's poles are no exception. Duke Florida produced a license agreement showing that, in 1991, one cable company had nearly [redacted] attachments on Duke Florida's distribution poles—over [redacted] *more* than AT&T's predecessor had that same year.[14]

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[10] *See, e.g.*, Answer ¶ 16 n.57 (claiming that "[a] case such as this requires the finder [of] fact to ascertain what the parties would have done in the absence of the joint use agreement."); Answer Ex. A at DEF000133 (Freeburn Decl. ¶ 15) ("In the 'but for' world in which AT&T did not enter into the Joint Use Agreement…"); Answer Ex. B at DEF000152 (Hatcher Decl. ¶ 6) ("In other words, in the absence of the agreement with AT&T…").

[11] *See* Answer ¶ 15.

[12] Answer, Executive Summary at ii; *see also, e.g.*, Answer Ex. A at DEF000131 (Freeburn Decl. ¶ 10) ("Because of the Joint Use Agreement …, DEF's network of distribution poles was built specifically to accommodate AT&T.").

[13] *See BellSouth Telecommunications LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, 35 FCC Rcd 5321, 5330 (¶ 15) (EB 2020) ("*FPL 2020 Order*").

[14] *See* Resp. to AT&T's First Set of Interrog., Ex. 2 at DEF000025-27 (certifying [redacted] attachments by the cable company to Duke Florida's distribution poles); Comp. Ex. 5 at ATT00172 (1990 Invoice) (invoicing AT&T's predecessor for 48,278 attachments on Duke Florida's poles).

9. Duke Florida nonetheless claims that AT&T was advantaged by Duke Florida's installation of poles that can accommodate a communications attacher because AT&T did not need to "pay make-ready cost to replace nearly every [Duke Florida] pole to which it is attached."[15] But AT&T's competitors did not need to replace every Duke Florida pole either. Mr. Hatcher imagines that cable companies would have replaced Duke Florida's poles in an "alternate universe" in which "a CATV with a pole license agreement had been the first communications company to make attachments to [Duke Florida]'s poles."[16] This is absurd. Mr. Burlison depicts a "typical" Duke Florida pole *without* AT&T or any other third party attached and it is a 45-foot pole.[17] A 45-foot pole is more than sufficient to hold communications facilities for AT&T and its competitors without requiring a pole replacement or significant make-ready.[18] In fact, the JUA contemplated a 35-foot pole to accommodate Duke Florida and possibly other communications attachers,[19] as a 35-foot pole can and frequently does.[20] Indeed, the Commission assumes a 37.5-foot pole can accommodate Duke Florida and 4 communications attachers.[21]

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[15] Answer Ex. A at DEF000132 (Freeburn Decl. ¶ 11).

[16] Answer Ex. B at DEF000155 (Hatcher Decl. ¶ 13).

[17] Answer Ex. C at DEF000168 (Burlison Decl., Ex. C-1).

[18] Accepting Duke Florida's assumption that poles require 18 feet of ground clearance measured on the pole (an assumption that is highly fact-specific, as I explain below), a 45-foot pole, with 6 feet underground, 3.33 feet of safety space, and 8.5 feet of "standard space" allocated by the JUA to Duke Florida, *see* Compl. Ex. 1 at ATT00090 (JUA, § 1.1.5(B)), would still have 9.17 feet of space for communications attachers, which each require just about 1 foot of space, *see* 47 C.F.R. § 1.1410.

[19] Compl. Ex. 1 at ATT00090, ATT00101 (JUA, § 1.1.5(B), Art. XVI).

[20] *See also* Reply Ex. D at ATT00299-300 (Davis Aff. ¶ 7).

[21] 47 C.F.R. §§ 1.1409(c), 1.1410.

10. Available data shows that Duke Florida's poles should not regularly require replacement to accommodate an additional communications facility. In a September 2020 filing made by Duke Florida's parent company, a group of electric utilities stated that only about 0.024% of an electric utility's poles require replacement each year to accommodate an additional communications facility.[22] That is consistent with my experience. It also bears mentioning that, if an existing Duke Florida pole must be replaced to accommodate an additional communications facility, it does not matter whether the additional facility is AT&T's or AT&T's competitor's. As a result, AT&T, like its competitors, must replace poles owned by Duke Florida when necessary to accommodate an additional facility and must compensate Duke Florida for the pole replacement. AT&T is not competitively advantaged.

11. Duke Florida also confirms that communications facilities are *not* the typical reason AT&T and its competitors have been incurring pole replacement costs to attach to Duke Florida's poles. Rather, Duke Florida admits that it requires *more* space on a pole now than when it imposed the JUA formula that set rates based on the allocation of just 4 feet of space on a 30-foot pole and 8.5 feet of space on a 40-foot pole.[23] Mr. Burlison says that Duke Florida's "typical vertical three-phase construction" now requires 15.1 feet of space on a pole,[24] which is additional to the 3.33 feet of safety space that is "usable and used by the electric utility."[25] No wonder Duke Florida would like to retain the JUA rates. AT&T pays [redacted] of pole costs for

[22] *See* Initial Comments of Duke Energy Corp., et al. at 16-17, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17-84 (Sept. 2, 2020).

[23] *See* Compl. Ex. 1 at ATT00090 (JUA, § 1.1.6(A)).

[24] Answer Ex. C at DEF000165-65, DEF000168 (Burlison Decl. ¶¶ 14-15 & Ex. C-1).

[25] *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("*Consolidated Partial Order*").

about 1 foot of space on a pole, while Duke Florida pays [redacted] of pole costs when its "typical vertical three-phase construction" requires more than 18 feet of pole space.

12. In light of the increasing size of Duke Florida's facilities, it appears its chosen pole heights are based on its own preferences, needs, and predictions about the highly competitive communications market. Indeed, if a "typical" Duke Florida pole *without* AT&T attached is a 45-foot pole,[26] it is impossible to conclude that Duke Florida would "have installed 30 or 35-foot poles" but for AT&T and the JUA.[27] AT&T is not the reason for the height of Duke Florida's poles.

13. *Second*, Duke Florida claims AT&T is competitively advantaged because it has a "contractual right to remain attached to [Duke Florida]'s poles even in the event of termination."[28] But this is a competitive *disadvantage* for AT&T. AT&T's competitors have a statutorily guaranteed right to attach to, and remain attached to, Duke Florida's poles. Duke Florida's witness agrees that this difference places "ILECs … at a material disadvantage compared to CLECs and CATVs."[29] Duke Florida nonetheless asks the Commission to ignore the disadvantage—and treat it like an advantage—because Duke Florida "cannot control what Congress gives or does not give to CATVs and CLECs."[30] But the disadvantage still exists. It must be accounted for in a proper analysis of competitive neutrality.

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[26] Answer Ex. C at DEF000168 (Burlison Decl., Ex. C-1).

[27] *Id.* at DEF000165 (Burlison Decl. ¶ 12).

[28] Answer, Executive Summary at ii; *see also, e.g.*, Answer Ex. A at DEF000136 (Freeburn Decl. ¶ 19); Answer Ex. B at DEF000156 (Hatcher Decl. ¶ 14).

[29] Answer Ex. E at DEF000208 (Metcalfe Aff. ¶ 9).

[30] Answer ¶ 30 n.128.

14. Duke Florida also repeats the error of other electric utilities in claiming that this alleged advantage should be valued "by assuming that, without the JUA, AT&T would have built a duplicate pole network."[31] Duke Florida, for example, claims that AT&T could have built its own network instead of entering into the JUA, and that AT&T can remove its facilities from Duke Florida's poles at any time to avoid the excessive JUA rates.[32] These are fictions—commonly advanced by electric utilities to avoid reducing rental rates to comply with the law. The fact is that a single pole line was created in large part because municipalities and property owners wanted efficiency in the use of their rights-of-way and wanted to avoid communities having a forest of utility poles. That remains true today, as is readily apparent from the accelerated adoption of municipal ordinances regulating use of the public rights-of-way by communications attachers. Homeowners and local authorities do not want two pole leads on one street, if they can be avoided. And setting the aesthetic issues aside, it is inconceivable that state regulators over the past century would have considered it prudent for two rate-of-return regulated utilities sharing common ratepayers to build two duplicative pole lines instead of a single shared network.

15. In any case, AT&T must rely on Duke Florida's infrastructure to provide service throughout Florida. This is another reason why Duke Florida's claim that the evergreen provision in the JUA is an advantage to AT&T is so inappropriate.[33] If the JUA terminates,

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[31] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *see, e.g.*, Answer, Executive Summary at iii ("This … perpetual license eliminates the need (or even the contingency) of constructing a new network of 62,000 poles in the event of a termination.").

[32] *See* Answer, Executive Summary at ii-iii ("AT&T … can choose at any time to remove its facilities from [Duke Florida]'s poles"); *see also, e.g.*, *id.* ¶¶ 11, 27; Answer Ex. E at DEF000212 (Metcalfe Aff. ¶ 18).

[33] *See, e.g.*, Answer ¶ 30.

AT&T will not be able to attach to new Duke Florida pole lines and will have to gain approval for alternate infrastructure from the same local authorities and residents that do not want duplicative utility poles. In contrast, AT&T's CLEC and cable competitors have a statutory right to attach and maintain attachments to Duke Florida's poles—and their right of access does not end with the termination of a license agreement. The contractual right of access that AT&T must negotiate and secure is thus a significant competitive *disadvantage* as compared to the statutory right of access enjoyed by its competitors.

16. *Third*, Duke Florida claims that AT&T is advantaged by space on a pole that AT&T does not and cannot use. Duke Florida tries to confuse matters by inaccurately claiming that AT&T is "constructively" occupying more than the 1 foot of space that is typically occupied, on average, by communications facilities.[34] This argument should also be rejected outright. Duke Florida admits its claim rests entirely on a continuing refusal to accept the Commission's longstanding precedent that "under the Commission's rate formula, 'space occupied' means space that is 'actually occupied.'"[35]

17. Duke Florida first claims that AT&T requires 3.33 feet of safety space, but the FCC has already found that that space is used by electric utilities and should not be charged to communications attachers.[36] This makes sense because the safety space is regularly used for

[34] *See, e.g.*, Answer ¶ 12.

[35] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) (citing precedent); *see also, e.g.*, Answer ¶ 25; Answer Ex. 5 at DEF000273 [redacted]

[36] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) ("The communication space should not be attributed to AT&T because … AT&T's attachments do not actually occupy the communications safety space."); *see also Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) (stating that "the 40-inch safety space …. is usable and used by the electric utility").

power company attachments. Mr. Freeburn and Mr. Burlison agree that Duke Florida has historically placed streetlights within the safety space.[37] Duke Florida admits it cannot charge CLECs or cable companies for this space.[38] It would defeat the principle of competitive neutrality to charge AT&T, but not its competitors, for safety space that none of them can occupy. Indeed, Duke Florida's attempt to assign the safety space on its poles to AT&T (and only AT&T) is particularly curious because AT&T's facilities are not usually adjacent to the safety space, but Duke Florida's facilities always are.

18. Duke Florida also claims that AT&T should be assigned *additional* space based on where AT&T's facilities are affixed to a pole, even if AT&T does not use the space. It claims that, if AT&T does not place its facilities at the absolutely lowest location permissible on a pole, the unoccupied space *below* AT&T's facilities should be considered "actually occupied" space, and so alleges that AT&T "actually occupies" [redacted] feet of space. This is wrong for many reasons, not least of which is the fact that "under the Commission's rate formula, 'space occupied' means space that is 'actually occupied.'"[39] AT&T, by definition, does not "actually occupy" space that is below its physical attachment to the pole.

19. Duke Florida's argument also incorrectly presumes that other communications facilities cannot be placed on a pole below AT&T's facilities. This does not comport with reality: Duke Florida admits that AT&T has encouraged the placement of wireless communications facilities *below* AT&T's wireline attachments[40] and Mr. Burlison admits there

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[37] Answer Ex. A at DEF000134 (Freeburn Decl. ¶ 16); Answer Ex. C at DEF000163-64 (Burlison Decl. ¶¶ 9-10).

[38] Answer ¶ 12 n.34 ("the Commission has already determined that CATV and CLEC attachers should not bear this cost …").

[39] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) (citing precedent).

[40] Answer ¶ 18.

may be "other third-party attachments beneath AT&T" on a pole.[41] Moreover, AT&T also routinely lowers its facilities to make additional room for another company's higher located facilities on a Duke Florida pole, many of which are placed more than 12 inches from AT&T's facilities. But, there is no indication that Duke Florida charges those facilities' owners higher pole attachment rates because their facilities could have been placed closer to AT&T's.

20. Duke Florida's [redacted]-foot space measurement is also purely hypothetical. Duke Florida did not measure the space occupied by AT&T's facilities on any real-world pole. Instead, Mr. Freeburn claims that, during the "third-party pole attachment process," its contractor reviewed 941 poles, reflecting about 1.5 percent of the 62,363 Duke Florida poles to which AT&T is attached,[42] and reported that AT&T's highest attachment was affixed to the pole at a height [redacted] feet above ground.[43] Duke Florida did not produce the underlying data or even identify the location of the 941 poles, making it impossible to verify this measurement. Duke Florida's lawyers then paired the [redacted]-foot measurement with a *presumption* that poles require "an average 18 feet for minimum ground clearance" to extrapolate a [redacted]-foot constructive occupancy for AT&T on and around its facilities.[44] Needless to say, this mathematical exercise does not prove the *actual* amount of space occupied on any real-world pole AT&T uses.

21. The 18-foot presumption for ground clearance cannot be used to accurately determine space occupied on a specific pole. It reflects an average of highly variable site-specific ground clearance requirements. The ground clearance required at a particular pole

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[41] Answer Ex. C at DEF000166 (Burlison Decl. ¶ 17).

[42] Answer Ex. A at DEF000132 (Freeburn Decl. ¶ 12); Compl. Ex. 3 at ATT00159 (2019 Invoice).

[43] Answer Ex. A at DEF000132 (Freeburn Decl. ¶ 12).

[44] ([redacted] – 18 = [redacted]). *See* Answer ¶ 12 & n.32.

depends on variety of factors, including topography and what is below the aerial facilities—a road, highway, railroad tracks, sidewalk, driveway, waterway, wooded area, parking lot, etc. This is evident from Duke Florida's license agreement. It cites an 18-foot clearance for Florida Department of Transportation roads *and* a 24-foot clearance for Florida limited access highways.[45]

22. Duke Florida is also wrong when it equates an 18-foot minimum ground clearance presumption with the "lowest point of attachment" on a pole.[46] The world is not flat. If a pole is located next to an elevated road, for example, an attachment would need to be higher than 18 feet on the pole to maintain the required clearance above the elevated road. Because Duke Florida's [redacted]-foot extrapolation depends on the 18-foot ground clearance presumption, it is pure conjecture. It does not prove the space actually occupied by AT&T's physical attachment on any Duke Florida pole.

23. Mr. Hatcher faults me for not providing alternate data that does establish the space occupied by AT&T's facilities across 62,000+ Duke Florida poles.[47] But the Commission adopted the presumption that communications attachers occupy 1 foot of space on a pole to *avoid* the need for costly pole surveys every time rates are set. If Duke Florida wants to rebut the presumption, it needs credible, actual data about AT&T's facilities across its network—not a [redacted]-foot extrapolation patched together from a presumption and what it claims its contractor reported about a small unidentified set of poles.

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[45] Answer Ex. 7 at DEF000334 (License Agreement).

[46] *See* Answer ¶ 12 & n.32.

[47] *See* Answer Ex. B at DEF000155 (Hatcher Decl. ¶ 12).

24. I also disagree with Mr. Freeburn's suggestion that AT&T places its facilities higher on a pole because of midspan sag in AT&T's cables (i.e., sag between two poles).[48] In my experience, the placement of AT&T's facilities is more typically an effort to accommodate the preference of electric utilities and local authorities for higher aerial facilities.[49] AT&T then lowers its facilities when possible to accommodate another attaching entity.

25. I also disagree that AT&T's facilities have more midspan sag than other aerial facilities on a pole. Midspan sag is not unique to AT&T. All aerial facilities include some sag midspan, but that sag could be 50 feet or more from a pole, and so it does not change the space actually occupied on the pole. Mr. Freeburn provides a wholly unsupported allegation that Duke Florida's "data indicates that the average midspan sag for AT&T's attachments is [redacted]."[50] It is impossible to know how he arrived at this number. It is also meaningless as a comparison with other companies' facilities without data about the midspan sag of every other company's aerial facilities, including Duke Florida's.

26. Mr. Freeburn takes issue with my description of AT&T's facilities, claiming that they are "not like the tensioned messengers of CATVs and CLECs."[51] This is absurd. AT&T installs light-weight copper and fiber optic cables that are comparable in size to the facilities of AT&T's competitors, and engineers its facilities to limit mid-span sag. Mr. Freeburn also effectively agrees that the facilities of AT&T and its competitors *are* comparable. He says that the largest of AT&T's facilities are "*among* the largest, and heaviest, horizontally run cables" on

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[48] Answer Ex. A at DEF000133 (Freeburn Decl. ¶ 14).

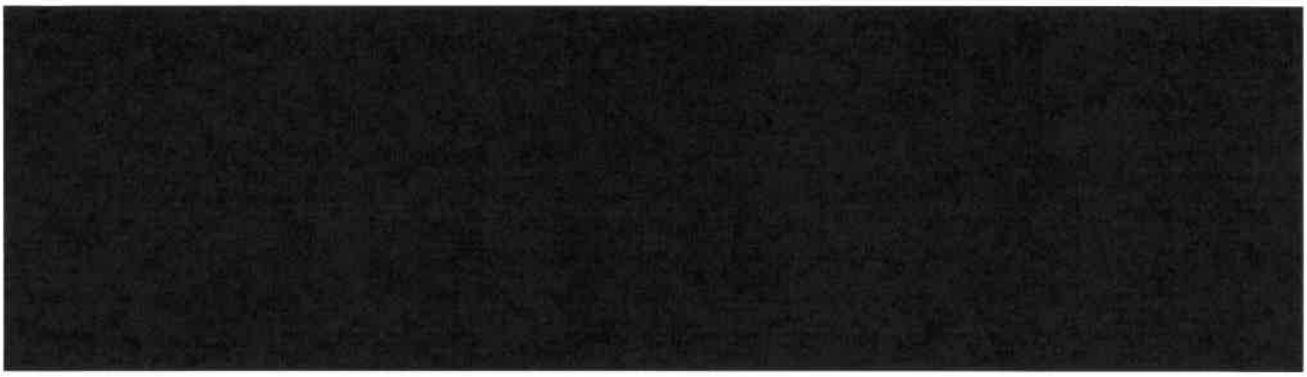
[49] *See, e.g., In Re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6468 (¶ 23) (2000) (noting that electric utilities argued that "the lowest attachment on a pole must be at least 19'8" from the ground").

[50] Answer Ex. A at DEF000133 (Freeburn Decl. ¶ 14).

[51] *Id.* at DEF000133 (Freeburn Decl. ¶ 13).

Duke Florida's poles.[52] In other words, they are not unique. Indeed, as a pole owner, AT&T is aware that the coaxial cables used by cable companies are increasingly being overlashed multiple times, which increases their bundle size, thickness, and weight. AT&T's facilities are comparable in size to its competitors' facilities, which are presumed to occupy 1 foot of space.[53]

27. Mr. Freeburn's criticism of AT&T's "copper cables" appears to be grounded in outdated stereotypes about the heavy copper cables that AT&T deployed a century ago. But not all copper cables are the same, and much of the copper AT&T has deployed on Duke Florida's poles is lightweight cable, comparable in size to cable used by AT&T's competitors, including the coaxial cables used by cable companies that have a copper-clad core. AT&T has also devoted substantial resources in recent years to the deployment of thin, lightweight fiber cables. The following graph illustrates this transition by comparing the amount (in feet) of AT&T's annual aerial copper placements (green) to the amount of its annual aerial fiber placements (black) from 1990 through September 2019 in Florida:



28. AT&T's network thus continues to significantly change and require less space on Duke Florida's poles. This is because on new pole lines, almost without exception, AT&T places only lightweight fiber cables (and not copper cable) and on existing pole lines typically

[52] Answer Ex. A at DEF000133 (Freeburn Decl. ¶ 14) (emphases added).

[53] *See also* Reply Ex. D at ATT00301 (Davis Aff. ¶ 9).

places copper cable only when needed to repair the copper cable network that has not yet transitioned to fiber. As more sections of the network transition to fiber, this decline in copper placements will continue. And on these copper cable replacements, AT&T engineers size replacement sections (*i.e.*, determine how many cable pairs are needed) based on the number of working circuits, which minimizes the size (*i.e.,* diameter and weight per foot) of the replacement, or new, cable. This trend of using less pole space will undeniably continue due to the abandonment of copper-based communications services by customers, resulting in significant reductions in the size and weight of copper cables in AT&T's network. There is, therefore, no good reason (much less any evidence on which) to differentiate the size of AT&T's cables from its competitors.

29. Duke Florida also points to the JUA's allocation of 3 feet of space to AT&T, arguing that it should justify charging AT&T a higher rate.[54] But AT&T does not occupy the [redacted] feet of space Duke Florida manufactured, so obviously does not use or require 3 feet (or more) space on Duke Florida's poles. Duke Florida does not dispute that AT&T cannot sublet any of the allocated space to another company.[55] Its license agreement shows it lets third parties attach in the space allocated to AT&T and collects additional rent from them.[56] And, indeed, it has not been allowed to "reserve" extra space for AT&T for nearly 25 years.[57] AT&T should

[54] *See, e.g.*, Answer ¶ 12.

[55] *See* Compl. Ex. C at ATT00043 (Peters Aff. ¶ 25); Compl. Ex. 1 at ATT00090 (JUA § 1.1.6).

[56] *See* Answer Ex. 7 at DEF000337 (License Agreement).

[57] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16079 (¶ 1170) (1996) ("Permitting an incumbent LEC, for example, to reserve space for local exchange service … would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.").

pay pole attachment rates that are calculated, like its competitor's rates, based on the 1 foot of space it presumptively occupies on a pole.

C. Duke Florida's Remaining Allegations Are Equally Meritless.

30. I disagree with several other operational claims in Duke Florida's Answer and Declarations. For example, Duke Florida says AT&T is competitively advantaged because of its typical location as the lowest attacher on a pole, but then admits that there are "certain costs and risks attendant to the lowest position on the pole."[58] It also acknowledges that AT&T does not *always* have that lowest spot.[59] That should be the situation more and more going forward, as AT&T continues to encourage other communications attachers to use pole space below AT&T's facilities.[60] And so, contrary to Duke Florida's allegation,[61] AT&T *does* work "through" other company's facilities and *does* ensure that its cable is taut so that it will not interfere with communications facilities below.

31. Mr. Freeburn is wrong that AT&T's location on a pole allows it to "transfer its facilities to new poles for maintenance projects and operational upgrades faster and more easily than higher mounted communications attachments."[62] The opposite is true. When a pole is replaced, each company attached to the pole must successively transfer its facilities to the replacement pole, with the companies completing the transfers sequentially from the pole top down to the lowest attacher. Because AT&T is typically the lowest attacher on the pole, it

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[58] Answer ¶ 19.

[59] Answer Ex. C at DEF000166 (Burlison Decl. ¶ 17) (stating AT&T is "almost always the lowermost wireline attaching entity").

[60] *See, e.g.*, Compl. Ex. C at ATT00041 (Peters Aff. ¶ 20).

[61] *See* Answer ¶ 19.

[62] Answer Ex. A at DEF000135 (Freeburn Decl. ¶ 17).

typically is the last party able to transfer its facilities to the replacement pole because it has to wait for the other attachers to complete their transfers first. And it is not uncommon for AT&T to travel to a pole to transfer its facilities only to find that the company above it had not in fact transferred its facilities as reported, further delaying AT&T's ability to transfer its facilities and increasing its costs by requiring repeat trips.

32. Duke Florida also claims that it "absorbs the costs of permitting, engineering and inspections in connection with AT&T's attachments."[63] This makes no sense. As I explained previously, AT&T completes the work required to permit, engineer, and inspect its facilities.[64] It appears from Mr. Freeburn's declaration that Duke Florida may double-check AT&T's inspection work—he says that "[w]hen AT&T submits a permit application, DEF performs the same pre-construction and post-construction inspections as it performs for CATV and CLEC permit applications."[65] Double-checking inspection work is Duke Florida's prerogative as a pole owner, but it certainly is not work required by the JUA.[66] It is also not work that AT&T asked Duke Florida to perform or from which AT&T derives a benefit. And it cannot justify charging AT&T for *permitting* and *engineering* work Duke Florida does not perform for AT&T.

33. Mr. Freeburn's list of so-called "absorbed" fees is particularly suspect.[67] He does not substantiate any of the fees with invoices or payment records. He does not explain what work is covered by what fees. He does not identify language in Duke Florida's license agreements that allow it to charge all the various fees. He admits some fees do not apply to

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[63] Answer ¶ 8; *see also id.* ¶¶ 14, 17.

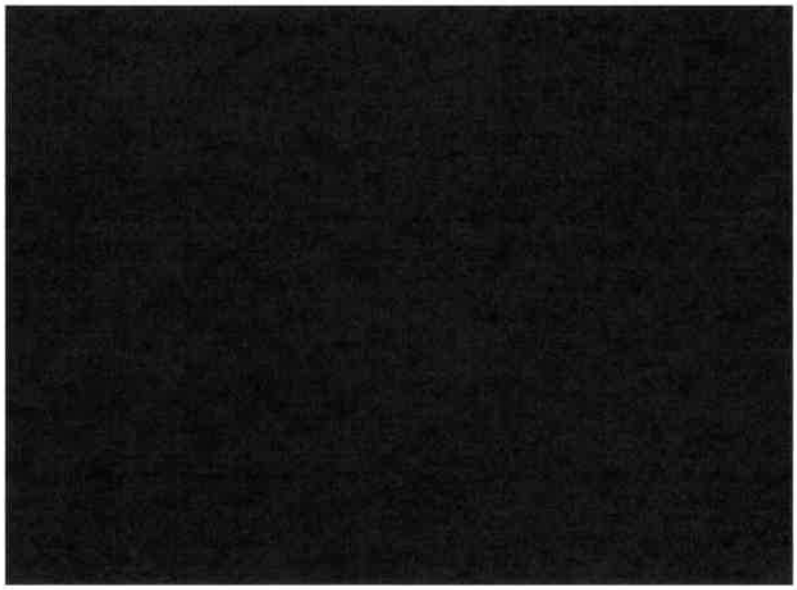
[64] Compl. Ex. C at ATT00037-38, ATT00039-40 (Peters Aff. ¶¶ 13, 17).

[65] Answer Ex. A at DEF000135 (Freeburn Decl. ¶ 18).

[66] Compl. Ex. 1 at ATT00092 (JUA, §§ 3.3, 3.4).

[67] *See* Answer Ex. A at DEF000142 (Freeburn Decl., Ex. A-1).

every pole.[68] And he did not ask Mr. Metcalfe to include all the fees in his analysis, which confirms that the list is significantly inflated. Mr. Metcalfe purports to value *all* fees that may be charged AT&T's competitors but then uses just [redacted] from Mr. Freeburn's list of [redacted]:[69]



Judging from the descriptions, Mr. Metcalfe should not have included any of the alleged fees in his analysis. AT&T completes its own engineering for new attachments, which includes permitting requests (also known as Exhibit A); identifying make-ready required of other attachers on the pole; performing its own pre- and post-construction inspections; and conducting its own structural, loading, and field analyses of poles to determine the capacity for a new AT&T attachment. AT&T pays for its own NJUNS membership and does not require Duke Florida's contractor to manage data or generate any pole reports. The JUA does not require Duke Florida to perform any of this work for AT&T.

[68] *See, e.g.*, Answer Ex. A at DEF000135-36 (Freeburn Decl. ¶ 18).

[69] Answer Ex. E at DEF000214-15 (Metcalfe Aff. ¶¶ 25-27); *see also* Answer Ex. A at DEF000142 (Freeburn Decl., Ex. A-1); Answer Ex. E at DEF000240 (Metcalfe Aff., Ex. E-3.2).

34. Moreover, the fees Mr. Freeburn lists would have been incurred, if ever, when an attacher first placed its facilities on Duke Florida's poles. But Duke Florida does not attempt to value these fees for AT&T's future deployment. Instead, it tries only to value what AT&T would have paid if it had paid all the fees (at current-day values) when it deployed facilities on 62,000+ poles years or decades ago.[70] But AT&T has already more than covered those fees, which Duke Florida claims amount to about [redacted] per pole, with JUA rates that have been [redacted] higher per pole than new telecom rates.

35. Duke Florida also says AT&T is advantaged when Duke Florida replaces an AT&T pole following an emergency,[71] but this is a competitive disadvantage. Duke Florida admits that AT&T pays for these pole replacements.[72] AT&T's competitors do not pay for similar pole replacements because, as Mr. Freeburn explains, "CATVs, CLECs and other third parties..., unlike AT&T, do not own poles."[73] And, although Mr. Freeburn claims it is a "benefit" to AT&T (albeit not a *competitive* benefit) that AT&T can rely on Duke Florida's "crews, equipment, inventory, dispatchers, engineers and all of the other things necessary to replacing a pole in the middle of the night on a moment's notice," he does not identify a single cost that AT&T does not cover.[74] And, in any event, AT&T has its own "crews, equipment, inventory, dispatchers, engineers" and can and does replace its "poles in the middle of the night on a moment's notice."[75]

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[70] *See* Answer Ex. E at DEF000240 (Metcalfe Aff., Ex. E-3.2).

[71] Answer ¶ 20.

[72] Answer Ex. A at DEF000138-139 (Freeburn Decl. ¶ 27).

[73] *Id.* at DEF000130 (Freeburn Decl. ¶ 9).

[74] Answer Ex. A at DEF000139 (Freeburn Decl. ¶ 27).

[75] *See* Reply Ex. D at ATT00299 (Davis Aff. ¶ 6).

36. Throughout its Answer, Duke Florida criticizes AT&T for not owning more poles, even though that would only increase AT&T's costs as compared to its competitors. Duke Florida also fails to acknowledge its own role in the parties' increasing pole ownership disparity. Under the JUA, Duke Florida is required to notify AT&T each time it thinks a new pole is needed so AT&T has the opportunity to install and own the pole.[76] I am not aware of Duke Florida ever providing AT&T the required notice to install and own new poles. Instead, Duke Florida has simply installed the poles itself and increased its pole ownership advantage.

37. For all of these reasons and those expressed in my prior Affidavit, it remains my opinion that Duke Florida has not identified any net benefit that gives AT&T a material advantage over its cable and CLEC competitors that could justify AT&T's payment of a higher rental rate for use of Duke Florida's poles.

Mark Peters

Sworn to before me on
this 23rd day of November, 2020

Notary Public

LAURA MARGARITA GONZALEZ
Notary Public, State of Texas
Comm. Expires 01-08-2024
Notary ID 132305049

[76] Compl. Ex. 1 at ATT00094 (JUA, § 4.3).

Reply Exhibit D

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. DUKE ENERGY FLORIDA, LLC, Defendant.	Proceeding No. 20-276 Bureau ID No. EB-20-MD-003

REPLY AFFIDAVIT OF TIMOTHY R. DAVIS
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF FLORIDA)
) ss.
COUNTY OF BREVARD)

I, Timothy R. Davis, being sworn, depose and say:

1. I am employed by BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T"), the Complainant in this matter. I am executing this Reply Affidavit to correct false and misleading statements made in declarations submitted on behalf of Duke Energy Florida, LLC ("Duke Florida") regarding AT&T's comparability to its competitors with respect to the make-ready AT&T completes when attaching facilities to Duke Florida's poles and the space AT&T occupies on Duke Florida's poles. I know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

2. My job title is Manager-Outside Plant Planning & Engineering Design. I am based in Cocoa, Florida and have outside plant design engineering responsibilities in AT&T's Orlando-Central Florida area, which also includes Duke Florida's service areas of Brooksville and Spring Hill. In my current role, I am responsible for implementing and maintaining quality control measures in all aspects of AT&T's outside plant design for a 15-person design engineering team. I am also responsible for managing the construction and engineering of AT&T's 5G Centralized Radio Access Network ("CRAN") buildout in the Orlando market. My responsibilities include the design and engineering of AT&T's aerial attachments in the Central Florida area, including its attachments to Duke Florida's utility poles. I am familiar with AT&T's Joint Use Agreement ("JUA") with Duke Florida, as well as with agreements and engineering practices governing aerial communications facilities throughout Central Florida.

3. I have over 19 years of experience in the telecommunications industry with AT&T and its predecessor companies and have worked in my present job since 2007. I was originally hired by SBC Ameritech in 2001 as a Network Manager, where I supervised technicians that performed cable splicing, installations, repairs, and cable locating functions. In 2005, I joined AT&T in Melbourne, Florida as an Outside Plant Construction Supervisor, where I was responsible for all aspects of aerial and underground construction design, which included aerial construction in AT&T's overlapping service area with Duke Florida (then known as Progress Energy Florida).

A. Duke Florida's Make-Ready Allegations are Misleading and Incorrect.

4. I reviewed Mr. Freeburn's and Mr. Hatcher's declarations. They claim that AT&T is advantaged as compared to cable companies and competitive local exchange carriers ("CLECs") when attaching facilities to Duke Florida's poles. This is not true. For 15 years, I have worked on, supervised, or consulted on AT&T make-ready projects in Florida, including in

the Duke Florida service area. I am not aware of any difference between the amount or type of make-ready AT&T typically requires when attaching facilities to Duke Florida's poles and the make-ready AT&T's competitors typically require when attaching to the same poles. I am also not aware of any cost related to permitting, engineering, or inspections that AT&T does not already incur. The suggestion that AT&T has "avoided" make-ready costs that AT&T's competitors pay is false.

5. There are a few claims in Mr. Freeburn's and Mr. Hatcher's declarations that I would like to specifically address and correct. *First*, Mr. Freeburn claims that "AT&T enjoys benefits vis-à-vis its competitors with respect to the DEF permitting process" because "[w]hen AT&T submits a permit application, DEF performs the same pre-construction and post-construction inspections as it performs for CATV and CLEC permit applications" but "AT&T (unlike CATVs and CLECs) does not get charged for this work."[1] This is misleading and doesn't make sense. AT&T performs all of the necessary pre-construction and post-construction engineering and inspections when attaching facilities to Duke Florida's poles. AT&T employees travel to the pole location, take all necessary measurements, conduct the required loading analysis, complete all needed engineering and design work and then document and submit their analysis to Duke Florida. AT&T's employees then complete the work and a post-construction inspection for compliance with design and safety specifications. I am not aware of any time when Duke Florida duplicated or checked AT&T's pre-construction and post-construction engineering or inspection work, nor can I fathom why it would.

[1] Answer Ex. A at DEF000135 (Freeburn Decl. ¶ 18)

6. *Second*, Mr. Freeburn claims that AT&T is advantaged by the JUA because Duke Florida sometimes replaces AT&T's poles following an emergency. Mr. Freeburn admits that AT&T pays Duke Florida for the cost of these pole replacements, but says AT&T benefits anyway because it can "get this work completed in a timely manner without the cost of carrying crews, equipment, inventory, dispatchers, engineers and all of the other things necessary to replacing a pole in the middle of the night on a moment's notice."[2] This is also misleading. AT&T has a dedicated After-Hours Service Restoration Group that manages damage and construction-related service outages between the hours of 4 p.m. and 7 a.m., 365 days a year. The After-Hours Service Restoration Group has a dedicated phone line to ensure timely reports from municipal officials, fire and police departments, electric utilities, and first responders following an accident or other emergency that has damaged a pole and a 1-800 number for the public. It also has all the resources, equipment, and personnel necessary to respond to "middle of the night" and early-morning emergencies, including third-party contractors to ensure prompt action on this emergency and mission-critical work. Despite all of AT&T's resources, Duke Florida typically receives a call about an emergency first because its facilities pose a safety hazard when downed and power needs to be cleared first. In those situations, Duke Florida reaches the emergency location first and replaces the pole; should it be AT&T's pole, Duke Florida will invoice AT&T for its costs. But Mr. Freeburn's suggestion that AT&T does not have a devoted team ready to restore poles after hours or in emergency situations could not be more wrong.

7. *Third*, Mr. Hatcher claims that "AT&T almost never had to perform make-ready when deploying its attachments on DEF's poles," but that CLECs and cable companies often

[2] Answer Ex. A at DEF000139 (Freeburn Decl. ¶ 27).

have to "pay for make-ready and/or pole changeouts in order to accommodate their attachments."[3] This allegation is baseless. Duke Florida has a pole network that accommodates AT&T's facilities and the facilities of AT&T's competitors without typically requiring a lot of make-ready. Many Duke Florida poles are 40-foot and taller, when a 35-foot pole can accommodate Duke Florida and more than one communications attacher in many circumstances. A 40-foot pole can hold the facilities of Duke Florida, AT&T, and at least 3 other attachers. It is relatively rare for a Duke Florida pole to require replacement to accommodate an additional communications facility. It is also incorrect to suggest that AT&T requires less make-ready to attach to Duke Florida's poles than its competitors require. Mr. Hatcher says that when cable companies and CLECs deployed their facilities, they "took the pole as they found it. If there happened to be sufficient loading and clearance capacity for the new attacher to attach, it could proceed. However, where there was insufficient clearance or loading capacity, the new attacher was required to pay for make-ready and/or pole changeouts in order to accommodate their attachments."[4] AT&T is no different when it seeks to attach to Duke Florida's poles. If a pole can accommodate AT&T's facilities, it performs the work to attach. But if there is insufficient clearance or loading capacity, AT&T incurs the cost of the make-ready and/or pole changeout in order to accommodate AT&T's attachment. AT&T does not "avoid" make-ready work or expense its competitors require.

B. Duke Florida's Allegations About the Size of AT&T's Facilities Are Wrong.

8. Mr. Freeburn, Mr. Hatcher, and Mr. Burlison suggest that AT&T's facilities are larger and heavier on average than the aerial facilities of cable companies and CLECs, such that

[3] Answer Ex. B at DEF000155 (Hatcher Decl. § 13).

[4] *Id.*

AT&T's facilities require and occupy more space on Duke Florida's poles. This is also unfounded and untrue.

9. *First*, Mr. Freeburn claims without support that AT&T's aerial facilities are larger and heavier than the facilities deployed by CLECs and cable companies.[5] This appears grounded in outdated stereotypes or anecdotal observations, but it is not fact. AT&T has devoted significant resources to deploying lightweight fiberoptic cables in its overlapping service area with Duke Florida. According to AT&T's Mobile Mapping tool database, over [redacted] percent of AT&T's aerial cable (by linear foot) in Duke Florida's service area is lightweight fiber optic cable ([redacted] linear feet) essentially identical to the aerial cable deployed by CLECs and cable companies. This percentage will continue to grow as AT&T places new fiber and replaces copper facilities with new fiber optic cable. In addition, AT&T's copper facilities today are not the same as the old copper facilities installed many decades ago. Of the [redacted] linear feet of copper cable AT&T has deployed in Duke Florida's territory, [redacted] is 50 gauge or smaller (weighing under .22 lbs/foot) and over [redacted] is 200 gauge or smaller (weighing under .73 lbs/foot). Cable facilities in these sizes are no larger or heavier than the facilities typically installed by CLECs and cable companies. Cable companies are also increasingly overlashing coax cable throughout Duke Florida's territory, creating bundles of increasing sizes and weights. Cable company overlashing commonly occurs on AT&T-owned poles as well.

10. *Second*, Mr. Hatcher and Mr. Freeburn claim that AT&T occupies an average of [redacted] feet of space on Duke Florida's poles based on undisclosed data it claims its contractor

[5] Answer Ex. A at DEF000132-133 (Freeburn Decl. ¶¶ 13-14).

pulled from 941 unidentified poles during the third-party attachment process.[6] Mr. Freeburn explains that these are not actual space measurements, but instead reflect the difference between an alleged measurement of AT&T's highest attachment at a [redacted]-foot elevation and a presumption that above-ground clearance is 18 feet.[7] This alleged space "measurement" is incorrect, inflated, and entirely inconsistent with my decades of experience in the field. In my experience, AT&T's facilities actually occupy, on average, about 1 foot of space across Duke Florida's poles.

11. Because Duke Florida did not disclose the poles it apparently relies on or provide any reliable evidence of its claim, my team was unable to visit the poles, assess the actual minimum ground clearance required, and obtain proper measurements of the space actually occupied by AT&T's physical attachment. My suspicion is that even if these calculations were accurate (and there is no reason to believe much less confirm that they are) the small number of poles selected might reflect atypical site-specific accommodations (some of which may have been driven by the needs of Duke Florida), and do not accurately reflect AT&T's average attachment height. AT&T's practice is to attach to Duke Florida's poles as low as possible to meet applicable clearance requirements. This typically means that AT&T attaches as close to 18 feet over most roadways, and even lower than 18 feet where roadways or other clearance obstacles are not implicated. In any event, AT&T can and will occasionally lower its attachments at its own cost to make room for other attachers when necessary, so the [redacted] foot

[6] *Id.* at DEF000132-133 (Freeburn Decl. ¶¶ 12-13); Answer Ex. B at DEF000154-155 (Hatcher Decl. ¶ 12).

[7] *See* Answer Ex. A at DEF000130, DEF000132 (Freeburn Decl. ¶¶ 8, 12).

figure on a select group of undisclosed poles is not a useful basis for calculating AT&T's actual space occupancy.

12. *Third*, Mr. Burlison claims to depict AT&T's use of space on a "typical current DEF distribution pole."[8] Mr. Burlison's "typical" joint use distribution pole bears no resemblance to reality. It is [redacted] feet, has no third-party attachments, and has 3 AT&T attachments spaced one foot apart.[9] However, most of the Duke Florida joint use poles in the field are closer to 40 feet, have multiple third-party attachments, and have fewer than 3 AT&T attachments. Nor does the NESC require attachments by the same company to be a foot apart from one another, as Mr. Burlison's diagram suggests. His diagram further ignores standard FCC-authorized practices allowing techniques like boxing and bracketing to expand pole capacity for telecommunications attachments.

13. *Fourth*, Mr. Hatcher and Mr. Burlison say Duke Florida "reserves" 3 feet of space for AT&T.[10] Again—not true. Duke Florida lets other attachers place their facilities 1 foot above AT&T's facilities, and within the 3 feet of space allocated to AT&T under the JUA. Exhibit D-1 contains photographs showing examples of AT&T and third-party attachments within the 3 feet Mr. Hatcher and Mr. Burlison say is "reserved" for AT&T.

14. *Finally*, Mr. Freeburn claims that the average midspan sag of AT&T'se attachments on Duke Florida's poles is [redacted] based on unspecified and undisclosed "DEF data."[11] This claim is also dubious. AT&T's fiber cables increasingly make up most of its aerial

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[8] Answer Ex. C at DEF000165-168 (Burlison Decl. ¶¶ 14-16 & Ex. C-1).

[9] Answer Ex. C-1 at DEF000168.

[10] Answer Ex. B at DEF000152 (Hatcher Decl. ¶ 7); Answer Ex. C at DEF000165 (Burlison Decl. ¶ 15).

[11] Answer Ex. A at DEF000133 (Freeburn Decl. ¶ 14).

placements in Duke Florida's territory and, when attached to poles, they are straight—or "banjo tight"—with virtually no midspan sag. When overlashed on existing cable, AT&T's fiber cables add minimal weight (and so no additional sag) to AT&T's existing facility. And because AT&T's current copper cables are primarily lightweight cables that are comparable in size and weight to AT&T's competitors' aerial cable, as explained above, they also exhibit minimal sag, and certainly no more than competitors' facilities which are themselves increasingly overlashed. Duke Florida's claim about sag is based on undisclosed and unspecified data that mischaracterizes the true conditions of AT&T's facilities in the field.

Timothy R. Davis

Sworn to before me on
this 20th day of November, 2020

Notary Public

PAUL FARRUGIA JR.

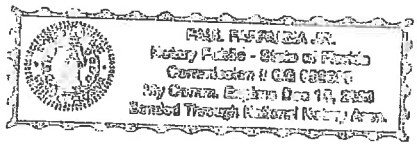
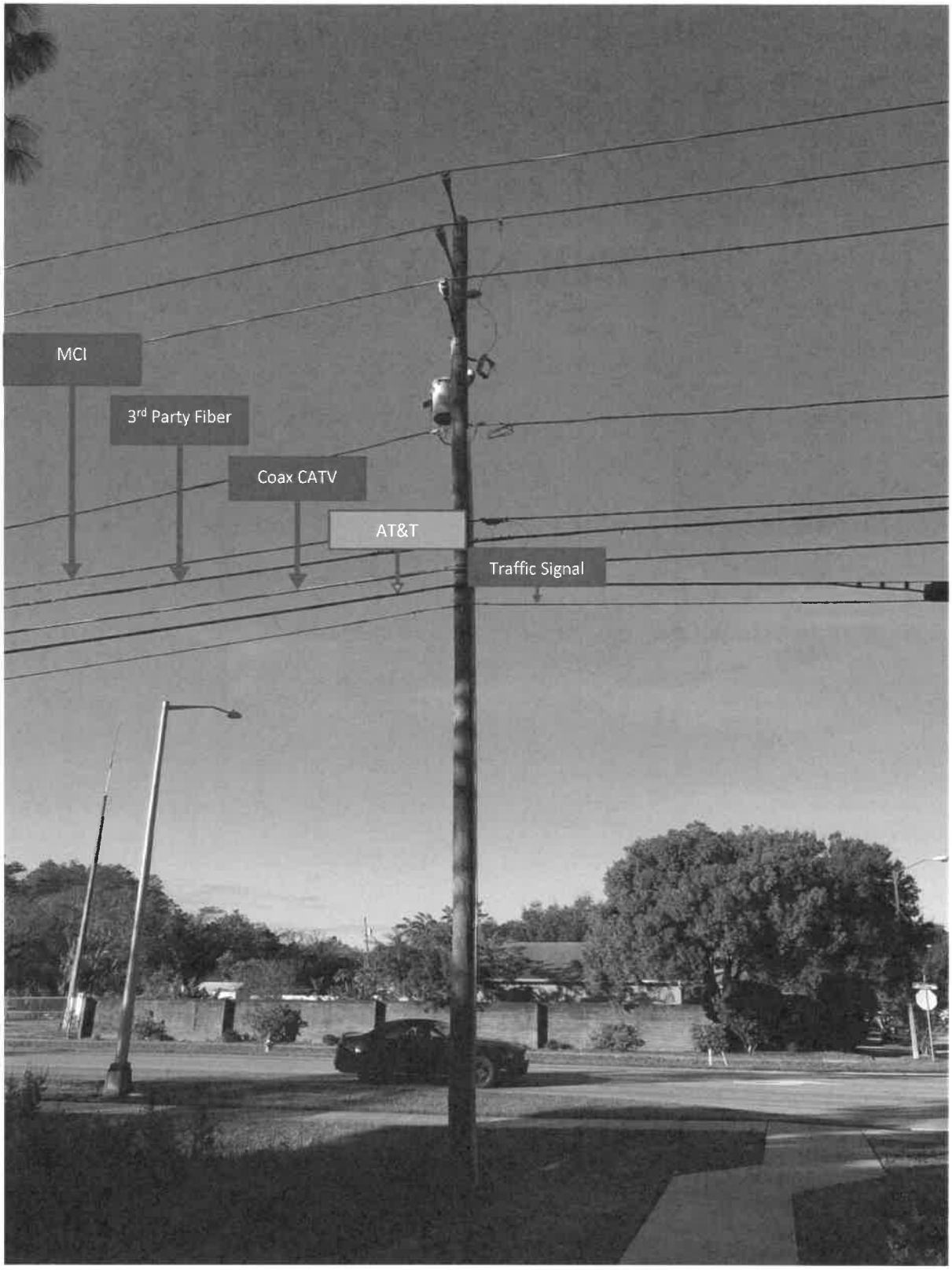
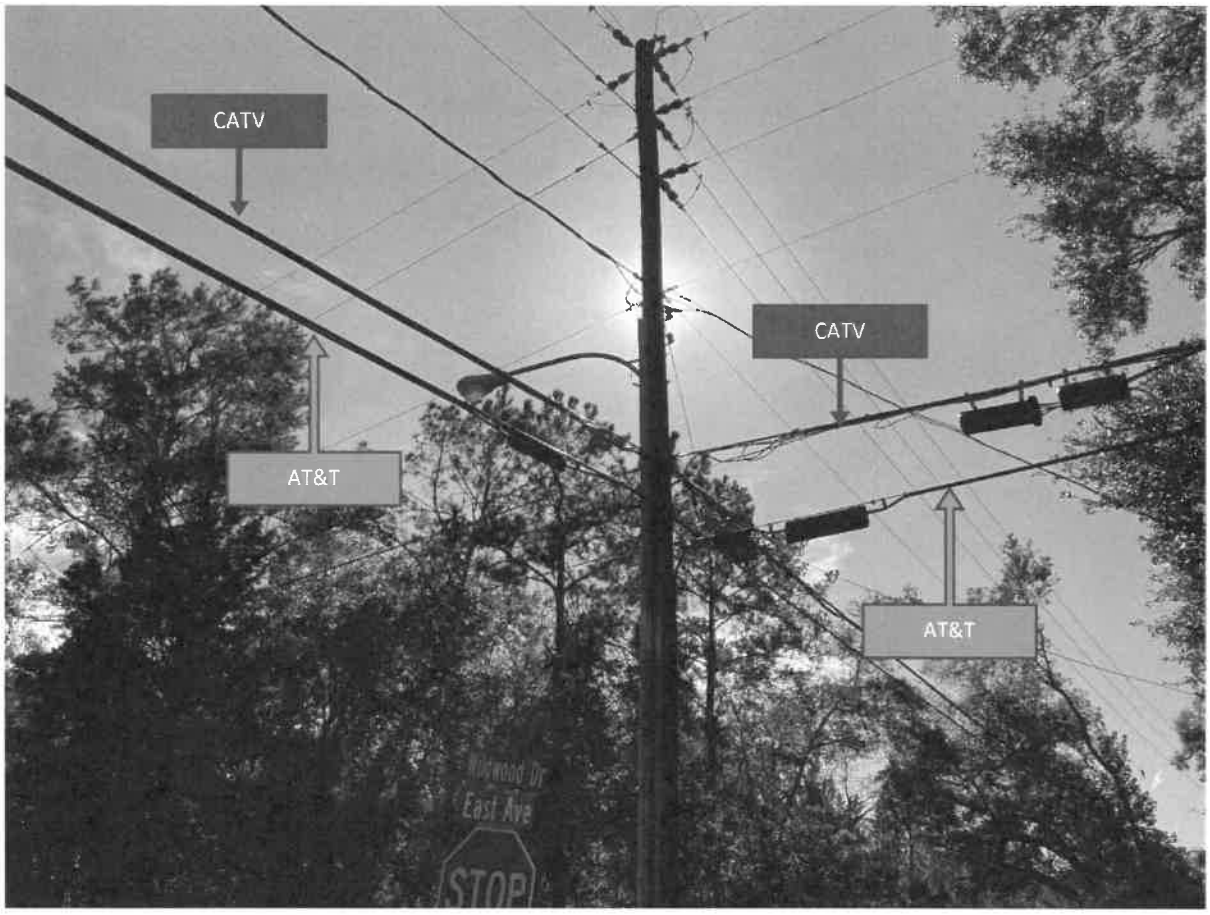


Exhibit D-1



[redacted]

[redacted]



[redacted]

Reply Exhibit E

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. DUKE ENERGY FLORIDA, LLC, Defendant.	Proceeding No. 20-276 Bureau ID No. EB-20-MD-003

REPLY AFFIDAVIT OF CHRISTIAN M. DIPPON, PH.D.
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

CITY OF WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

I, Christian M. Dippon, Ph.D., hereby declare:

1. My name is Christian M. Dippon. My business address is 1255 23rd Street, Suite 600, Washington, DC 20037. I am a Managing Director at the Washington, DC, office of NERA Economic Consulting (NERA) where I also serve as Chair of the Global Energy, Environment, Communications & Infrastructure (EECI) practice. I submitted an Initial Affidavit in this matter that includes my qualifications as Exhibit A.[1]

2. I prepared this Reply Affidavit at the request of counsel for Complainant BellSouth Telecommunications, LLC d/b/a AT&T Florida (AT&T). Counsel for AT&T

[1] See Pole Attachment Complaint, BellSouth Telecommunications, LLC d/b/a AT&T Florida, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003, August 25, 2020, Ex. D, Aff. of C. Dippon, Aug. 24, 2020 (hereinafter Dippon Initial Aff.).

requested that I review the Answer and Affirmative Defenses and supporting Declarations, Affidavit, and Exhibits filed by Duke Energy Florida, LLC (Duke Florida or DEF), and respond to Duke Florida's arguments.[2] This Reply Affidavit focuses primarily on Duke Florida's Answer and the Affidavit of Kenneth P. Metcalfe.[3]

3. My review of the Duke Florida Answer not only confirms but also reinforces the conclusions in my Initial Affidavit. Specifically, the pole attachment rates that Duke Florida has been charging AT&T under the parties' 1969 Joint Use Agreement (JUA), as amended in 1980 and 1990,[4] are not just and reasonable or competitively neutral. Rather, the rates reflect Duke Florida's abuse of its position as owner of a large majority of the utility poles jointly used by the parties. Duke Florida has not presented any evidence that provides a basis for its stark deviation from the new telecom rate. Further, AT&T does not enjoy net material competitive benefits with respect to its use of Duke Florida's poles. Thus, I continue to recommend that the Federal Communications Commission (FCC) set the just and reasonable rate for AT&T's use of Duke Florida's poles at the new telecom rate.

4. As support for my conclusions, I explain that Duke Florida advocates for a rate structure that the FCC has been trying to eliminate for nearly a decade and for rate inputs that the FCC has found unlawful when applied to communications attachers. Duke Florida presents a

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[2] See Duke Energy Florida, LLC's Answer and Affirmative Defenses to AT&T's Pole Attachment Complaint, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003, dated October 30, 2020 (hereinafter Duke Florida Answer).

[3] See Affidavit of Kenneth P. Metcalfe, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC,* Proceeding No. 20-276, Bureau ID No. EB-20-MD-003, dated October 30, 2020, attached to Duke Florida Answer as Ex. E (hereinafter Metcalfe Aff.).

[4] Joint Use Agreement Between Florida Power Corporation and Southern Bell Telephone and Telegraph Company, June 1, 1969 (hereinafter JUA), amended October 16, 1980 (hereinafter 1980 Amendment) and January 2, 1990 (hereinafter 1990 Amendment).

series of conflicting and uncorroborated arguments aimed at maintaining the current JUA rates, which are over [redacted] times the rates that result from the FCC's new telecom formula and over [redacted] times the rates that result from the FCC's preexisting telecom rate formula. FCC regulations and orders, however, require that Duke Florida base its rates on the FCC's new telecom formula unless it proves by clear and convincing evidence that it provides AT&T net material competitive benefits under the JUA that warrant a deviation from the new telecom formula. Further, if Duke Florida could meet that standard, its rates cannot exceed the rates under the preexisting telecom formula. Duke Florida's refusal to lower and ongoing effort to perpetuate its far higher JUA rates conflicts with the FCC's ratemaking principles and a decade of Commission reforms designed to produce competitively neutral rates.

5. I also detail why Duke Florida's attempted defense of the JUA rates, which is that replicating Duke Florida's pole network would be more expensive and that the JUA rates are similar to new telecom rates calculated using inputs the FCC has found unlawful, is evidence of Duke Florida's continued exercise of market power. Moreover, this defense is at odds with the objectives of FCC orders that mandate just, reasonable, and competitively neutral rates. I also rebut Duke Florida's valuations and arguments, which lack supporting data, are economically and factually incorrect, and would preserve the competitive rate disparities the FCC has previously found unlawful. Finally, I respond to Duke Florida's criticism of my Initial Affidavit.

6. As before, AT&T retained me as an independent expert in this matter. As such, neither my compensation nor my firm's compensation is dependent in any way on the substance of my opinions or the outcome in this matter. I may revise and supplement my opinions herein upon further review and analysis of any new data, materials, expert reports, or pleadings.

I. DUKE FLORIDA ADVOCATES THE RATE STRUCTURE THAT THE FCC HAS BEEN TRYING TO ELIMINATE

7. As explained in my Initial Affidavit, the present dispute is about what constitutes a just and reasonable pole attachment rate that is competitively neutral for AT&T's use of Duke Florida's poles. I highlighted two FCC orders that "offer specific guidance on this topic."[5] Specifically, the 2011 *Pole Attachment Order*[6] and the 2018 *Third Report and Order*[7] make it clear that Duke Florida must charge AT&T the same annual attachment rate that applies to competitive local exchange carriers (CLECs) under the FCC's new telecom formula ($4.54 per pole for the 2019 rental year),[8] *unless* Duke Florida can definitively demonstrate that the JUA would give AT&T a net material competitive advantage over its cable television (CATV) and CLEC competitors.[9] However, Duke Florida may not charge more than the rate justified by the net material competitive advantage it proves, with the rate resulting from the FCC's preexisting telecom formula ($6.89 per pole for the 2019 rental year)[10] serving as a ceiling on the just and reasonable rate.[11]

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[5] Dippon Initial Aff., ¶ 16.

[6] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (hereinafter *Pole Attachment Order*).

[7] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 14 FCC Rcd 18049 (2018) (hereinafter *Third Report and Order*).

[8] See Pole Attachment Complaint, BellSouth Telecommunications, LLC d/b/a AT&T Florida, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003, August 25, 2020, Ex. A, Aff. of D. Rhinehart, Aug. 24, 2020, ¶ 11 (hereinafter Rhinehart Aff.).

[9] See *Third Report and Order*, ¶ 123; *Pole Attachment Order*, ¶¶ 217-218.

[10] See Rhinehart Aff., ¶ 17.

[11] See *Third Report and Order*, ¶ 129; *Pole Attachment Order*, ¶ 218.

8. The FCC's guidance significantly simplifies the present matter because (using the 2019 rental year as an example) it establishes that $4.54 per pole is the rate that Duke Florida may lawfully charge AT&T, requires Duke Florida to demonstrate with clear and convincing evidence that it may lawfully charge a higher rate, and, in such an event, sets a $6.89 per pole upper bound on the range of potential just and reasonable rates.[12] Rates set outside the FCC's paradigm are, by definition, not just and reasonable or competitively neutral.

9. At [redacted] per pole for the 2019 rental year,[13] the JUA rate Duke Florida charges AT&T is far above the presumptively lawful new telecom rate *and* the preexisting telecom rate. It is thus by definition not just and reasonable or competitively neutral. Duke Florida ignores the FCC's guidelines and pursues a mix of unsupported and inconsistent theories in an attempt to justify its JUA rates—none of which makes economic sense or is consistent with the FCC's conclusions on issues it has already considered and ruled upon. Moreover, Duke Florida unnecessarily complicates this matter by presenting a defense of the JUA rates that depends entirely on a departure from settled ratemaking and competitive neutrality principles. Duke Florida's apparent effort to obscure should not be mistaken for the clear and convincing evidence required to justify a departure from the new telecom rate. Its arguments would directly undermine and roll back a decade of FCC pole attachment reforms designed to ensure competitive neutrality and promote deployment and competition in the telecommunications market.

[12] *Third Report and Order*, ¶¶ 123-129; 47 C.F.R. § 1.413(b).

[13] See Duke Florida's invoice to AT&T, Invoice #F44819, Period January 1, 2019 – December 31, 2019, Date of Invoice December 30, 2019.

A. Duke Florida's Theories Seek to Retain the Status Quo and Ignore All ILEC Rate Reforms Issued by the FCC Since 2011

10. Duke Florida seeks to preserve the current JUA rental rates by presenting a series of arguments regardless of whether they make sense, are consistent with other theories or FCC ratemaking principles, or grounded in fact. Under one theory, Duke Florida claims that AT&T should pay for [redacted] feet of space, 3 feet of space, [redacted] feet of space, or [redacted] feet of space it says AT&T "constructively" occupies on a pole—without supporting any of these values with survey data that actually measured AT&T's space across the joint use network.[14] Under another theory, Duke Florida argues that AT&T should pay rental rates that cover the cost of its own separate network of poles—which, of course, would mean that AT&T would not occupy any space on Duke Florida's poles.[15] Under a third theory, Duke Florida argues that AT&T instead should pay even higher rates to cover the "make-ready" cost to replace the over 62,000 hypothetical shorter Duke Florida poles with taller poles that accommodate communications attachers.[16]

11. The only commonality in Duke Florida's conflicting theories is its ability to manipulate data and contrive hypotheticals to try to produce rental rates that approximate or exceed the [redacted] per pole rate that Duke Florida charged AT&T for the 2019 rental year. This, Duke Florida reasons, is enough to establish that the [redacted] per pole rate is just, reasonable, and competitively neutral. There are at least three fundamental errors in Duke Florida's argumentation.

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[14] See, e.g., Duke Florida Answer, Executive Summary, ¶ 12.

[15] See, e.g., Metcalfe Aff., ¶ 18 ("To quantify this benefit, I have calculated the costs AT&T would incur to replace the network AT&T currently has in place on the joint use poles owned by Duke Energy Florida.").

[16] See Metcalfe Aff., ¶ 30 ("Per Mr. Freeburn, but for the existence of the JUA and the reserved pole space provided for AT&T therein, AT&T would have been required to pay for pole replacement costs for virtually every JUA pole currently owned by Duke Energy Florida.").

12. First, no combination of Duke Florida's theories replicates the rate that Duke Florida charges AT&T. Under its "constructive" space theory, it selects a [redacted]-foot space occupied value to claim the rate should be [redacted] or [redacted] per pole (for the 2019 rental year).[17] Under its duplicative network theory, it claims AT&T's rate should be at least [redacted] per pole.[18] Its make-ready theory raises that rate further to [redacted] per pole.[19] Mr. Metcalfe suggests that his unsupported values are additive, producing an annual rental rate as high as [redacted] per pole.[20]

13. Of course, the JUA rates are not based on any of these theories. Instead, Duke Florida's arguments are afterthoughts constructed to try to make its excessive JUA rates appear less out-of-line. However, all this cannot establish that the JUA rates Duke Florida charges AT&T are, in fact, just, reasonable, and competitively neutral. The [redacted] per pole rate that Duke Florida charged AT&T for 2019 still far exceeds the new and preexisting telecom rates—and the average $26.12 per-pole rate that, in part, led the Commission to adopt the new telecom rate presumption in order to accelerate rate relief to ILECs.[21]

14. Second, Duke Florida does not advocate for a single rate that falls within the range of new and preexisting telecom rates set by the FCC.[22] Indeed, Duke Florida so manipulates the FCC rate formulas to try to support its argument that it asserts new telecom rental rates that are [redacted] times the preexisting telecom rates for the same amount of space

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[17] Duke Florida Answer, ¶¶ 12, 22, 37.

[18] Metcalfe Aff., ¶ 20.

[19] Ibid, ¶ 30.

[20] Ibid, Ex. E-1 (apparently adding [redacted] per pole amounts).

[21] See *Third Report and Order*, ¶ 125.

[22] As calculated by Mr. Rhinehart, the new and preexisting telecom rates for AT&T's use of Duke Florida's poles were $4.54 per pole and $6.89 per pole, respectively, for the 2019 rental year. *See* Rhinehart Aff., ¶¶ 11, 17.

occupied,[23] even though properly calculated new telecom rates in Duke Florida's service area are 0.66 times the preexisting telecom rate using the FCC's presumptive inputs.[24]

15. Third, Duke Florida admits that the rates it charges AT&T—and the rates it calculates under its various theories—are not competitively neutral. Specifically, for the 2019 rental year, Duke Florida calculated a $4.99 new telecom rate and a $4.97 cable rate for AT&T's competitors, significantly less than the [redacted] per pole JUA rate that AT&T paid and every other rate Duke Florida derived under its various theories.[25]

16. Fourth, whether considered individually or cumulatively, not one of Duke Florida's theories speaks to the critical issue—specifically, whether Duke Florida currently provides a net material competitive advantage to AT&T *relative to AT&T's competitors*. Duke Florida instead offers unsupported and meaningless accounting exercises premised on its theories about a world that could have been had there been no joint use of utility poles.[26] However, an electric utility "may not embed in [an ILEC]'s rental rate costs that [the electric utility] does not incur."[27] Duke Florida's demand for higher rates based on hypotheticals confirms that it has and continues to abuse its substantial pole ownership advantage to collect unjust and unreasonable rates from AT&T.

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[23] See Duke Florida Answer, ¶ 31 (claiming [redacted] per pole new telecom rate for 2019); Ibid, ¶ 22 (claiming [redacted] per pole pre-existing telecom rate for 2019).

[24] See 47 C.F.R. § 1.1406(d)(2).

[25] See Answer, ¶ 12; Declaration of Marcia Olivier, ¶ 10, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003, dated October 29, 2020, attached to Duke Florida Answer as Ex. D (hereinafter Olivier Decl.).

[26] See, e.g., Duke Florida Answer, ¶ 16 n.57 (arguing case is about "what the parties would have done in the absence of the joint use agreement").

[27] *Verizon Va. v. Va. Elec. & Power Co.*, 32 FCC Rcd 3750, 3759 (¶ 18) (EB 2017) (hereinafter *Dominion Order*).

17. The goal of each of Duke Florida's theories is to retain the status quo. In doing so, Duke Florida ignores every ILEC rate reform adopted by the FCC since 2011 and tries to justify charging rates that will continue to cause the distorting economic effects the FCC has tried to eliminate. The Commission has rightly recognized that excessive rates like those charged by Duke Florida discourage network rollouts, network upgrades, and other investments. They also provide a competitive advantage to CLEC and CATV providers and overcompensate the power companies. Duke Florida's various theories do not provide a valid economic basis to reverse the FCC's reforms.

B. Duke Florida's Calculation of Space Occupied Is Incorrect

18. In its effort to justify its rates, Duke Florida ignores more than the Commission's ILEC rate reforms. It also ignores the Commission's ruling that just and reasonable and competitively neutral rental rates shall be calculated based on the space that the attacher occupies on a utility pole.[28]

19. Under one of Duke Florida's theories, it argues that the new telecom rates charged to AT&T should be [redacted] times the new telecom rates it charged AT&T's competitors. Duke Florida arrives at this multiple by claiming that AT&T occupies [redacted] feet of space on its poles whereas its competitors occupy only one foot of space on those poles. To arrive at AT&T's alleged pole space requirement, Duke Florida sums the 3.33 feet of the safety space and [redacted] feet of space that Duke Florida claims represents the average pole space occupied by AT&T.[29] Duke Florida did not provide any data used to derive this [redacted]-foot value except to state that in the course of

[28] See 47 C.F.R. § 1.1406(d); *Bellsouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, Memorandum Opinion and Order, ¶ 16, 35 FCC Rcd 5321 (2020) (hereinafter *FPL Order*).

[29] See Duke Florida Answer, ¶ 12.

the "third-party pole attachment process" in 2019 and 2020, a contractor reported that AT&T's "highest attachment" on 941 unidentified poles (1.5% of the 62,363 Duke Florida poles to which AT&T is attached) averaged [redacted] feet above ground.[30] Duke Florida then assumes that the "lowest point of attachment" on those poles was 18 feet, so it subtracts 18 feet from [redacted] feet and announces that AT&T "actually" occupies [redacted] feet of space on a pole.[31] There are errors with every aspect of this argument.

1. Duke Florida's Multiplication of New Telecom Rates Violates FCC Rules

20. Duke Florida's multiplication of one foot new telecom rates by the number of feet of occupied pole space violates the Commission's rules, which include rate formulas that "determine the maximum just and reasonable rate *per pole*."[32] The formulas include a "space occupied" input, which is presumptively populated with a 1-foot value for communications attachers but can be adjusted if statistically valid survey data establishes that an attacher occupies more space, on average, across a pole network.[33] This ensures that the unusable space on the pole is proportionally shared among *attaching entities*.[34] Conversely, calculating rates in the manner

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[30] See Declaration of Gilbert Scott Freeburn, ¶ 21, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003, dated October 30, 2020, attached to Duke Florida Answer as Ex. A (hereinafter Freeburn Decl.).

[31] See Duke Florida Answer, ¶ 12 & n.32.

[32] See *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 31 (2001) (hereinafter *Consolidated Partial Order*) (emphasis added).

[33] See 47 C.F.R. §§ 1.1406(d), 1.1410.

[34] See 47 U.S.C. § 224(e)(2).

of Duke Florida leads to artificially high rental rates that overcompensate the electric utility to the detriment of attachers.

2. Commission Precedent Precludes Duke Florida's Safety Space Theory

21. Duke Florida's attempt to assign AT&T 3.33 feet of safety space violates FCC precedent. Earlier this year, the Enforcement Bureau rejected the exact same argument, stating:

> The communication space should not be attributed to AT&T because, under the Commission's rate formula, "space occupied" means space that is "actually occupied," and AT&T's attachments do not actually occupy the communications safety space. Further, the Commission has long held that the communication safety space is for the benefit of the electric utility, not communications attachers. In the 2000 *Pole Attachments Report and Order*, the Commission rejected electric utilities' request to revise the rate formula by removing the safety space from usable space, stating, "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 [competitive LEC] attachers. The space is usable and used by the electric utilities."[35]

22. Charging AT&T for the safety space would also violate competitive neutrality because, by Duke Florida's own admission, it cannot lawfully charge AT&T's competitors for that space.[36] The FCC found that the "safety space …. is usable and used by the electric utility,"[37] and that does not change when AT&T is attached to the pole. Indeed, AT&T's facilities are often not even located next to the safety space.[38] The safety space is located between Duke Florida's lowest attachment and the highest communications attachment, which is

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[35] *FPL Order*, ¶ 16.

[36] *See* Duke Florida Answer, ¶ 12 n.34.

[37] *Consolidated Partial Order* ¶ 51.

[38] See Peters Reply Aff., ¶ 17.

often the attachment of a CLEC or CATV attacher and not AT&T.[39] Further, as Duke Florida's witnesses confirm, Duke Florida does in fact use the safety space for its own facilities.[40]

3. Duke Florida's [redacted]-Foot Measurement Is Hypothetical and Unsupported

23. There are many flaws with Duke Florida's claim that AT&T occupies [redacted] feet of space on a pole. First, Duke Florida does not argue that AT&T's physical attachment occupies [redacted] feet of space.[41] Instead, Duke Florida argues AT&T should pay for space *below* its physical attachment because it thinks "it would not be possible (on average) to locate another wireline communications attachment beneath AT&T" because of the place where AT&T's facilities are affixed to the pole.[42] The Commission, however, sets rates based on "space occupied" by a physical attachment to a pole, not based on space below that attachment.

24. Second, Duke Florida's alleged [redacted]-foot measurement is not actually a measurement of space on any real-world pole. Instead, Duke Florida pairs a contractor's uncorroborated report about 941 poles with a presumption that the minimum ground clearance for poles is 18 feet.[43] Further, as Mr. Peters explains, minimum ground clearance is a highly site-

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[39] Ibid.

[40] See Declaration of Steven D. Burlison, P.E., ¶ 9, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003, dated October 28, 2020, attached to Duke Florida Answer as Ex. C (hereinafter Burlison Decl.) ("[S]treetlights are occasionally mounted within the Communication Worker Safety Zone on DEF's poles as permitted by the NESC."); Freeburn Decl., ¶ 16 ("[S]treetlights are occasionally mounted within the safety space on DEF's poles").

[41] See *FPL Order*, ¶ 16 ("under the Commission's rate formula, 'space occupied' means space that is 'actually occupied'").

[42] Freeburn Decl., ¶ 8.

[43] Duke Florida Answer, ¶ 12 & n.32.

specific issue that varies from pole to pole.[44] Even where the minimum ground clearance for a pole is 18 feet, it is still impossible to conclude that the "lowest point of attachment" on the pole will also be 18 feet because that measurement could vary based on site-specific topographical conditions (e.g., a pole could be set at a lower elevation than the road an aerial facility must span).[45]

25. Third, Duke Florida's theory assumes that it is not possible to locate another attachment below AT&T's wireline facility on a pole. However, Mr. Burlison admits there are third-party attachments below AT&T's facilities on some Duke Florida poles.[46] Mr. Peters also explains that AT&T has encouraged other companies to place their wireless facilities below AT&T's wireline facilities, and it has lowered or raised its facilities to ensure there is room for other communications attachers.[47]

26. Fourth, Duke Florida's measurement is not the product of a statistically reliable and valid survey, as required to rebut the Commission's presumption that a communications facility occupies 1 foot of space, on average, across a pole network.[48] The only information Duke Florida provides is an unsupported statement from Mr. Freeburn about a contractor's measurements "on 941 DEF poles to which AT&T is attached."[49] Making matters worse, Mr. Freeburn does not seem to trust the measurements, stating only that they may be accurate.[50] Mr.

[44] Peters Reply Aff., ¶ 21.

[45] Ibid.

[46] Burlison Decl., ¶ 17.

[47] Peters Reply Aff., ¶ 19.

[48] See 47 C.F.R. §§ 1.1406(d), 1.1410.

[49] Freeburn Decl., ¶ 12.

[50] Ibid.

Freeburn does not provide any data needed to evaluate the alleged measurement. He does not provide pole locations, field data, or an explanation of the methodology used to identify the poles or generate the data. He does not disclose whether the poles were randomly selected or whether they were dispersed throughout the overlapping service area. He does not explain how sampling 941 of 62,363 Duke Florida poles (1.5%) to which AT&T attaches could form a representative sample. He does not detail a sampling technique, provide information about a standard deviation, or calculate a confidence interval.

27. Fifth, Mr. Freeburn suggests its [redacted]-foot measurement is somehow corroborated by some other undisclosed set of "DEF data [that] indicates that the average midspan sag for AT&T attachments is [redacted]."[51] No further detail is provided. Mr. Freeburn does not provide information on the sample size, sampling technique, or standard deviation for this claim. He does not identify the poles purportedly reviewed or even explain who completed the measurements or how the cable sag was measured. Mr. Freeburn also does not provide any comparable data about other aerial facilities on Duke Florida's poles. His claim is thus unreliable and also meaningless for comparative purposes.

28. Duke Florida's claim about midspan sag is also irrelevant. The Commission has rejected requests to consider midspan sag located *off the pole* when calculating space occupied *on the pole*. For example, the Commission held that an overlashed facility should be presumed to occupy 1 foot of space on the pole even if the added weight from the overlashing could result in increased pole loading and sag.[52] There is no valid economic reason to treat AT&T's facilities differently.

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[51] Ibid, ¶ 14.

[52] *Consolidated Partial Order*, ¶¶ 77-78.

29. Indeed, all aerial cables are subject to sag, including those for Duke Florida, CATV, and CLEC attachers. However, Duke Florida apparently only wants to charge AT&T for sag. Duke Florida's license agreement includes a pole allocation schematic that depicts the 1-foot space occupied measurement for licensees without reference to sag.[53] It also clarifies that an attachment is a "contact *on a pole*."[54] Charging AT&T differently violates the principle of competitive neutrality.

30. It would also lead to significant overrecovery if Duke Florida were able to charge for space that is not actually occupied on the pole. For example, by charging for space that is not occupied *on the pole* because it is purportedly "occupied" *between poles*, Duke Florida could recover double for the same segment of pole space—once from the attacher whose attachment is occupying the space on the pole and again from another attacher whose attachment is on the same plane midspan. The Commission instead bases rates on space occupied on the pole itself.

4. Rates Must Be Set Based on Space Occupied, Not Space Allocated

31. Duke Florida's final theory about pole space relies on the 3 feet of space allocated under the JUA.[55] However, "under the Commission's rate formula, 'space occupied' means space that is 'actually occupied'"—and not simply allocated.[56] Moreover, it is undisputed that AT&T does not actually occupy 3 feet of space on a pole. Indeed, AT&T indicates that it "does not need, want, or use 3 feet of space across Duke Florida's poles for its existing facilities, for

[53] Duke Florida Answer, Ex. 7 at p. 41.

[54] *Id*, § 1.3 (emphasis added).

[55] JUA, § 1.1.6(B).

[56] *FPL Order*, ¶ 16.

future facilities, or for any other purpose, and it cannot sublet that space to others."[57] Instead, AT&T requires space comparable to its competitors, that is, 1 foot of pole space.[58] Duke Florida, meanwhile, requires *more* space than it was allocated under the JUA.[59] Its insistence that rates be set based on unrealistic space allocations that benefit Duke Florida is evidence that Duke Florida has abused its position as the owner of the vast majority of poles jointly used by the parties to perpetuate unjust and unreasonable rates.

32. Competitive neutrality demands that rates for AT&T treat the "space occupied" input to the new telecom formula in the same manner that it is treated for all communications attachers. Duke Florida charges AT&T's competitors based on the presumption that they occupy, on average, 1 foot of space. Thus, in the absence of verifiable data, which Duke Florida has not produced, Duke Florida must apply the same one-foot presumption to AT&T's attachments. Therefore, there is no basis to charge or continue charging AT&T rates that exceed those resulting from the proper application of the new telecom rate using the Commission's default inputs.

II. DUKE FLORIDA CONFIRMED THAT ITS RATES EVIDENCE ITS POLE OWNERSHIP ADVANTAGE

33. In my Initial Affidavit, I explained that Duke Florida has been able to impose and continue charging unreasonably high rental rates over the course of the JUA because of the bargaining power it enjoys by virtue of the significant disparity in pole ownership between Duke

[57] See Pole Attachment Complaint, BellSouth Telecommunications, LLC d/b/a AT&T Florida, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003, August 25, 2020, Ex. C, Aff. of M. Peters, Aug. 24, 2020, ¶ 25 (hereinafter Peters Aff.).

[58] Ibid, JUA, § 1.1.6(A).

[59] Burlison Decl., ¶ 14.

Florida and AT&T. The analysis performed by Duke Florida's outside accountant, Mr. Metcalfe, exemplifies Duke Florida's disregard of the FCC's competitive concerns and its intention to use its pole ownership advantage to continue charging uncompetitively high JUA rates.

34. The essence of Mr. Metcalfe's argument is that Duke Florida's pole attachment rates are just and reasonable because they are significantly lower than what AT&T would pay if it had to furnish and install poles to replace the Duke Florida poles to which it currently attaches. Specifically, Mr. Metcalfe argues that but-for the JUA, AT&T would need "to replace the network AT&T currently has in place on the joint use poles owned by Duke Energy Florida."[60] This, Mr. Metcalfe argues, would cost [redacted] per pole per year in perpetuity.[61] Mr. Metcalfe acknowledges that Duke Florida would also need to replace the 5,233 AT&T poles to which it is attached. After providing an offset to account for these poles, Mr. Metcalfe concludes that AT&T would still need to pay [redacted] per pole in perpetuity without the JUA and Duke Florida would pay nothing.[62] Mr. Metcalfe concludes, "[T]his is a significant and fundamental contractual benefit to AT&T associated with the JUA."[63]

35. Before addressing the many conceptual errors contained in Mr. Metcalfe's calculations, it is important to examine his argument because it makes the very point that I made in my Initial Affidavit. Mr. Metcalfe's argument and after-the-fact claims clearly demonstrate that Duke Florida has superior bargaining power over AT&T. He opines that it was just and reasonable for Duke Florida to charge AT&T [redacted] per pole for 2019 rent because it was lower

[60] Metcalfe Aff., ¶ 18.

[61] Ibid, ¶ 20.

[62] Ibid, ¶ 20 and Ex. E-2.

[63] Ibid, ¶ 21.

(significantly so) than AT&T's next best alternative of placing its own poles, which would have cost AT&T [redacted] per pole.[64] However, Mr. Metcalfe's calculation does not establish the justness or the reasonableness of the attachment rate, let alone its competitive neutrality.

36. A just and reasonable rate obtained through commercial negotiations requires that the parties be equal partners and that they possess relatively equal bargaining power such that the resulting price is independent of their relative bargaining positions. However, Mr. Metcalfe demonstrates that AT&T would stand to lose far more than Duke Florida would lose absent joint use. Even under his highly flawed calculations, he values this difference at [redacted] per pole—the amount AT&T would have to pay Duke Florida under his analysis, equal to nearly [redacted] million every year in perpetuity.[65]

37. This [redacted] million annual difference refutes Duke Florida's claim that AT&T "can choose at any time to remove its facilities from DEF's poles. AT&T has a choice. DEF does not."[66] It also establishes that Duke Florida has substantial market power "when granting access to its pole infrastructure under the essential facilities doctrine…."[67] Thus, Mr. Metcalfe confuses the concept of just and reasonable rates (which is independent of a party's bargaining position) with a bargaining situation where one party (Duke Florida) previously had and currently has far less to lose than the other party (AT&T). Under such circumstances, the dominant party can use this leverage to obtain its desired result. This is precisely what Duke Florida has done to AT&T.

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[64] Ibid, ¶ 20.

[65] Ibid and Ex. E-2.

[66] Duke Florida Answer, Executive Summary.

[67] Dippon Initial Aff., ¶ 23.

38. Not surprisingly, because of his confusion between rates resulting from unequal bargaining power versus rates that are just and reasonable, Mr. Metcalfe's affidavit makes no mention of competitive neutrality other than in a section describing my analysis.[68] If Duke Florida bases CLEC and CATV attacher rates on the FCC's new telecom formula and AT&T's rates on the cost of placing its own poles, it is impossible to achieve competitive neutrality.

III. MR. METCALFE DID NOT IDENTIFY ANY NET MATERIAL BENEFIT THAT JUSTIFIES CHARGING AT&T A RATE HIGHER THAN THE NEW TELECOM RATE

39. Duke Florida claims it rebutted the presumption that AT&T should be charged a new telecom rate with "the economic evaluation submitted by Mr. Kenneth P. Metcalfe, CPA, CVA."[69] I disagree.

40. Mr. Metcalfe provides calculations that focus on three theories that he may or may not see as additive. First, AT&T receives, as the "benefit of the bargain," a right to remain attached to existing Duke Florida poles after the JUA terminates that should be valued based on the cost of a replacement network. Second, AT&T purportedly avoided make-ready and other costs when it attached to Duke Florida's poles that should be valued based on the cost of replacing Duke Florida's poles with taller poles. Third, AT&T has derived a benefit from space on Duke Florida's poles and other alleged but unquantified benefits. Each theory is fatally flawed.

A. Mr. Metcalfe's Benefit of The Bargain Theory Is Wrong

41. Mr. Metcalfe is wrong in his claim that AT&T is competitively advantaged by a "benefit of the bargain," which gives AT&T the right to remain attached to existing Duke Florida

[68] Metcalfe Aff., ¶ 40.

[69] Duke Florida Answer, ¶ 13.

poles after the JUA terminates. According to Duke Florida, "AT&T, in essence, has a unilateral perpetual license option on 62,000 joint use poles owned by DEF."[70] It asserts that this "eliminates the need (or even the contingency) of constructing a new network of 62,000 poles in the event of a termination."[71] Mr. Metcalfe characterizes this alleged benefit as "avoided system replacement costs," and values it at [redacted] per pole per year.[72]

42. There are several conceptual and factual errors in Duke Florida's allegation and Mr. Metcalfe's accounting exercise. First, the entire exercise is irrelevant because what Mr. Metcalfe attempts to measure does not provide AT&T with a net *competitive* benefit.[73] Under this theory, Mr. Metcalfe attempts to quantity the value of a perpetual license because, as Mr. Metcalfe understands the JUA, Duke Florida cannot require AT&T to remove its attachments on *existing* JUA poles if the JUA terminates; it can only prevent it from attaching to *new* poles (i.e., poles to which AT&T does not yet attach). However, per Mr. Metcalfe's own finding, "Duke Energy Florida is required by the FCC to provide mandatory access to CLECs and CATVs, but is not required to provide mandatory access to AT&T, which is an ILEC."[74] Further, he notes that this is a material *disadvantage* for AT&T.[75] However, in his calculations, Mr. Metcalfe entirely ignores the fact that CLEC and CATV attachers have access rights to *all* poles, *existing and new*, at all times. As stated by the FCC:

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[70] Ibid, ¶ 38.

[71] Ibid, Executive Summary.

[72] Metcalfe Aff., ¶ 20.

[73] Duke Florida's Answer incorrectly claims that I offered no economic analysis about the alleged benefits Duke Florida claims AT&T receives. See Duke Florida Answer, ¶ 32 n.136. In fact, paragraphs 39–49 of my Initial Affidavit includes this analysis.

[74] Metcalfe Aff., ¶ 9.

[75] Ibid.

> The Telecommunications Act of 1996 (1996 Act) expanded the definition of pole attachments to include attachments by providers of telecommunications service, and granted both cable systems and telecommunications carriers an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility.[76]

Thus, if anything, the JUA improves (but does not eliminate) the material disadvantage that Mr. Metcalfe acknowledges and thus provides no net advantage to AT&T over CLEC and CATV attachers. Thus, Mr. Metcalfe's "benefit of the bargain" calculation is meaningless because the so-called "perpetual license" or "evergreen" provision in the JUA provides no net competitive benefit to AT&T.

43. Second, the Enforcement Bureau already rejected a similar effort to price pole attachment rates based on the value of a complete pole network, stating:

> FPL further attempts to calculate the monetary value of AT&T's guaranteed access by assuming that, without the JUA, AT&T would have built a duplicate pole network. But, as Congress has found, owing to a variety of factors, including environmental and zoning restrictions, there is "often no practical alternative except to utilize available space on existing poles."[77]

Mr. Metcalfe wholly ignores the Enforcement Bureau's decision, while attempting the exact same flawed exercise.

44. Third, Mr. Metcalfe's calculation is unsupported, hypothetical, and entirely unrealistic. Mr. Metcalfe has no documentation for any of his data and simply cites "discussions with Scott Freeburn" and "Duke Energy Florida's estimating system" as his sources.[78] Mr. Freeburn provides no further specificity in his declaration, instead stating that he obtained the uncorroborated "procurement and installation" cost estimates from a "work order system."[79]

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[76] *Pole Attachment Order*, ¶ 10 (footnotes omitted).

[77] *FPL Order*, ¶ 15.

[78] Metcalfe Aff., Ex. E-2.

[79] Freeburn Aff., ¶ 30.

45. It is also highly unlikely that Duke Florida ever purchased over 62,000 poles *at one time* and thus would know how much each pole would cost if purchased in these quantities. More important, the entire accounting exercise—which consists of Mr. Metcalfe taking unsupported numbers from Mr. Freeburn and annualizing them—is meaningless. As I stated previously, duplicating Duke Florida's pole network is "not economically feasible or socially desirable."[80] Hence, quantifying the cost of a dystopian world in which there are two poles placed next to each other at every location adds no value to this matter.

B. Mr. Metcalfe's "Make-Ready" Theory Is Incorrect

46. Mr. Metcalfe engages in a similar hypothetical accounting exercise when calculating the purported benefit AT&T receives from allegedly avoiding make-ready costs because of the JUA. Underlying Mr. Metcalfe's calculation is an assumption that but-for the JUA, Duke Florida would have built a network of shorter poles and that—had AT&T sought to attach facilities, "AT&T would have paid make-ready costs to replace virtually all of Duke Energy Florida's poles with taller poles."[81] Mr. Metcalfe claims these "avoided pole replacement costs" are valued at [redacted] per pole per year.[82] There are several errors with this claim as well.

47. First, the Enforcement Bureau's recent decision precludes Mr. Metcalfe's "make-ready" theory. If it is unreasonable to set rates based on the assumption that "without the JUA, AT&T would have built a duplicate pole network,"[83] which Mr. Metcalfe says would cost [redacted] per pole per year, it is equally unreasonable to assume that without the JUA, AT&T would have followed behind Duke Florida and replaced each of its poles with a taller pole (at a

[80] Dippon Initial Aff., ¶ 23.

[81] Metcalfe Aff., Ex. E-3.1.

[82] Ibid, ¶ 30.

[83] *FPL Order*, ¶ 15.

higher cost of [redacted] per pole per year, according to Mr. Metcalfe). It is impossible to conclude that a regulator a half-century ago would have considered it prudent for two rate-of-return regulated utilities sharing common ratepayers to build and then rebuild the pole line both companies required. It is even more inconceivable today.

48. Second, the Enforcement Bureau has previously rejected Mr. Metcalfe's underlying assumption that but for joint use with ILECs, electric utilities would have built networks of shorter poles:

> FPL did not build its poles just to accommodate AT&T. By 1978, cable attachments were so common that Congress saw fit to regulate their rates, and, by 1996, section 224 of the Act was amended to provide cable and competitive LECs a statutory right of access.[84]

Duke Florida's response to this precedent is, "So what? DEF did."[85] However, the evidence demonstrates that Duke Florida did not build stronger and taller poles because of AT&T. Specifically, in 1991, one cable company had nearly [redacted] attachments on Duke Florida's distribution poles.[86] That same year, Duke Florida invoiced AT&T for more than [redacted] fewer poles (48,278).[87] The prevalence of cable attachments in Duke Florida's territory in 1991 makes sense. Indeed, by 1977, there were already 12.2 million CATV subscribers and many more homes passed in the United States.[88] Thus, whereas Duke Florida offers no evidence that it built stronger and taller poles because of AT&T, the available data clearly indicate that CATV attachments were far more prevalent than telecommunications attachments.

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[84] Ibid, ¶ 15.

[85] Duke Florida Answer, ¶ 16 n.57.

[86] See Resp. to AT&T's First Set of Interrogs., Ex. 2 at DEF000025-27.

[87] Complaint, Ex. 5 (1990 Invoice).

[88] See Kagan Research, *Broadband Cable Financial Databook*, 2005, p. 8.

49. Moreover, if Duke Florida chose to install taller poles, available data show that it did not *need* to do so because of the JUA. I reviewed publicly available pole height data for another electric utility in Florida, Florida Power and Light Company ("FPL"), which shows that it installed larger quantities of taller poles when an ILEC was *not* attached than when an ILEC was attached. There is no reason to believe that the result would differ in Duke Florida's territory because both electric utilities operate in Florida under the oversight of the same regulator.

50. The following table includes, by percentage, the pole lengths of FPL's poles and Verizon's poles (then an ILEC in FPL's territory) in 2013. Column (a) shows the percentage of poles by height where the poles only have electric utility (FPL) attachments. Column (b) reports the percentages for poles under the JUA with Verizon. Column (c) presents percentages of poles with a third-party attachment, but not an ILEC attachment. Finally, column (d) reports the percentages of poles by height then owned by Verizon. Analyzing these percentages reveals that FPL did not install a taller pole network because of the JUA with Verizon:

FPL and Verizon Pole Percentages by Height and Attacher (2013)

	FPL Poles			Verizon
	Only FPL Attachments (a)	Joint-Use Pole (b)	Third-Party But No Verizon Attachments (c)	Joint-Use Pole (d)
30' & shorter	19.6%	13.4%	10.1%	45.1%
35'	11.5%	18.2%	14.1%	35.7%
40'	51.3%	58.4%	49.1%	18.2%
45'	13.1%	8.2%	20.3%	0.9%
50' & higher	4.6%	1.9%	6.5%	0.1%
Poles	100,765	67,159	38,799	7,018
% over 30'	80.5%	86.7%	90.0%	54.9%
% over 35'	69.0%	68.5%	75.9%	19.2%

Source: Affidavit of Timothy J. Tardiff, Ph.D. Verizon Florida LLC v. Florida Power and Light Company, Before the Federal Communications Commission, Docket No. 15-73, March 13, 2015, Table 1.

Column (a) of this table reveals that 80.5 percent of FPL's poles that had only an electric utility's attachments (i.e., no ILEC or third-party attachment) were taller than 30 feet and 69 percent (over 2/3) were taller than 35 feet. This negates Mr. Burlison's claim that but-for the JUA Duke Florida "could have installed 30 or 35-foot poles."[89] The FPL example demonstrates that electric utilities regularly install poles taller than 35 feet without any communications facilities attached. Also of interest is the data reported in column (b) because it shows that slightly *fewer* electric utility poles were taller than 35 feet when shared with an ILEC (68.5 percent) than when used exclusively by the electric utility (69.0 percent). And column (c) then reveals that electric utility poles with *only* third-party attachments (i.e., no ILEC attachment) were taller than electric utility poles shared with ILECs and electric utility poles used exclusively by FPL. In other words, the

[89] Burlison Decl. at ¶ 12; see also Freeburn cited in Metcalfe Aff. at Ex. E-2.1.

poles were the tallest in the two scenarios in which an ILEC was *not* attached. FPL's data thus demonstrate that it is not necessary to build taller poles simply because of a JUA.

51. Third, Mr. Metcalfe's premises his make-ready claim entirely on his "discussions" with Mr. Freeburn that Duke Florida installed 40-foot poles because of the JUA, when it would have installed shorter 30- or 35-foot poles otherwise.[90] Mr. Freeburn, likely does not know what Duke Florida would or would not have done in 1969 when the JUA was entered because he did not join Duke Florida's predecessor company until 2004 and he does not source his information.[91] Furthermore, the evidence contradicts his premise. The JUA shows that 40-foot poles were not required if a shorter pole would meet the requirements of both parties.[92] Moreover, the JUA defined a 35-foot pole as the "normal joint use pole" in certain areas.[93] Therefore, it is not true that Duke Florida was ever forced to install 40-foot poles because of the JUA, and it is certainly not true today. Per Mr. Burlison, Duke Florida's "typical vertical three-phase construction" *without* AT&T attached involves a 45-foot pole.[94]

52. Indeed, the premise of Mr. Metcalfe's valuation also renders it irrelevant because Duke Florida's installation of 40-foot poles does not *competitively* advantage AT&T. A 40-foot pole can accommodate AT&T *and* its competitors, and in many cases, a 35-foot pole can as well.[95] The fact that Duke Florida installed poles that could accommodate communications attachers applies equally to AT&T and its competitors. Thus, this is not a net competitive benefit.

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[90] See Metcalfe Aff., ¶ 30 n.40 & Ex. E-3.1; *see also* Freeburn Decl., ¶ 11.

[91] Freeburn Decl., ¶ 1.

[92] JUA, § 1.1.5.

[93] Ibid, § 1.1.5(B).

[94] Burlison Decl., ¶ 14 & Ex. C-1.

[95] See Peters Reply Aff., ¶ 9.

53. Fourth, Mr. Metcalfe's assumption that AT&T would have had to replace all of Duke Florida's poles in this hypothetical scenario is rebutted by the 1972 document Duke Florida attached to its Answer. It states:

[redacted]

Mr. Metcalfe nonetheless assumes that AT&T would have replaced 100% of Duke Florida's poles.[97] At the same time, he fails to give AT&T any credit for the high rental rates that AT&T *did* pay over the entirety of the JUA—rates that far exceeded the rental rates paid by AT&T's competitors since 2011.

54. Fifth, Mr. Metcalfe also has no source data to support his pole replacement cost; he simply states, [redacted][98] Mr. Freeburn provides little additional information, except to state that the [redacted] per pole estimate is Duke Florida's "average wood pole replacement cost for the year ending 2019 … based on 4,115 wood pole replacements."[99] Mr. Freeburn thus included all pole replacements of all sizes in his estimate, rendering it incapable of estimating the specific cost to replace a 30- or 35-foot pole with a 40-foot pole. Yet, Mr. Metcalfe fails to

[96] Duke Florida Answer, Ex. 6 at DEF000278 (emphasis added).

[97] Metcalfe Aff., Ex. E-3.1.

[98] Ibid, ¶ 31.

[99] Freeburn Decl., ¶ 29.

appreciate or does not acknowledge this inconsistency with his theory. Further, he does not mention if he tried to verify independently the information he was provided.

55. Mr. Metcalfe's use of the 2019 average cost that Mr. Freeburn provided is flawed for another reason as well. He uses 2019 costs, instead of historic costs, to estimate what AT&T would have had to pay to replace Duke Florida's poles *when AT&T made its initial attachment.* Any such costs would have been incurred long ago. In 1969, the parties entered the JUA and replaced "[a]ll existing Agreements between the parties hereto for the joint use of poles."[100] By 1991, AT&T had attachments on 48,278 poles.[101] There is no justifiable basis to set rates as though AT&T were paying to replace poles a half century ago at 2019 costs.

C. Mr. Metcalfe's Other Quantification Exercises Are Also Misplaced

56. The remainder of Mr. Metcalfe's analysis also suffers from oversimplification and unsupported data. He simply adopts his client's claim that AT&T should be assigned 3.33 feet of safety space on the pole and 3 feet of space allocated by the JUA,[102] without even citing the FCC decisions that preclude these space assignments because they do not reflect space that AT&T actually occupies on the pole.[103] With respect to the 3.33 feet of safety space, Mr. Metcalfe simply states that from "an economic cost-causation perspective, and under the current circumstances, it would be more equitable to allocate 100% of the safety space to the licensee."[104] It is unclear what Mr. Metcalfe means because he provides no analysis or explanation of his "economic cost-causation" analysis or the "current circumstances" to which he

[100] JUA, Art. XVIII.

[101] Complaint, Ex. 5 (1990 Invoice).

[102] Metcalfe Aff., ¶¶ 31-37.

[103] *FPL Order*, ¶ 16 (citing authorities).

[104] Metcalfe Aff., ¶ 34.

refers. Mr. Metcalfe's opinion is also beside the point because the FCC already considered this issue and ruled that the safety space must be allocated to the power company, not the communications attacher, when calculating rates.[105]

57. With respect to the 3 feet of space allocated to AT&T by the JUA, Mr. Metcalfe simply states, "AT&T has 3 feet of reserved space per the JUA."[106] This ignores the fact that AT&T "does not need, want, or use 3 feet of space across Duke Energy Florida's poles for its existing facilities, for future facilities, or for any other purpose, and it cannot sublet that space to others."[107] Rates must be based on "space that is 'actually occupied.'"[108] Mr. Metcalfe does not cite this settled ratemaking principle or the FCC's decision nearly a quarter century ago that space on a pole *cannot* be "reserved" for an ILEC.[109] The FCC required competitively neutral rates in order to eliminate outdated rate disparities, not to lock in obsolete space assignments that will forever set AT&T at a competitive disadvantage.

58. Mr. Metcalfe also tries to add to his flawed "benefit of the bargain" valuation by claiming that AT&T also avoided "contingency costs" because it does not need to be ready at all times "to install its own network of poles within a short period of time" should Duke Florida

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[105] See *Pole Attachment Order*, ¶ 192; see also ibid, ¶ 180 n.559 (quoting *Consolidated Partial Order*, ¶ 51 as "finding that 'the presence of the potentially hazardous electric lines … makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers,' and further that this 'space is usable and is used by the electric utilities'").

[106] Metcalfe Aff., ¶ 37.

[107] See Peters Aff., ¶ 25.

[108] *FPL Order*, ¶ 16.

[109] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16053 (¶ 1170) (1996) ("Permitting an incumbent LEC, for example, to reserve space for local exchange service … would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.").

terminate the JUA.[110] Mr. Metcalfe bases his analysis on his "understand[ing] from Mr. Freeburn that it is reasonable to assume AT&T would likely need to procure poles and potentially acquire land and storage equipment to store the poles in inventory in reasonable proximity to the service areas at issue."[111] Mr. Metcalfe did not quantify this alleged benefit, perhaps because it does not exist. Mr. Metcalfe himself admits the fact that Duke Florida's ability to deny AT&T access to its poles after termination sets "ILECs … at a material disadvantage compared to CLECs and CATVs" due to their statutory right of access.[112] Thus, Mr. Metcalfe is not being "conservative" when he assigns no value to this alleged "benefit," as he claims.[113] The benefit does not exist. It also does not involve any costs Duke Florida has ever or will ever incur, so Duke Florida "may not embed" those nonexistent costs in AT&T's rental rate.[114]

59. Mr. Metcalfe also repeats his flawed pole replacement theory by claiming that AT&T has benefitted from the JUA because taller and stronger poles have higher carrying costs for Duke Florida than shorter poles that are "only tall enough to accommodate Duke Energy Florida's own attachments."[115] The argument is just as meritless the second time around. In addition, it ignores the fact that the FCC has found that the new telecom rate, which is calculated using Duke Florida's pole costs, is "fully compensatory."[116]

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[110] Metcalfe Aff., ¶ 23.

[111] Ibid, ¶ 24.

[112] Ibid, ¶ 9.

[113] Ibid, ¶ 24.

[114] *Dominion Order*, ¶ 18.

[115] Metcalfe Aff., ¶ 38.

[116] *Pole Attachment Order*, ¶ 137.

60. Mr. Metcalfe also claims, "[A]fter adjusting for inflation, the rates charged to AT&T today are no higher than the rates AT&T has paid historically."[117] It is unclear what Mr. Metcalfe attempts to demonstrate with this point. As explained in my Initial Affidavit, AT&T has long overpaid for access to Duke Florida's pole network.[118] Thus, Mr. Metcalfe is merely stating that the overcharge has remained relatively constant. Clearly, this adds no value and does not negate the fact that AT&T has long paid Duke Florida an unjust, unreasonable, and competitively unequal rate.

61. Finally, Mr. Metcalfe claims that AT&T has an "avoided annual inspection cost benefit for poles under the JUA" of [redacted] per pole per year,[119] but there are several errors with his analysis that render it unsupported and incorrect. First, Mr. Metcalfe's only support for the existence and fees underlying his calculation are "discussions" with Mr. Freeburn that "had AT&T not had a joint use agreement with Duke Energy Florida … AT&T would have paid inspection costs associated with attaching to all of Duke Energy Florida's poles."[120] However, I understand that Duke Florida has not established through invoices or payment records that it has in fact charged AT&T's competitors any fees.

62. Second, Mr. Metcalfe fails to understand that this information alone does not establish a net competitive advantage. As explained by Mr. Peters, "AT&T incurs the same costs to itself inspect its new and existing AT&T attachments to ensure their compliance with safety standards and specifications. AT&T's technicians perform a post-attachment inspection on every new AT&T attachment and conduct regular and ongoing inspections on AT&T's poles and

[117] Metcalfe Aff., ¶ 39.

[118] See Dippon Aff., ¶¶ 13-14.

[119] Metcalfe Aff., Ex. E-3.2.

[120] Ibid, Ex. E-3.2.

attachments when working in the field." Hence, AT&T incurs inspection and permitting costs through its internal cost structure and therefore enjoys no net benefit over its competitors.

63. Third, Duke Florida's license agreement for other attachers does not include the fees Mr. Metcalfe relies upon and describes inspections only as a possibility: "Licensor may conduct inspections from time to time as necessary in Licensor's sole judgment to determine whether Licensee's Attachments meet the technical requirements and specifications...."[121] It cannot be a *competitive* advantage if AT&T inspects all of its attachments whereas Duke Florida may on occasion, but is not contractually obligated to, inspect some of the CLEC's or CATV's attachments. Second, Mr. Metcalfe says he understands, "AT&T would have paid *inspection* costs," but he then adds engineering and permitting fees to reach his [redacted] per pole valuation.[122] Mr. Freeburn similarly claims only that Duke Florida completes *inspection* work for AT&T, stating that Duke Florida "performs the same pre-construction and post-construction *inspections* as it performs for CATV and CLEC permit applications" when AT&T seeks to attach, but Duke Florida does not charge AT&T "for this work."[123] Setting aside the lack of proof for this claim, it does not support Mr. Metcalfe's assignment of additional fees to AT&T, such as coordination fees, pre-attachment engineering fees, and structural analysis fees to AT&T.[124]

64. Third, it appears that Mr. Metcalfe selected the fees for his analysis solely because Mr. Freeburn claims that Duke Florida charges each of the fees to its licensees. However, as explained by Mr. Peters, this does not account for the fact that AT&T engineers its own attachments, performs much of its own make-ready work (and pays Duke Florida for the

[121] See Duke Florida Answer, Ex. 7, § 7.1.

[122] Metcalfe Aff., Ex. E-3.2 (emphasis added).

[123] Freeburn Decl., ¶ 18 (emphasis added).

[124] Metcalfe Aff., Ex. E-3.2; *see also* Freeburn Decl., Ex. A-1.

make-ready work that it requires Duke Florida to perform), and "incurs the same costs to itself inspect its new and existing AT&T attachments to ensure their compliance with safety standards and specifications."[125] Because Mr. Metcalfe's analysis does not account for the costs AT&T incurs by completing work itself, it is meaningless.[126]

65. Fourth, Mr. Metcalfe does not attempt to quantify any "avoided" costs associated with deployment going forward (the only relevant question when setting rates going forward). Instead, he limits his analysis to the alleged costs "avoided" when AT&T deployed its facilities on Duke Florida's existing poles. However, AT&T has more than covered those costs, which are already priced in Mr. Metcalfe's 2019 costs (rather than at historic costs). Mr. Metcalfe's analysis fails to question when Duke Florida began charging the alleged fees, and he does not give AT&T any credit for the high rental rates that AT&T has been paying over the entirety of the JUA or even the 9 years since the FCC recognized that ILECs were statutorily entitled to just and reasonable rates—rates that far exceeded the rental rates paid by their competitors. Using 2019 as an example, Duke Florida charged AT&T [redacted] per pole, but it charged AT&T's competitors a $4.97 cable rate or $4.99 new telecom rate. AT&T's decades of higher rental rates have more than covered any "avoided" [redacted] per-pole per-year cost associated with the deployment of the existing network.

IV. DUKE FLORIDA'S 1972 BELL SYSTEM PRACTICE DOES NOT SUPPORT THE CONTENTION THAT THE JUA RATES ARE JUST AND REASONABLE AND COMPETITIVELY NEUTRAL

66. Duke Florida argues that the JUA's rate provision must be equitable because a 1972 Bell System Practice (BSP) purportedly [redacted]

[125] Peters Aff., ¶¶ 13, 17.

[126] See, e.g., *Dominion Order* ¶ 18; *FPL Order* ¶ 15.

[redacted]

percentages that are close to the [redacted] and [redacted] percentages in the JUA rate formula.[127] There are several serious problems with Duke Florida's inference.

67. First, an outdated BSP about rates over 45 years ago says nothing about whether the pole attachment rates that Duke Florida charges AT&T today are just, reasonable, and competitively neutral. It is an understatement to say that much has changed in the industry over this period, particularly in the last 10 years or so.

68. Second, the numbers in the BSP are stylized, as the document states that it uses [redacted][128] Hence, Duke Florida's observation that the percentages in the JUA are [redacted] is mere coincidence and not an admission of fairness. In fact, Duke Florida relies on a cost allocation methodology in the BSP that is entirely different from that employed in the JUA. The BSP defines the [redacted] as:

[redacted]

The JUA differs entirely because it does not include any consideration of "nonjoint construction." Rather, the JUA relies on Duke Florida's total annual pole costs.[130] Thus, whereas

[127] Duke Florida Answer, ¶ 26.

[128] Bell System Practices, AT&T Co Standard, Section 937-217-126, Division of Cost Methods In Formulating Joint Use Agreements, Issue 1, September 1972, Section 2.02, attached to Duke Florida Answer as Exhibit 6 (hereinafter BSP).

[129] BSP, Section 5.01.

[130] JUA, § 0.3.

the BSP arrives [redacted]. the JUA covers Duke Florida's investment in joint use poles only.

69. Third, the BSP did not promise cost savings for AT&T but instead recognized that joint use was often a necessity as [redacted][131] The BSP also recognizes that given [redacted] In fact, the BSP recognizes that joint use [redacted]

70. Finally, contrary to what Duke Florida portrayed, nowhere in the BSP does AT&T say that it is content with the [redacted]. Rather, the BSP is a [redacted] That did not mean that the cost-sharing methods then being confronted by negotiators for two rate of return regulated entities produced just and reasonable rental rates or would be relevant for all time. The BSP

[131] Cost Methods, Section 1.04.

[132] Ibid.

[133] Ibid, Section 1.08.

[134] Ibid, Section 1.02.

dates back to 1972, and there is no reason to believe, let alone mentioned in the BSP, [redacted]. Given the market developments since the Pole Attachment Act was enacted in 1978 in which CATV, CLEC and wireless attachers provide an additional revenue source to Duke Florida as a pole owner, it is highly unlikely that anyone would describe a [redacted] if it ignored this revenue from CATV, CLEC, and wireless attachers. In contrast, as discussed in my Initial Affidavit, the FCC's new telecom formula is the "equitable" cost-sharing methodology today.[135] That is, the FCC's new telecom rate specifically accounts for market developments (e.g., an increased number of communications attachers) and reflects several other real-world realities (including allocating the safety space to the power company). Hence, it presents an economically superior outcome and it aligns with AT&T's stated desire in 1972 for an equitable cost-sharing arrangement.

V. MR. METCALFE'S CRITICISMS OF MY TESTIMONY ARE MISDIRECTED

71. Duke Florida in large part ignores my Initial Affidavit, citing it just once and for the unremarkable fact that "AT&T competes with CATVs."[136] Mr. Metcalfe appends some brief criticisms of my Initial Affidavit to the end of his affidavit. Mr. Metcalfe declares that Duke Florida does not enjoy or exercise bargaining power.[137] He further asserts that reciprocal benefits provided by the JUA do not zero out.[138] I reply to each of these incorrect arguments in turn.

72. First, Mr. Metcalfe opines, "Duke Energy Florida's actions do not appear to support [an exercise of bargaining power] claim."[139] Mr. Metcalfe's principal arguments are that

[135] Dippon Initial Aff., ¶ 36.

[136] Duke Florida Answer, ¶ 12 n.35.

[137] Metcalfe Aff., ¶ 42.

[138] Ibid, ¶ 48.

[139] Ibid, ¶ 42.

the rates have not increased and that the JUA offers the alleged benefits I already refuted. These arguments are no more credible when made in the context of a bargaining power argument. They do not establish that the JUA rates are just, reasonable, or competitively neutral and provide no basis for Duke Florida's insistence on JUA rates that far exceed the FCC's mandated rate ceiling (the preexisting telecom rate formula).

73. Mr. Metcalfe ignores the numerous analyses conducted by the FCC regarding bargaining power in the context of pole attachments. As a result, he fails to note that AT&T owns proportionally fewer poles (just 7.7% to Duke Florida's 92.3%) than the example that the FCC provided when it found that market forces were not alone sufficient to ensure just and reasonable rates because "electric utilities appear to own approximately 65–70 percent of poles."[140] In addition, Mr. Metcalfe, as described above, confirms that Duke Florida's pole ownership advantage gives it the negotiating advantage that the FCC recognized. He calculates the replacement cost that AT&T would have to incur absent joint use with Duke Florida, and he shows that AT&T's costs would far exceed those incurred by Duke Florida in that scenario.[141] Duke Florida and Mr. Metcalfe thus confirm and reinforce the FCC's decision to ensure that pole attachment rates are just and reasonable and competitively neutral because "the marketplace evidence" shows that "market forces and independent negotiations" are not "sufficient to ensure just and reasonable rates, terms and conditions" for AT&T's use of Duke Florida's poles.[142]

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[140] *Pole Attachment Order*, ¶ 206; *see also ibid*, ¶ 206 n.618 ("As a hypothetical illustration, if the electric company owned 90% of poles in an area and the incumbent LEC owned 10%, and if the best outside alternative for each party was deploying the remaining needed poles (and having the legal right to do so), the electric utility would face the cost of deploying 10% of poles, while the incumbent LEC would face the cost of deploying 90% of poles. As a result, the incumbent LEC would have less bargaining power than the electric utility.").

[141] Metcalfe Aff., ¶¶ 19–24.

[142] See *Pole Attachment Order*, ¶¶ 199, 208.

74. Second, Mr. Metcalfe expresses surprise that I do "not acknowledge that Duke Energy Florida's significantly greater pole ownership results in AT&T receiving the great majority of any 'reciprocal' benefits for avoided permitting fees."[143] Mr. Metcalfe misunderstands the FCC's competitive neutrality principles, and so does Duke Florida when it claims, "AT&T relies upon the false premise that, because the benefits of the joint use agreement are reciprocal, they cancel each other out."[144]

75. Unlike Mr. Metcalfe's and Duke Florida's understanding of the situation, the question is not whether AT&T "benefits" more from the JUA than Duke Florida does. Instead, the FCC's competitive neutrality principle dictates that Duke Florida can only charge AT&T rates higher than the rates resulting from the new telecom formula if it can demonstrate that AT&T receives a material net competitive benefit *relative to AT&T's CLEC and cable competitors*. As a result, it is relevant that AT&T incurs costs under a Joint Use Agreement that Duke Florida does not impose on AT&T's CLEC and cable competitors. Some of those costs are associated with reciprocal provisions that require AT&T to extend the same alleged "benefit" to Duke Florida that Duke Florida extends to AT&T. In addition, those reciprocal terms often apply equally to AT&T and Duke Florida irrespective of pole ownership numbers, and so net out to zero.[145] Others instead impose far higher costs on AT&T than on Duke Florida—such as the far higher cost Mr. Metcalfe agrees would be imposed on AT&T should the parties lose their contractual right of access to each other's poles.[146]

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[143] Metcalfe Aff. at ¶ 41.

[144] See Duke Florida Answer, Executive Summary.

[145] See, e.g., Dippon Initial Aff., ¶ 44; Peters Reply Aff., ¶ 4.

[146] See Metcalfe Aff., Ex. E-2.

VI. CONCLUSION

76. I have carefully reviewed and considered Duke Florida's Answer including its supporting declarations, affidavit, and exhibits. I find that the arguments Duke Florida presents are inaccurate and contrary to the FCC's deployment and competition goals and that the work of Mr. Metcalfe is deeply flawed and of little (if any) value to the present matter. My conclusion remains that the pole attachment rates that Duke Florida has charged AT&T since 2015 have not been, and will not be, just and reasonable or competitively neutral rates. I recommend that the FCC set the just and reasonable rate for AT&T's use of Duke Florida's poles as the properly calculated per-pole new telecom rate because Duke Florida has not shown that AT&T receives net benefits under the JUA that provide it a material advantage over its CLEC and cable competitors.

Washington, District of Columbia
The foregoing instrument was subscribed and sworn before me this 23rd day of November, 2020
by Dariene Francesca Rogers
Notary Public
My commission expires 08/14/2024

Christian M. Dippon, Ph.D.

Sworn to before me on
this 23rd day of November 2020

Notary Public

DARIENE FRANCESCA ROGERS NOTARY PUBLIC DISTRICT OF COLUMBIA COMMISSION EXPIRES 08-14-2024