PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 20-214 Bureau ID No. EB-20-MD-002 REDACTED

REPLY LEGAL ANALYSIS IN SUPPORT OF POLE ATTACHMENT COMPLAINT

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA

By Counsel:

Robert Vitanza
Gary Phillips
David Lawson
AT&T SERVICES, INC.
1120 20th Street NW, Suite 1000
Washington, DC 20036
(214) 757-3357

Christopher S. Huther
Claire J. Evans
Frank Scaduto
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevans@wiley.law
fscaduto@wiley.law

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

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I. INTRODUCTION AND SUMMARY

FPL's Answer confirms that the Commission should grant AT&T's Complaint and enjoin FPL's unjust and unreasonable pole attachment practices, which are unprecedented, threaten AT&T's network of cables in Florida, and stand at odds with the Commission's policy objectives to reduce infrastructure costs, promote competition, and foster broadband deployment. FPL and AT&T share an estimated 638,914 poles, with FPL owning about 425,704 of the joint use poles (67%) and AT&T owning about 213,210 of the joint use poles (33%).[1] As detailed in AT&T's Complaint, FPL has wielded the default provision in the parties' Joint Use Agreement ("JUA") to demand that AT&T remove its facilities from all of FPL's poles because AT&T challenged its pole attachment rental rates—rates that AT&T paid in full and that the Enforcement Bureau has since found were unlawful.[2] FPL simultaneously devised a novel reading of the JUA's pole abandonment provision in an attempt to shift to AT&T ownership of worthless replaced poles and the cost to remove and dispose of those poles to offset the pole attachment rate reductions that FPL knows will be required by federal law.

In its Answer, FPL does *not* try to establish that the default and pole abandonment provisions, or its application of them, has been just and reasonable.[3] Instead, it argues that it has the right to take extraordinary action under the plain language of the JUA and because of a host of irrelevant and unfounded operational gripes. But FPL cannot defend its actions by relying on

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[1] *See* Compl. Ex. A at ATT00004 (Aff. of D. Miller, July 3, 2020 ("Miller Aff.") ¶ 7).

[2] *BellSouth Telecommunications, LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, 35 FCC Rcd 5321, 5328 (¶ 13) (EB 2020) ("*FPL 2020 Order*") ("[B]ecause we find that the JUA rate is unjust and unreasonable, AT&T is entitled to a lower rate.").

[3] *See* 47 U.S.C. § 224(b); *Fla. Cable Telecommunications Ass'n v. Gulf Power Co.*, 18 FCC Rcd 9599, 9603 (¶ 8) (2003) ("The terms and conditions of pole attachments … include not only the reasonableness of the contract provisions themselves, but also the reasonableness of pole owner practices in implementing contract provisions.").

JUA terms that are unjust and unreasonable. FPL tried the same argument almost 30 years ago and it is just as meritless now.[4] Nor can FPL avoid the application of federal law by trying to throw mud in someone else's eye. The Commission *shall* ensure that *FPL*'s pole attachment terms, conditions, and practices are just and reasonable—irrespective of any meritless side grievances FPL would like to voice. The resolution of this case is thus straightforward. FPL has not (and cannot) justify its exceptionally unreasonable response to AT&T's request for rates that comply with federal law. The Commission should grant AT&T's complaint, set the just and reasonable terms and conditions for AT&T's use of FPL's poles, and enjoin FPL's effort to increase AT&T's costs simply because AT&T deigned to question the lawfulness of FPL's unreasonably high pole attachment rates.

II. LEGAL ANALYSIS

A. The Commission Has Jurisdiction and Must Exercise It.

FPL devotes much of its brief to three specious jurisdictional arguments that cannot eliminate the Commission's statutory obligation to "hear and resolve" this case.[5] *First*, FPL argues that AT&T improperly split a claim when it challenged FPL's rates separately from FPL's terms, conditions, and practices. Not so. Because the parties' dispute involves more than one issue, AT&T "may file a separate complaint, which will receive its own file number and start the

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[4] *See Selkirk Commc'ns, Inc. v. Fla. Power & Light Co.*, 8 FCC Rcd 387, 389 (¶ 17) (1993) ("*FPL 1993 Order*") ("FPL relies on the pole lease agreement which allows a higher charge and that such an agreement was negotiated through arms length bargaining. FPL's reliance on this argument is misplaced…").

[5] *See* 47 U.S.C. § 224(b); *Fla. Cable Telecomms. Ass'n v. Gulf Power Co.*, 18 FCC Rcd 9599, 9603 (¶ 8) (2003) ("The terms and conditions of pole attachments … include not only the reasonableness of the contract provisions themselves, but also the reasonableness of pole owner practices in implementing contract provisions.").

normal pleading cycle."[6] That is particularly true here because AT&T's current claims were not ripe when AT&T filed its rate complaint in July 2019.[7] AT&T was still working to resolve this access dispute by paying FPL's unlawful rental rates in full as FPL had demanded.[8] And the parties had not yet completed the JUA's mandatory pre-complaint dispute resolution process about their pole abandonment dispute.[9] AT&T, therefore, did not "split" a claim in 2019—it appropriately limited its rate complaint to the one claim that *was* ripe, while working to try and resolve the parties' other "disputes informally before instituting formal processes at the Commission."[10]

FPL's reliance on the claim splitting doctrine is also misplaced because the doctrine can only apply where a single *claim* is split, such that a decision in the first case will also resolve the

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[6] *RCN Telecom Servs. of Philadelphia, Inc. v. PECO Energy Co.*, 16 FCC Rcd 11857, 11858 (¶ 4) (2001).

[7] *See Waad v. Farmers Ins. Exch.*, 762 F. App'x 256, 260 (6th Cir. 2019) (The "claim splitting" doctrine does "not apply to claims that were not ripe at the time of the first suit."); *see also Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002) ("What is particularly noteworthy here is that many of the central events underlying *FAA II* had not even taken place at the time when Drake instigated *FAA I*.... Accordingly, the District Court's conclusion that Drake should, or could, have raised these claims in *FAA I* was misguided.").

[8] Compl. Ex. A at ATT00009, ATT00011 (Miller Aff. ¶¶ 18, 25).

[9] *See* Compl. Ex. 31 at ATT00517 (Opinion at 8, *FPL v. AT&T*, Case No. 9:19-cv-81043-RLR (S.D. Fla.) ("*FPL v. AT&T*")) (holding the pole abandonment dispute was not ripe because it had not yet been submitted to mediation as required by the JUA); *see also* Compl. Ex. 1 at ATT00056-57 (JUA, Art. XIIIA).

[10] *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, 5285 (¶ 98) (2011) ("*Pole Attachment Order*"). FPL's claim that AT&T did not engage in executive-level discussions specific to this Complaint and created its Count I claim because of a footnote in the Enforcement Bureau's interim decision is belied by AT&T's efforts to resolve the claims well before the interim decision issued on May 20, 2020, including at a May 5, 2020 mediation. *See, e.g.*, Compl. Ex. 32 at ATT00522 (Email from H. Gurland, Counsel for AT&T, to M. Moncada, Counsel for FPL (Apr. 20, 2020)); *see also* Compl. Ex. A at ATT00011-12 (Miller Aff. ¶¶ 24-25); Compl. Ex. B at ATT00026-27 (Aff. of M. Peters, July 5, 2020 ("Peters Aff.") ¶¶ 27-28); Reply Ex. B at ATT00607 (Aff. of D. Miller, Dec. 3, 2020 ("Miller Reply Aff.") ¶ 4).

second.[11] In negotiations, FPL insisted that the claims in AT&T's complaints were different—and FPL refused to negotiate the parties' access and abandonment disputes at the same time as the parties' rate dispute.[12] And, indeed, the claims are different. AT&T's rate complaint will resolve the just and reasonable *rate* that applies; this complaint will determine the just and reasonable *terms and conditions* that apply.[13] This case thus bears no resemblance to the cases FPL cites,[14] where the plaintiff "repeat[ed] identical claims" in a second lawsuit[15] or filed a second complaint that was "effectively identical with a few minor tweaks" to the first.[16] Here, the two complaints involve different statutory violations that may be resolved separately.

And even if the claim splitting doctrine did apply, it still would not exempt FPL from compliance with federal law. The doctrine is discretionary, not jurisdictional,[17] and it "does *not*

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[11] *See, e.g.*, *Horia v. Nationwide Credit & Collection, Inc.*, 944 F.3d 970, 974 (7th Cir. 2019) ("Discrete and independently wrongful acts produce different claims, even if the same wrongdoer commits both offenses and the second wrong is similar to the first.").

[12] *See, e.g.*, Reply Ex. B at ATT00613 (Miller Reply Aff., Ex. M-1) ("[W]hile this offer would resolve the rate issue, FPL maintains its positions regarding the termination, abandonment and other non-rate related issues."); *see also* Reply Ex. A at ATT00572 (Aff. of M. Peters, Dec. 3, 2020 ("Peters Reply Aff.") ¶ 5); Reply Ex. B at ATT00606 (Miller Reply Aff. ¶ 3).

[13] FPL's claim that AT&T "repackaged" its rate complaint is belied by FPL's materially different Answer in the two cases and its serial requests for additional time to file an Answer in this case given "the size and complexity of the complaint." *See* FPL Motion for Adjustment of Deadlines ¶ 7 (Sept. 3, 2020); FPL Motion for Adjustment of Deadlines ¶ 8 (July 24, 2020).

[14] *See* FPL's Br. in Support of Its Answer ("FPL Br.") 13-17.

[15] *See Dorsey v. Jacobson Holman, PLLC*, 476 F. App'x 861, 863 (D.C. Cir. 2012).

[16] *See Vanover v. NCO Fin. Sys., Inc.*, No. 8:15-CV-1434-T-33EAJ, 2015 WL 13540996, at *3 (M.D. Fla. Oct. 28, 2015), *aff'd sub nom. Vanover v. NCO Fin. Servs., Inc.*, 857 F.3d 833 (11th Cir. 2017); *see also Vanover v. NCO Fin. Servs., Inc.*, 857 F.3d 833, 841 (11th Cir. 2017) ("plaintiff may not file duplicative complaints") (citation omitted).

[17] *See, e.g.*, *Smith v. D.C.*, 387 F. Supp. 3d 8, 19 (D.D.C. 2019).

compel dismissal of the second lawsuit."[18] Rather, as a matter of docket management, it allows consolidation of two suits if that is "the most administratively efficient procedure" for resolving them.[19] Contrary to FPL's claim, by law, the Commission still "*shall* … hear and resolve" both complaints to ensure just and reasonable pole attachment rates, terms, and conditions.[20]

Second, FPL tries to escape settled law by arguing that, because an ILEC does not have a right of access under § 224(f), an ILEC's contractual right of access is *not* one of the terms and conditions that must be just and reasonable.[21] FPL thus asks the Commission to deem this a "straightforward contract dispute" that is beyond its jurisdiction and let FPL force AT&T off its poles for any reason—however unjust or unreasonable—so long as the demand is consistent with the plain language of the JUA.[22]

The Commission has rejected all aspects of this argument. This is not a straightforward contract dispute because "[t]he Complaint clearly alleges that terms and conditions in the pole attachment agreement between the parties and the practices in implementing those terms and conditions are not just and reasonable."[23] As a result, this Commission has jurisdiction "'to

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[18] *See Matthews Int'l Corp. v. Lombardi*, No. 2:20-CV-00089-NR, 2020 WL 1309399, at *2 (W.D. Pa. Mar. 19, 2020) (quoting *Walton v. Eaton Corp.*, 563 F.2d 66, 71 (3d Cir. 1977)) (emphasis added).

[19] *Id.* at *2.

[20] 47 U.S.C. § 224(b)(1).

[21] FPL Br. at 22-26. FPL misquotes the Complaint when it claims AT&T described Count I as "'identical' to a right of access dispute under § 224(f)." *See id.* at 21 n.85 (citing Compl. ¶ 21). The cited paragraph expressly acknowledges that AT&T does *not* have a statutory right of access to FPL's poles under Section 224(f). *See* Compl. ¶ 21.

[22] *See* FPL Br. at 21-26. For this reason, FPL declares that it "properly terminated" AT&T's right to use its poles under the default provision, *id.* at 22, but that is impossible if the default provision as written or applied is unjust and unreasonable.

[23] *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 14 FCC Rcd 3244, 3248 (¶ 12) (1999); *see also, e.g.*, *Marcus Cable Assocs., L.P. v. Tex. Util. Elec. Co.*, 18 FCC Rcd 15932, 15935 (¶ 6) (2003) (explaining that "the Commission's authority does not supplant that of the local

ensure that the pole attachment terms and conditions FPL provides AT&T are just and reasonable.'"[24] And FPL agrees "[i]t is true that the Commission has held that the contract provisions in attachment agreements must be just and reasonable as applied."[25]

Also contrary to FPL's argument, an ILEC's contractual right of access *is* one of the terms and conditions that must be just and reasonable. The Commission explained that although "[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)."[26] FPL ultimately agrees, stating that "AT&T … *does have* a statutory right under Section 224(b) that the rates, terms and conditions of the parties' 1975 JUA be just and reasonable."[27]

And since the Pole Attachment Act passed in 1978, it has been black letter law that an electric utility may only "terminate its voluntary relationship with an attacher *under reasonable terms and conditions*."[28] Congress clarified when passing the Act that, if an electric utility were

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jurisdiction" *only* when "the issue between the parties is limited to a breach of contract claim that does ***not*** include an allegation of unjust or unreasonable contractual rates, terms, or conditions") (emphasis in original).

[24] FPL Br. at 55 (quoting Compl. ¶¶ 49, 53); *see also In the Matter of Implementation of Section 224 of the Act*, 25 FCC Rcd 11864, 11908 (¶ 105) (2010) ("*2010 NPRM*") (The Commission "would not be fulfilling [its statutory] duty if it were to substitute the requirements of contract law for the dictates of section 224."). FPL misrepresents the Complaint when it claims AT&T "asserts[ ] its complaint sounds in contract law." *See* FPL Br. at 24 n.93 (citing Compl. ¶ 47). The cited paragraph asks the FCC to "ensure just and reasonable terms and conditions for use of FPL's poles" consistent with the applicable statute of limitations, which is drawn from contract law. *See* Compl. ¶ 47; *see also Verizon Maryland v. The Potomac Edison Co.*, FCC 20-167, Memorandum Opinion and Order at 20-21, Proceeding No. 19-355 (¶¶ 40-46) (Nov. 23, 2020).

[25] FPL Br. at 39.

[26] *Pole Attachment Order*, 26 FCC Rcd at 5241 (¶ 202).

[27] FPL Br. at 22 (emphasis in original).

[28] *Ala. Cable Telecomms. Ass'n v. Ala. Power Co.*, 16 FCC Rcd 12209, 12218 (¶ 21) (2001) (emphasis added).

to try to *remove* facilities from its poles "in order to avoid FCC regulation," the Commission could "determine that such conduct … constitute[s] an unjust or unreasonable practice and take appropriate action."[29] This is because the Pole Attachment Act "applies the 'just and reasonable' standard to *all* rates, terms, and conditions of pole attachments."[30] No subset of terms and conditions is excluded.[31] And so the Commission has intervened when an electric utility "threat[ened] to dislodge … attachments" from utility poles in the course of a rental rate dispute.[32] It also "exercised jurisdiction in the past over a dispute involving the removal of a telecommunications carrier's attachments due to non-payment," as FPL concedes.[33] Such disputes, like this one, are "well within" the Commission's jurisdiction "to ensure that conditions of pole attachment agreements are just and reasonable" under Section 224(b).[34]

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[29] S. Rep. No. 580, 95th Congress, 1st Sess. at 16 ("1977 Senate Report"), reprinted in 1978 U.S.C.C.A.N. 109)).

[30] *Pole Attachment Order*, 26 FCC Rcd at 5283 (¶ 93) (emphasis in original).

[31] *Id.* at 5241 (¶ 202); *see also, e.g.*, *Verizon Va., LLC v. Va. Electr. & Power Co.*, 32 FCC Rcd 3750, 3751 (¶ 3) (EB 2017) ("*Dominion Order*") ("[T]he 'just and reasonable' requirement of Section 224(b)(1) applies to the rates, terms, and conditions governing attachments by [I]LECs"); *FPL 2015 Order*, 30 FCC Rcd at 1141 (¶ 5 n.9) ("[I]LECs are entitled to pole attachment rates, terms and conditions that are just and reasonable pursuant to Section 224(b)(1)") (citation omitted).

[32] *Fla. Cable Telecomms. Ass'n v. Gulf Power Co.*, 18 FCC Rcd 9599, 9603 (¶ 8) (2003) ("This case concerns Gulf Power's … threat to dislodge [the Cable Operators'] attachments…. This type of practice by a utility in administering its contracts with attachers falls squarely within the ambit of section 224.").

[33] FPL Br. at 25 (citing *Ala. Cable Telecomms. Ass'n*, 16 FCC Rcd 12209 (2001)).

[34] *Ala. Cable Telecomms. Ass'n*, 16 FCC Rcd at 12217 (¶ 19). With mandatory statutory jurisdiction over this dispute, the Commission cannot accept FPL's footnoted request to "decline to exercise [its] jurisdiction under principles of federal-state comity." *See* FPL Br. at 26 n.101. FPL's sole support for this request is a decision that expressly clarified that the complaint did *not* challenge as "unjust and unreasonable any [relevant] terms of the Pole Attachment Agreement." *MAW Commc'ns, Inc. v. PPL Elec. Utilities Corp.*, 34 FCC Rcd 7145, 7154 (¶ 21) (2019).

Third, in a last-ditch effort to avoid FCC jurisdiction, FPL regurgitates, nearly verbatim,[35] arguments the Enforcement Bureau already rejected from the FPL-AT&T rate dispute—that the FCC cannot retroactively review existing pole attachment agreements,[36] that AT&T was not in an inferior bargaining position when it negotiated the JUA,[37] and that AT&T does not lack the ability to terminate the JUA.[38] These arguments should be summarily rejected again. FPL adds one equally meritless new argument, specifically that AT&T does not genuinely lack the ability to terminate the unjust and unreasonable JUA provisions because it could have accepted FPL's June 2020 settlement offer.[39] But FPL's settlement offer proves the exact opposite. FPL's

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[35] *Compare* FPL Br. at 27-34 *with* FPL Brief at 30-31, 34-37, 39, 41-42, *AT&T v. FPL*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (Sept. 1, 2019). FPL even relies again on a 1975 letter, which it says "proclaimed that FPL had accepted AT&T's preferred contractual language." *See* FPL Br. at 29. It does not. *See* Answer Ex. C at FPL00154-156. But the letter also has absolutely nothing to do with this case because it predates relevant 2007 Amendments and only discusses rental rates—not the default or pole abandonment provisions at issue here. *See id.*

[36] FPL Br. at 27-28, 33-34. *But see FPL 2020 Order*, 35 FCC Rcd at 5325 (¶ 10) (finding the JUA "subject to review under the *Pole Attachment Order*"); *FPL 2015 Order*, 30 FCC Rcd 1145-47 (¶¶ 17-19) (explaining why the *Pole Attachment Order* "is not unlawfully retroactive."); *Potomac Edison Order* at 22 (¶ 47) ("We reject Potomac Edison's assertion that only prospective relief may be granted in this case because it would violate the prohibition on retroactive ratemaking. . . .").

[37] FPL Br. at 28-31. *But see FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 18) ("[W]here an [I]LEC's pole ownership ratio falls to a level such as AT&T's, the [I]LEC 'may not be in an equivalent bargaining position.' That is the case here.") (citation omitted).

[38] FPL Br. at 31-33. *But see FPL 2020 Order*, 35 FCC Rcd at 5326 (¶ 11) ("[T]he Commission found that it could examine the rates, terms, and conditions of 'existing' joint use agreements such as AT&T's if the [I]LEC could demonstrate that it 'genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement.' AT&T makes such a showing.") (citation omitted).

[39] FPL Br. at 31-32. FPL also says it followed up on its June 2020 settlement offer, but its "follow-up" was to ask AT&T for old telecom rate calculations that AT&T provided FPL long ago. *See* Answer Ex. D at FPL00158; *see also* Pole Attachment Complaint, Ex. A at ATT00011-13, ATT00016-00044 (Aff. of D. Rhinehart, ¶¶ 22-28 & Exs. R-1 – R-3), Proceeding No. 19-187 (July 1, 2019).

settlement offer states outright that it does not compromise its positions regarding these pole access and abandonment disputes, leaving AT&T genuinely unable to resolve them without Commission action.[40]

FPL's settlement offer was also an offer in name only. Sent after the Enforcement Bureau found that "AT&T is entitled to a lower rate,"[41] FPL offered 2017 and 2018 rental rates that were so manipulated that, if accepted, would have resulted in AT&T [redacted].[42] In light of this outrageous offer, FPL's expressed indignance at AT&T's decision to seek Commission invention in this matter is not credible.[43] And it certainly does not provide a reason to reconsider the Enforcement Bureau's prior decision.

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[40] Reply Ex. B at ATT00613 (Miller Reply Aff., Ex. M-1) ("[W]hile this offer would resolve the rate issue, FPL maintains its positions regarding the termination, abandonment and other non-rate related issues."). *See also, e.g.*, *FPL 2020 Order*, 35 FCC Rcd at 5324 (¶ 11) ("AT&T's attempt to negotiate a new rate with FPL before filing its Complaint demonstrates that AT&T genuinely lacks the ability to obtain a new arrangement.").

[41] *See FPL 2020 Order*, 35 FCC Rcd at 5328 (¶ 13).

[42] *See* Reply Ex. E at ATT00652, ATT00654 (Aff. of D. Rhinehart, Dec. 4, 2020 ("Rhinehart Reply Aff.") ¶ 17 & Ex. R-1); *see also* Reply Ex. B at ATT00612-613 (Miller Reply Aff., Ex. M-1); Compl. Ex. 2 at ATT00065-66 (2017 and 2018 Invoices).

[43] This case is *not* "predicated on the fact that the parties' agreement has been terminated" as FPL contends. FPL Br. at 31. All poles at issue are covered by the JUA's evergreen provision, which states that, notwithstanding FPL's termination of the JUA as to "the further granting of joint use of poles" on September 26, 2019, the JUA "shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination." *See* Compl. Ex. 1 at ATT00048 (JUA, Art. XVI); Compl. Ex. 23 at ATT00465-466 (Notice of Termination (Mar. 25, 2019)). AT&T cannot escape the default and pole abandonment provisions because of the evergreen provision and FPL's refusal to negotiate. FPL is also wrong when it describes the default provision as a "termination" provision. The default provision cannot terminate the JUA; it can only terminate one party's right to attach to poles of the other party. *See* Compl. ¶ 11; Compl. Ex. 1 at ATT00045 (JUA, § 12.3).

"AT&T has established that it is unable to terminate the JUA and establish a new arrangement with FPL," so the terms and conditions of the JUA are subject to Commission review.[44]

B. FPL Bears the Burden To Justify the Reasonableness of the Challenged Pole Attachment Terms, Conditions, And Practices.

FPL tries to lessen its burden in this case based on an argument it unsuccessfully made before, specifically "that Complainant[ ] failed to establish its *prima facie* case" because "FPL disputes the accuracy of some of the information" provided.[45] The argument still fails. AT&T presented a *prima facie* case when it filed "a statement of the specific unreasonable pole attachment … term or condition and all arguments used to support its claim of unreasonableness."[46] FPL must, therefore, "justify" the default and pole abandonment terms, conditions, and practices that are "alleged in the complaint not to be just and reasonable."[47] It has not and cannot meet that standard.[48]

FPL's attempt to sully AT&T's *prima facie* case also fails. It says AT&T's arguments are "belied by the plain language of the parties' agreement," but the issue is not *what* the JUA says, but *whether* that language is just and reasonable and applied in a just and reasonable

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[44] *FPL 2020 Order*, 35 FCC Rcd at 5325 (¶ 10); *see also, e.g.*, Compl. Ex. A at ATT00005-12 (Miller Aff. ¶¶ 9-25); Compl. Ex. B at ATT00026-27 (Peters Aff. ¶ 28); Reply Ex. A at ATT00571-572 (Peters Reply Aff. ¶¶ 4-5); Reply Ex. B at ATT00606-607 (Miller Reply Aff. ¶ 3).

[45] *Time Warner Entm't v. Fla. Power & Light Co.*, 14 FCC Rcd 9149, 9150-51 (¶ 3) (1999) ("*FPL 1999 Order*"); *see also* FPL Br. at 35-36.

[46] *Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co.*, 11 FCC Rcd 11202, 11207 (¶ 11) (1996); *see also FPL 1999 Order*, 14 FCC Rcd at 9150-51 (¶ 3) ("The Complaint contains information required under Section 1.1404," so "the Complaint is sufficient and … establish[es] a *prima facie* case under our rules.").

[47] *See FPL 1993 Order*, 8 FCC Rcd at 389 (¶ 17) (citation omitted).

[48] *See* Sections II.C, II.D, below.

manner.[49] FPL claims AT&T "grossly misrepresents" the facts by relying on a quote from FPL's prior testimony[50] and states that its witnesses disagree with AT&T's witnesses, but points to testimony that corroborates AT&T's witnesses.[51] And FPL describes AT&T's complaint as based on opinions lacking "facts or documentation,"[52] yet FPL relies almost exclusively on documents attached to AT&T's complaint.[53] The bottom line is that AT&T provided far more than a *prima facie* case of unreasonableness. The burden is on FPL to justify its default and pole abandonment terms, conditions, and practices. Because it has not, the Commission should grant AT&T's complaint.

C. FPL's Effort To Eject AT&T From Over 425,000 Poles Is Unjust and Unreasonable.

FPL demands that AT&T remove its facilities from all of FPL's poles because AT&T did not pay disputed invoices while trying to negotiate lawful rates using the JUA's mandatory pre-complaint dispute resolution process. AT&T eventually paid FPL's invoices in full—invoices the Enforcement Bureau has held were based on unjust and unreasonable rates—but FPL still seeks to eject AT&T from its poles because AT&T did not overpay FPL sooner. In its Answer, FPL

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[49] *See* FPL Br. at 36; *see also Mile Hi Cable Partners, LP*, 17 FCC Rcd 6268, 6271 (¶ 7) (2002) ("The issue in this matter is not whether the Complainant failed to [comply with] a just and reasonable term or condition, but whether the term or condition itself was reasonable.").

[50] *See* FPL Br. at 36 n.139 (stating that FPL did not "actually intend[ ]" what its witness said); *see also* Compl. ¶ 36 (quoting Response Ex. A at Ex. 1 ¶ 31, *Verizon Fla. v. FPL*, FCC Docket No. 15-73, related to FCC Docket No. 14-216 (June 29, 2015) (public version)).

[51] *See* FPL Br. at 36 n.137 (agreeing that, for the past 20 years, AT&T has applied the pole abandonment provision *only* where AT&T has "convert[ed] its facilities, e.g. undergrounding or relocating" and FPL still requires a pole at the location); *see also* Answer Ex. B at FPL00139 (Allain Decl. ¶ 17); Compl. Ex. B at ATT00016 (Peters Aff. ¶ 6); Reply Ex. A at ATT00575 (Peters Reply Aff. ¶ 12).

[52] FPL Br. at 35.

[53] *Compare, e.g.*, Answer Ex. A, Exs. 1-9, 12, 14-15 *with* Compl. Exs. 1-2, 5-6, 9, 11, 23.

asks the Commission to condone this behavior because no prior case is squarely on point and it has other grievances in addition to non-payment. Neither argument refutes the fact that FPL's effort to dismantle AT&T's network in response to its request for just and reasonable rates is unjust, unreasonable, and unenforceable under federal law.

1. FPL's Demand Is Unreasonable Under FCC Precedent.

The JUA's default provision provides one and only one reason to eject a party from the other party's poles: a "failure to meet a money payment obligation."[54] But, even if FPL believes this default occurred,[55] the Enforcement Bureau has held that it is *unreasonable* for a pole owner to take adverse action "due to the attacher's refusal to pay invoices … where the attacher has 'disputed the reasonableness' of the invoices and 'requested further detail substantiating the charges…'"[56] That is *exactly* what happened here. AT&T presented FPL with express *bona fide* challenges to the lawfulness of the rental invoices the entire time they were outstanding:

- FPL issued its 2017 invoice on March 5, 2018.[57]

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[54] Compl. Ex. 1 at ATT00045 (JUA, § 12.3).

[55] AT&T has not failed to satisfy a monetary payment obligation because it is not obligated to pay unlawful rental rates, even under the JUA, which required FPL to invoice rates that complied "with all applicable provisions of law," *id.* at ATT00039 (JUA, Art. VI); it is not obligated by the JUA to unilaterally proffer some *uncertain*, undisputed amount while challenging the invoiced amounts during the JUA's mandatory pre-complaint dispute resolution process, *id.* at ATT00056-57 (JUA, Art. XIIIA); and it paid FPL's unlawful invoices in full, despite the accumulation of unlawful rental charges FPL has collected from AT&T over the years, Compl. Ex. A at ATT00009-10 (Miller Aff. ¶¶ 18-21); Reply Ex. E at ATT00651-652 (Rhinehart Reply Aff. ¶ 16). Those facts have not deterred FPL, as it now argues that the "money payment obligation" is to "make *timely* payment," which FPL unilaterally defines as 30 days. *See* Compl. Ex. 30 at ATT00504 (Report and Recommendation at 8, *FPL v. AT&T*) (emphasis in original); *see also* Compl. Ex. 2 at ATT00065-67 (Invoices).

[56] FPL Br. at 54 (quoting *MAW Commc'ns*, 34 FCC Rcd at 7151-53 (¶¶ 15-18)).

[57] Compl. Ex. 2 at ATT00065 (2018 Invoice).

- "AT&T shortly thereafter, on April 3, 2018, and April 20, 2018" challenged the invoice and requested information to resolve "concerns related to the calculations and financial information used to develop" the invoiced rates.[58]
- Despite AT&T's repeated requests throughout the JUA's lengthy mandatory pre-complaint dispute resolution process, FPL never substantiated the invoiced amounts and refused to discuss the rates required by federal law even though the JUA requires "conformity with all applicable provisions of law."[59]
- At the conclusion of the JUA's mandatory pre-complaint dispute resolution process, AT&T paid the disputed 2017 and 2018 invoices in full.[60]
- AT&T's invoice challenge was well-grounded. The invoiced rates were declared unlawful.[61]

FPL acknowledges *MAW Communications* as precedent,[62] but argues the Commission should ignore it and allow FPL to eject AT&T from over 425,000 poles because that precedent does not fit the exact fact pattern of this dispute.[63] FPL's argument fails because it skirts clear precedent and relies on fantasy (not facts) and hyper-technical distinctions that miss the mark.

FPL claims that this dispute is distinguishable from *MAW Communications* because "AT&T … refused to pay *anything* and showed no good faith"[64] but that claim is refuted by AT&T's payment history, AT&T's payment in full of the invoices that were in dispute, and the Enforcement Bureau's rejection of "FPL's assertion that AT&T did not make a genuine effort to

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[58] FPL Br. at 6; *see also* Reply Ex. E at ATT00649 (Rhinehart Reply Aff. ¶ 12).

[59] *See* Compl. Ex. 1 at ATT00039 (JUA, Art. VI); *see also FPL 2020 Order*, 35 FCC Rcd at 5326 (¶ 11 & n.37); Reply Ex. A at ATT00571-572 (Peters Reply Aff. ¶ 4).

[60] FPL Br. at 11; *see also* Compl. Ex. A at ATT00009-10 (Miller Aff. ¶¶ 18-20); Reply Ex. B at ATT00607-608 (Miller Reply Aff. ¶ 5).

[61] *FPL 2020 Order*, 35 FCC Rcd at 5321 (¶ 1); *see also id.* at 5328 (¶ 13) ("[B]ecause we find that the JUA rate is unjust and unreasonable, AT&T is entitled to a lower rate.").

[62] FPL Br. at 54.

[63] *See* FPL Br. at 39-42, 54-57, 63-65.

[64] FPL Br. at 55.

obtain a new arrangement."[65] FPL also argues that *MAW Communications* applies only when an attacher has a statutory right of pole access under Section 224(f),[66] but ignores Commission findings that ILECs with contractual pole access are entitled to just and reasonable rates, *terms and conditions.*[67] Moreover, the proposition that an unjust and unreasonable term or condition can become reasonable simply because an ILEC's access is contractual instead of statutory is illogical.[68] The Commission has never made such a pronouncement. Lastly, FPL's claim that the present dispute requires a "holistic approach" because of how AT&T poles are maintained and AT&T facilities on FPL poles are transferred[69]is purely smoke-and-mirrors, as those issues are not grounds to eject AT&T from FPL's poles under the JUA and thus, are irrelevant to this inquiry. And, in any event, even FPL's self-described "holistic approach" can be, and in this case is, unjust and unreasonable.[70]

FPL does not identify a single case that supports its exceptional demand. In fact, it relies on cases that *prohibit* what FPL seeks—termination of rights during a *bona fide* invoice dispute.[71] And, it has no answer for the many cases and orders AT&T cites, including those that

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[65] *FPL 2020 Order*, 35 FCC Rcd at 5327 (¶ 11); *see also* Compl. Ex. A at ATT00009-10 (Miller Aff. ¶¶ 18-20); Reply Ex. E at ATT00651-652 (Rhinehart Reply Aff. ¶ 16).

[66] *See, e.g.*, FPL Br. at 55 ("the *MAW Commc'ns* decision involved a claim of mandatory access under Section 224(f)."); *id.* at 25 (in the *Alabama Power* case, "the Commission … explicitly relied on the fact that the attaching entity had a mandatory right to attach to the poles").

[67] *Pole Attachment Order*, 26 FCC Rcd at 5241 (¶ 202).

[68] *See, e.g.*, Compl. ¶ 21; *see also Ala. Cable Telecomms. Ass'n*, 16 FCC Rcd at 12217 (¶ 18) (basing decision on "the Commission's jurisdiction to enforce the access provisions of the Pole Attachment Act *as well as* the Commission's jurisdiction to ensure that conditions of pole attachment agreements are just and reasonable") (emphasis added).

[69] FPL Br. at 56.

[70] *See, e.g.*, Reply Ex. A at ATT00576-581 (Peters Reply Aff. ¶¶ 14-23); Reply Ex. D at ATT00621-628 (Aff. of J. Ellzey, Dec. 3, 2020 ("Ellzey Reply Aff.") ¶¶ 4-18).

[71] *See In Re Cavalier Tel. LLC*, 18 FCC Rcd 25887, 25984 (¶ 177) (2003) (quoted at FPL Br. at 56-57 & 65 n.262) ("[T]hese *bona fide* disputes are *not* subject to termination notifications until

evidence the Commission's work to *reduce* infrastructure costs to further its deployment and competition goals.[72] The Commission's prior cases also establish the unreasonableness of FPL's ejectment demand, even if their facts are not identical. As the Commission explained, "general contract principles prohibit the enforcement of unreasonable penalties for breach of contract."[73] No penalty for breach of a provision in a pole attachment agreement could be more extreme and unreasonable than the forced removal of essential telecommunications facilities from over 425,000 poles—yet FPL demanded that AT&T remove its facilities, arguing "AT&T's failure to make timely payment … authorized FPL to terminate AT&T's right to attach" to FPL's poles.[74]

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resolved through the dispute resolution process also provided in the Agreement.") (emphasis added); *In Re Worldcom, Inc.*, 17 FCC Rcd 27039, 27391 (¶ 730) (2002) (cited at FPL Br. at 65 n.262) (explaining "Verizon could suspend or terminate service, after giving notice and allowing WorldCom to cure the default, if WorldCom is overdue in making payments that are *not* subject to a *bona fide* billing dispute") (emphasis added); *see also AT&T Corp. v. Matrix Telecom, Inc.*, No. CIV-05-118-C, 2006 WL 2246452, at *4 (W.D. Okla. Aug. 4, 2006) (cited at FPL Br. at 57 n.225) (relying on fact that "Matrix never officially disputed either the rate at which AT&T billed the usage charges or the actual usage charges themselves"). FPL also relies on cases involving tariffed charges, which are fundamentally different from the rates FPL invoiced, which were required to comply with federal law. *See* FPL Br. at 57 n.225 (citing *Bus. Wats, Inc. v. Am. Tel. and Tel.Co.*, 7 FCC Rcd 7942, 7942 (¶ 3) (1992) (charges were "legally effective and overdue tariffed charges for tariffed service"); *Tel-Cent. of Jefferson City, Mo., Inc. v. United Tel. Co. of Mo.*, 4 FCC Rcd 8338, 8339 (¶ 11) (1989) (charges were "ordered, furnished, and priced pursuant to the terms and conditions of [the relevant] tariff")).

[72] *See* Compl. ¶ 18; Answer to Compl. ¶ 18. FPL also ignores cases finding one-way default provisions unreasonable, *see* Compl. ¶ 20, although it admits that it does not receive a rental invoice from AT&T or pay one, Answer Ex. A at FPL00003, FPL00006 (Jarro Decl. ¶¶ 10, 27), and so *never* risks being declared in default due to non-payment of a disputed rental invoice.

[73] *See Mile Hi Cable Partners*, 17 FCC Rcd at 6272 (¶ 10). FPL is wrong when it says the Commission walked away from this principle in the 2011 *Pole Attachment Order*. *See* FPL Br. at 65. Instead, the Commission decided what remedy is "presumptively reasonable" and required that it include an opportunity to challenge the pole owner's allegations. *Pole Attachment Order*, 26 FCC Rcd at 5290-91 (¶ 115).

[74] Compl. Ex. 30 at ATT00504 (Report and Recommendation at 8, *FPL v. AT&T*).

FPL argues generally that the Commission should disregard precedent if it did not, like this dispute, involve a challenge to the default provision in a JUA.[75] But the type of provision at issue in a case does not change foundational principles of reasonableness, which apply to "*all* rates, terms, and conditions of pole attachments."[76] And the fact that no other electric utility has ever tried to dismantle a communications network because the electric utility's *unlawful* invoices were *paid in full* at the conclusion of a mandatory pre-complaint mediation process is telling and is not grounds for the Commission to defer to FPL. In fact, the sheer uniqueness of FPL's conduct in the 42-year history of the Pole Attachment Act reinforces its unreasonableness. FPL's demand is unreasonable in part because it is unprecedented.

For these reasons, it *is* unreasonable under Commission precedent for FPL to take adverse action against AT&T "due to [its] refusal to pay invoices … where [AT&T] has 'disputed the reasonableness' of the invoices and 'requested further detail substantiating the charges…'"[77] It is also unreasonable under federal law to take such action where the rate challenge was justified and FPL was nonetheless overpaid all unlawful amounts it invoiced. FPL cannot distinguish its way to reasonable conduct.

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[75] *See, e.g.*, FPL Br. at 41 ("none involved the application of the default and termination provisions of a joint use agreement"); *id.* at 64 ("That decision, however, is inapplicable to the case at hand because it concerned monetary penalties for unauthorized attachments.").

[76] *Pole Attachment Order*, 26 FCC Rcd at 5283 (¶ 93) (emphasis in original); *see also Fla. Cable Telecomms. Ass'n v. Gulf Power Co.*, 18 FCC Rcd 9599, 9603 (¶ 8) (2003); *Cable Texas, Inc. v. Entergy Servs., Inc.*, 14 FCC Rcd 6647, 6652 (¶ 14) (1999); *Mile Hi Cable Partners*, 14 FCC Rcd at 3246 (¶ 7).

[77] FPL Br. at 54 (quoting *MAW Commc'ns*, 34 FCC Rcd at 7151-53 (¶¶ 15-18)).

2. FPL's Grievances Confirm the Unreasonableness of Its Demand.

FPL spends much of its brief spewing misplaced frustrations and operational grievances against AT&T and arguing that they justify terminating the JUA.[78] But even if these grievances were true (and they are not), termination of the JUA is *not* at issue and does not require removal of either party's facilities.[79] This case is about FPL's unjust and unreasonable attempt to eject AT&T from FPL's poles under the JUA's default provision.[80] And FPL's reliance on bogus and unfounded operational issues and complaints about the parties' negotiations to eject AT&T from its poles is *per se* unreasonable because they are not valid grounds for FPL to terminate AT&T's access to FPL's poles under the JUA's default provision.[81]

FPL relies on three conclusory grievances, alleging that AT&T should have (1) paid the disputed invoices sooner, (2) better pole maintenance and replacement practices, and (3) transferred its facilities to FPL's replacement poles at an even more accelerated pace. Each grievance is unfounded and cannot be used to condone FPL's actions.

First, AT&T reasonably sought to determine the amount FPL should have invoiced through the JUA's mandatory pre-complaint dispute resolution process.[82] FPL admits AT&T

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[78] FPL Br. at 42-63.

[79] Compl. Ex. 1 at ATT00048 (JUA, Art. XVI) ("notwithstanding any such termination, other applicable provisions of this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination.").

[80] *See, e.g.*, FPL Br. at 65 ("Importantly, the default provision of the 1975 JUA merely terminates the breaching party's rights under the agreement.").

[81] A "failure to meet a money payment obligation" is the *sole basis* to terminate AT&T's access to FPL poles. Compl. Ex. 1 at ATT00045 (JUA, § 12.3) ("If the default giving rise to a suspension of rights *involves the failure to meet a money payment obligation hereunder*, and such suspension shall continue for a period of sixty (60) days, then the party not in default may forthwith terminate the rights of the other party to attach to the poles involved in the default.") (emphasis added).

[82] *See MAW Commc'ns*, 34 FCC Rcd at 7152-53 (¶ 18).

promptly questioned its invoices.[83] And, although FPL casts aspersions on AT&T's justified rate challenge, FPL's prior writings refute the arguments it makes:

- FPL says AT&T "ignored FPL's substantial invoices for an extended period of time," but FPL admits AT&T disputed the first of the relevant invoices "shortly" after it was issued and discussed the second invoice during the same mandatory pre-complaint process.[84]

- FPL says AT&T negotiated for "more than a year" before asking for a just and reasonable rate.[85] But about 4 months into the negotiations, FPL wrote to express its disagreement with AT&T's interpretation of "the FCC Pole Attachment orders and their application to our Agreement."[86]

- FPL says AT&T expressed "conclusory" concerns about FPL's calculations, but FPL attached some of AT&T's detailed concerns to its Answer.[87]

- FPL says it "respond[ed] to each AT&T inquiry in good faith," but FPL refused to discuss just and reasonable rates or corroborate rate inputs AT&T questioned, such as the carrying charge rate and depreciation rate.[88]

- FPL says AT&T was "on FPL's poles for over two years without making any payments to FPL," but admits the two relevant invoices—issued in March 2018 and February 2019—were paid in full on July 1, 2019.[89]

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[83] FPL Br. at 6.

[84] *Id.* at 4, 8; *see also* Compl. Ex. 4 at ATT00076 (Email from P. Simmons, AT&T, to T. Kennedy, FPL (Apr. 20, 2018)) (documenting discussions on April 3 and 20, 2018 about the March 2018 invoice).

[85] FPL Br. at 44.

[86] Compl. Ex. 6 at ATT00090 (Notice of Default (Aug. 31, 2018)).

[87] FPL. Br. at 45; Answer Ex. 10 at FPL00076-78 (Email from D. Miller, AT&T, to M. Jarro, FPL (Dec. 14, 2018)).

[88] FPL Br. at 44; Answer Ex. 10 at FPL00082 (Email from D. Bromley, FPL, to D. Miller, AT&T (Dec. 20, 2018)) ("Before FPL makes the effort to respond to the information requested…"); Answer Ex. 10 at FPL00083 ("[T]here is nothing in the 2011 FCC Order that affirmatively requires the parties to modify an existing agreed upon contract rate.").

[89] FPL Br. at 49, 51. FPL thus received payment 120 days after the due date on the February 2019 invoice, meaning any delay in its payment could not justify relief under the default provision, which requires 120 days' notice of a failure to meet a money payment obligation. *See* Compl. Ex. 1 at ATT00044-45 (JUA, §§ 12.1, 12.3).

- FPL says it would have acted differently if AT&T had paid some portion of the disputed invoices earlier, but FPL insisted on full payment of all invoiced amounts throughout the negotiations and refused to discuss payment of any other amount.[90]

FPL's expressed outrage regarding the parties' negotiations is simply not credible given its own writings. Had it wanted AT&T to pay an undisputed amount calculated at new telecom rates, it should have at least *discussed* its new telecom rates during the negotiations. It did not.[91]

And AT&T did *not* engage in "self-help" when it questioned FPL's invoices before paying them. Instead, AT&T proceeded as the parties intended when an invoice is disputed: by seeking to settle the amount that is due through the mandatory dispute resolution process.[92] When it became clear that the parties' dispute would not be resolved at the end of the dispute resolution process, AT&T processed payment of the full disputed amounts as FPL requested.[93] AT&T, therefore, *did* pay "the disputed rates while simultaneously challenging them."[94]

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[90] *See, e.g.*, Compl. Ex. 6 at ATT00089 (Notice of Default (Aug. 31, 2018)) (demanding that AT&T "timely cure this default" defined as failure "to pay FPL's invoice for the 2017 calendar year"); Compl. Ex. 23 at ATT000465 (Notice of Termination (Mar. 25, 2019)) (demanding payment of "outstanding balance [that] amounts to more than $20 million"); Compl. Ex. 26 at ATT000474 (Letter from M. Jarro, FPL, to D. Miller, AT&T (May 23, 2019)) (alleging default "leav[es] an outstanding balance due FPL that currently exceeds $20 million."); Compl. Ex. 28 at ATT00481, ATT00483 (alleging breach based on "failure to pay FPL the full amount of the 2017 Invoice" and "the full amount of the 2018 Invoice"); *see also* Compl. Ex. A at ATT00009 (Miller Aff. ¶ 17); Reply Ex. A at ATT00573-574 (Peters Reply Aff. ¶ 8); Reply Ex. B at ATT00608 (Miller Reply Aff. ¶¶ 6-7); Reply Ex. C at ATT00616-617 (Aff. of J. York, Dec. 4, 2020 ("York Reply Aff.") ¶¶ 3-4); Reply Ex. E at ATT00651 (Rhinehart Reply Aff. ¶ 14).

[91] *See, e.g.*, *FPL 2020 Order*, 35 FCC Rcd at 5326 (¶ 11) ("FPL refused to lower AT&T's rate, maintaining throughout [the negotiations] that the *Pole Attachment Order* imposes no such obligation."); *see also, e.g.*, Reply Ex. A at ATT00572 (Peters Reply Aff. ¶ 5); Reply Ex. E at ATT00646-647 (Rhinehart Reply Aff. ¶¶ 7-9).

[92] Compl. Ex. 1 at ATT00056-57 (JUA, Art. XIIIA).

[93] Compl. Ex. A at ATT00009 (Miller Aff. ¶ 18); Reply Ex. B at ATT00608 (Miller Reply Aff. ¶ 8); *see also* Compl. Ex. 23 at ATT00466 (Notice of Termination).

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

Also contrary to FPL's argument, AT&T's conduct did not violate the Communications Act.[95] One case that FPL cites is "not good law" because the FCC has since clarified that nonpayment of disputed charges does *not* violate federal law.[96] FPL cites another case that does "not rule on the lawfulness of … self-help."[97] Other decisions FPL cites deal with distinguishable issues, such as those presented when parties seek injunctive relief.[98] And one of the cases even recognizes that it could "be unjust to require a party, who is entitled to withhold payment for charges that are the subject of a good faith dispute, to simply pay those charges anyway."[99] That is certainly the case here, where FPL over-collected millions of dollars of unlawful rent from AT&T for nearly a decade before this dispute began.[100] Given those

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[95] *See* FPL Br. at 52-54.

[96] *See id.* at 53 n.208 (citing *MGC Commc'ns, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999), *aff'd*, 15 FCC Rcd 308 (1999)); *but see All Am. Tel. Co. v. AT&T Corp.*, 26 FCC Rcd 723, 732 (¶ 20) (2011) ("To the extent the Commission's decision in *MGC* can be read to stand for the proposition that a carrier's failure to pay access charges violates the Act, we hold that it is not good law."); *see also Line Sys., Inc. v. Sprint Nextel Corp.*, No. 11-6527, 2012 WL 3024015, at *6 (E.D. Pa. July 24, 2012) (dismissing claim because "failure to pay … tariffed charges … does not give rise to a claim … for breach of the [Communications] Act" (quotation omitted)).

[97] *In the Matter of Communique Telecomms., Inc.*, 10 FCC Rcd 10399, 10405 (¶ 31) (1995) (cited at FPL Br. at 53 n.208).

[98] *In the Matter of MCI Telecomms. Corp.*, 62 FCC 2d 703 (1976) (cited at FPL Br. at 53 n.208, 54 nn.210, 211); *see also Nat'l Commc'ns Ass'n, Inc. v. Am. Tel. & Tel. Co.*, No. 93 CIV. 3707(LAP), 2001 WL 99856, at *5 (S.D.N.Y. Feb. 5, 2001) (relying on *Communique Telecomms*, 10 FCC Rcd ¶¶ 1, 36; *MCI Telecomms. Corp.*, 62 FCC 2d at 705-06 (¶¶ 6-7)) (cited at FPL Br. at 52 n.206, 53 n.208).

[99] *Level 3 Commc'ns, LLC v. Tel. Operating Co. of Vermont, LLC*, No. 5:11-CV-280, 2011 WL 6291959, at *12 (D. Vt. Dec. 15, 2011) (cited at FPL Br. at 53-54).

[100] *See FPL 2020 Order*, 35 FCC Rcd at 5328 (¶ 13) ("[B]ecause we find that the JUA rate is unjust and unreasonable, AT&T is entitled to a lower rate."); Reply Ex. E at ATT00651-652 (Rhinehart Reply Aff. ¶ 16).

substantial overpayments, AT&T owed FPL nothing for 2017 and 2018 rent, but nonetheless paid the invoices in full as FPL requested to avoid this very litigation.[101]

Second, FPL's broad-brush criticisms of AT&T's pole maintenance and replacement practices are wrong[102] and paper thin. FPL relies on (1) allegations about an unidentified set of poles it says "need[ ] to be replaced but do[ ] not present an immediate threat,"[103] and (2) an email exchange about one pole in Coral Gables that confirms AT&T's diligence because AT&T visited the pole "*the same day*" it learned the City was concerned about its condition.[104] FPL admits it has no cause for complaint if an extensive network of utility poles shows "a few *ad hoc* instances of neglect."[105] FPL has not proven even that.[106] And FPL's claims are belied by its own lack of action, as FPL does *not* seek to remove its own facilities from those same 213,000+

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[101] Compl. Ex. A at ATT00011 (Miller Aff. ¶ 25); Reply Ex. E at ATT00651-652 (Rhinehart Reply Aff. ¶ 16).

[102] Reply Ex. A at ATT00576-581 (Peters Reply Aff. ¶¶ 14-23); Reply Ex. D at ATT00621-628 (Ellzey Reply Aff. ¶¶ 4-18).

[103] *See* Answer Ex. A at FPL00008 (Jarro Decl. ¶ 37 n.2); Answer Ex. B at FPL00141 (Allain Decl. ¶ 21(B)); *see also* Reply Ex. D at ATT00622-623 (Ellzey Reply Aff. ¶¶ 6-7).

[104] *See* Answer Ex. A at FPL00127-132 (Jarro Decl., Ex. 16); *see also* Reply Ex. D at ATT00624-625 (Ellzey Reply Aff. ¶¶ 9-10).

[105] FPL Br. at 60.

[106] FPL was just as vague during the parties' negotiations. *See* Compl. Ex. 6 at ATT00090 (Notice of Default) ("AT&T is not promptly replacing poles that are reported as being in a dangerous and unsafe condition."); Compl. Ex. 7 at ATT00094 (Letter from K. Hitchcock, AT&T to M. Jarro, FPL (Sept. 13, 2018) ("Because FPL did not identify any specific poles…").

AT&T-owned poles[107] that it claims are not maintained.[108] It seeks *only* to eject AT&T's facilities from FPL's poles.[109]

Third, FPL's complaints about the speed with which AT&T transfers its facilities to FPL's replacement poles are refuted by the data.[110] From 2008 to 2019, AT&T completed more than 97,000 NJUNS work tickets that required AT&T to transfer its facilities to an FPL replacement pole, an exceptional number that far exceeded the transfer work any other Florida electric utility required of AT&T.[111] AT&T has devoted significant resources to promptly complete the transfer work FPL required. According to FPL, AT&T averaged about 1,200 transfers per month *before* this dispute,[112] an accelerated pace under the Commission's make-ready rules, which provide 75 days to perform make-ready on "large orders" involving more than 300, but fewer than 3,000 poles.[113] And AT&T's actual pace was *faster* than the 1,200 poles per month that FPL estimated. According to NJUNS data, AT&T completed 16,230 tickets in 2018 that required AT&T to transfer its facilities to an FPL replacement pole—reflecting an average of about 1,350 transfers per month.[114] FPL, in contrast, completed 3,503 tickets in 2018 that

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[107] FPL Br. at 58 ("FPL is attached to over 200,000 AT&T poles."); Compl. Ex. A at ATT00004 (Miller Aff. ¶ 7) (stating that AT&T owns about 213,210 of the joint use poles).

[108] *See, e.g.*, FPL Br. at 65 ("the default provision … terminates the breaching party's rights under the agreement"); *see also* Compl. Ex. 1 at ATT00045 (JUA, § 12.3).

[109] Compl. Ex. 28 at ATT00487, ATT00490 (seeking order "directing AT&T Florida to remove immediately its equipment from FPL poles").

[110] Compl. Ex. B at ATT00020-21 (Peters Aff. ¶¶ 15-16); Reply Ex. A at ATT576-579 (Peters Reply Aff. ¶¶ 14-20).

[111] Compl. Ex. B at ATT00020-21 (Peters Aff. ¶¶ 15-16); Reply Ex. A at ATT00577 (Peters Reply Aff. ¶ 16).

[112] FPL Br. at 62 (stating AT&T's commitment to complete "an average of 1,200 transfers per month during 2019" was about the same as "AT&T's past transfer rate.").

[113] *See* 47 C.F.R. § 1.1411(g)(1), (3).

[114] Reply Ex. A at ATT00577 (Peters Reply Aff. ¶ 16).

required it to transfer its facilities to an AT&T replacement pole, reflecting about 292 transfers per month.[115] FPL's gripes about AT&T's diligence and promptness in completing transfer work are unsubstantiated and untrue.[116] They cannot, and do not, provide a basis for forcing AT&T to remove facilities from nearly a half-million FPL poles.

3. AT&T Proposed a Reasonable and Tailored Default Provision.

FPL's final argument regarding its demand that AT&T remove facilities from over 425,000 poles is irrelevant, untrue, and confirms the need for the Commission action.[117] According to FPL, even if the Commission adopts the proposed default provision AT&T requested—which precludes FPL from terminating AT&T's use of existing poles so long as AT&T is challenging the default allegation—FPL will *still* seek to dismantle AT&T's network.[118] It reasons that AT&T disputed FPL's rental invoices as unjust and unreasonable, so AT&T must only have disputed the default allegation as to the unjust and unreasonable amounts.[119] Therefore, it says it can still threaten AT&T's network even if the Commission revises the JUA's default provision as AT&T requested because AT&T did not immediately and unilaterally pay some undisputed amount.[120]

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[115] *Id.*

[116] Reply Ex. A at ATT00576-581 (Peters Reply Aff. ¶¶ 14-22); Reply Ex. D at ATT00626 (Ellzey Reply Aff. ¶ 13).

[117] *2010 NPRM*, 25 FCC Rcd at 11900 (¶ 83) ("The Commission has broad authority to 'enforc[e] any determinations resulting from complaint procedures' and to 'take such action as it deems appropriate and necessary, including issuing cease and desist orders …'").

[118] *See* FPL Br. at 66-67.

[119] *Id.*

[120] *Id.*

FPL, of course, did not ask AT&T to pay an undisputed amount, instead insisting that the only acceptable payment was a full payment.[121] But FPL's change of heart, designed to create an argument to hold onto even after the Commission rules, shows why the Commission must order FPL to *cease and desist* from its unjust and unreasonable demand that AT&T remove facilities from over 425,000 FPL poles.[122] Adopting the default provision AT&T proposed should be enough to preclude FPL's conduct; AT&T disputed the entirety of FPL's default allegation[123] and the requested provision precludes default remedies until the dispute is resolved. The provision also ensures the timely resolution of disputes by incorporating the parties' mandatory dispute resolution process.[124] Yet FPL pledges to fight on. The Commission should promptly end this dispute by declaring the default provision unjust and unreasonable and enjoining FPL's

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[121] *See, e.g.*, Compl. Ex. A at ATT00009 (Miller Aff. ¶ 17) ("FPL would not … agree to accept any amount other than the full amount of the 2017 and 2018 Invoices."); *see also* Reply Ex. A at ATT00573-574 (Peters Reply Aff. ¶ 8); Reply Ex. B at ATT00608 (Miller Reply Aff. ¶¶ 6-7); Reply Ex. C at ATT00616-617 (York Reply Aff. ¶¶ 3-4); Reply Ex. E at ATT00651 (Rhinehart Reply Aff. ¶ 14).

[122] Compl. ¶¶ 56-58; *see also 2010 NPRM*, 25 FCC Rcd at 11900 (¶ 83) ("The Commission has broad authority to 'enforc[e] any determinations resulting from complaint procedures' and to 'take such action as it deems appropriate and necessary, including issuing cease and desist orders ….'") (citations omitted).

[123] *See, e.g.*, Compl. Ex. 7 at ATT00093 (Letter from K. Hitchcock, AT&T, to M. Jarro, FPL (Sept. 13, 2018)) ("[W]e disagree with FPL's claim that AT&T is in default of the Joint Use Agreement as a result of our asking FPL to substantiate its 2017 rental invoice."); Compl. Ex. 13 at ATT00252 (Letter from D. Miller, AT&T, to M. Jarro, FPL (Jan. 16, 2019)) ("AT&T is not in default of the Joint Use Agreement."); Compl. Ex. 24 at ATT00468 (Letter from D. Miller, AT&T, to M. Jarro, FPL (Apr. 3, 2019)) ("We have previously detailed at length the reasons why AT&T is not in default of any of its obligations under the JUA."); Compl. Ex. 27 at ATT00476 (Letter from D. Miller, AT&T to M. Jarro, FPL (May 30, 2019)) ("AT&T is not in default of any money payment obligation under the JUA.").

[124] *See* Compl. ¶ 58. A party, therefore, will not be able to "merely utter[ ] the word 'dispute'" in order to avoid default remedies as FPL contends. *See* FPL Br. at 67. The party will need to submit the dispute to the process the parties' agreed to follow. *See* Compl. Ex. 1 at ATT00056-57 (JUA, Art. XIIIA).

ongoing effort to force AT&T to remove its facilities from over 425,000 FPL poles because AT&T challenged FPL's unlawful rates.

D. FPL's Abuse of the Pole Abandonment Provision Is Unjust and Unreasonable.

FPL's Answer also confirms the unreasonableness of its pole abandonment scheme, under which it has attempted to unilaterally designate thousands of poles it has replaced as "abandoned poles," thereby invoking the JUA's pole abandonment provision. FPL acknowledges its effort is novel and was devised *because* AT&T did not accede to FPL's demands during the parties' negotiations.[125] It provides no valid justification for its misuse of the pole abandonment provision to transfer to AT&T ownership of (and attempt to charge AT&T for) replaced poles with no useful future, which also results in a stealthy transfer of millions of dollars of its own pole removal and disposal costs to AT&T.[126]

1. FPL's Actions Are Unprecedented and Unreasonable.

FPL's Answer confirms five core facts that establish the unreasonableness of its pole abandonment scheme, under which it has attempted to unilaterally designate thousands of poles it has replaced as "abandoned poles," thereby invoking the JUA's pole abandonment provision.

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[125] *See, e.g.*, Answer Ex. A at FPL0009 (Jarro Decl. ¶ 43 n.4).

[126] If successful, FPL's scheme to transfer thousands of replaced poles to AT&T would operate as an offset to the reductions required by law to the unjust and unreasonable pole attachment rental rates FPL charges AT&T. *See FPL 2020 Order*, 35 FCC Rcd at 5321 (¶ 1) (holding that "the rate AT&T paid to attach to FPL's poles was unjust and unreasonable"). FPL states in its interrogatory responses that its pole removal cost has averaged $749 per pole, and that it plans to charge AT&T $310 per pole, after which AT&T would incur the additional cost to remove and dispose of the useless asset. *See* Resp. to Interrogatory No. 7; Second Supp. Resp. to Interrogatory No. 4. In other words, by "abandoning" 5,230 worthless poles, FPL seeks to shift $3.9 million in its removal costs to AT&T, charge AT&T $1.6 million for the worthless poles, and set a precedent to continue doing so going forward.

First, FPL admits it is trying to "abandon" poles to AT&T that FPL replaced with a new pole as part of FPL's State-mandated Storm Hardening Plan.[127] But it is unreasonable to apply a pole abandonment provision to poles that are mid-way through the process of replacement.[128] A pole abandonment provision allows a pole owner to transfer ownership of a single pole when it no longer needs a pole in that location—and the attacher wants to continue to use that pole to support its facilities.[129] Conversely, when a pole is replaced (rather than abandoned), all attachers must transfer their facilities to the replacement pole before the pole owner removes and discards the replaced pole.[130] FPL does not show that it has *ever* attempted to abandon poles mid-transfer to any other entity or in the volume FPL attempted here. FPL also does not dispute that it changed its practice after AT&T challenged FPL's rates. Previously, FPL's pole abandonments were cooperative one-off scenarios when FPL would no longer serve customers using a pole at a certain location, such that the pole was truly being "abandoned" by FPL.[131]

In an apparent effort to confuse, FPL argues that AT&T *has* abandoned poles in "almost identical" scenarios.[132] But this is not true.[133] FPL explains that "[f]or the past twenty years, AT&T has been abandoning its poles to FPL after converting [AT&T's] facilities (*e.g.* undergrounding or relocating)" so FPL could continue serving customers from the existing

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[127] *See, e.g.*, FPL Br. at 4, 68-79.

[128] *See, e.g.*, Compl. ¶¶ 36-37.

[129] Compl. Ex. B at ATT00016-17 (Peters Aff. ¶ 6); Reply Ex. A at ATT00574 (Peters Reply Aff. ¶ 10); Reply Ex. D at ATT00628 (Ellzey Reply Aff. ¶ 18).

[130] Compl. Ex. B at ATT00017 (Peters Aff. ¶ 7); Reply Ex. A at ATT00574 (Peters Reply Aff. ¶ 10).

[131] *See* Compl. Ex. 3 at ATT00068-71 (sample FPL pole abandonment notice); Reply Ex. A at ATT00574-575 (Peters Reply Aff. ¶ 11); Reply Ex. D at ATT00628 (Ellzey Reply Aff. ¶ 18).

[132] FPL Br. at 86.

[133] Reply Ex. A at ATT00575 (Peters Reply Aff. ¶ 12).

pole.[134] FPL also points to notes from a workshop, where AT&T explained a pole abandonment may occur if an electric company "abandons rear lot construction" to serve customers from a different location and AT&T "elects to remain on [the] existing pole line."[135] But these are industry-standard pole abandonment scenarios, where the pole owner no longer requires use of the pole, but the attacher does still need to use the pole.[136] They are not the situation here, where FPL seeks to abandon to AT&T replaced poles that neither the pole owner nor the attachers need and that will have no useful future once all required transfers are made because they must be removed.[137] FPL's effort to conflate pole replacements and pole abandonments is unprecedented, with costly consequences for the communications industry should FPL succeed.

Second, FPL proudly announces that it intentionally devised its new approach to pole abandonments to try to evade the JUA's transfer provision and increase the operational pressure on AT&T during the parties' negotiations.[138] FPL agrees the JUA's transfer provision requires that the transfer work be performed "promptly," but says it decided AT&T was not working "promptly" enough after its request for lawful rental rates.[139] Instead of working with AT&T or discussing matters further, FPL took matters into its own hands and declared over 11,000

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[134] Answer Ex. B at FPL00139 (Allain Decl. ¶ 17); *see also* FPL Br. at 86; Reply Ex. A at ATT00575 (Peters Reply Aff. ¶ 12).

[135] FPL Br. at 86 n.343; *see also* Reply Ex. A at ATT00576, ATT00584-599 (Peters Reply Aff. ¶ 13 & Exs. P-1, P-2). FPL also points to a transfer provision in a draft agreement, which provides for a pole to transfer ownership if transfer deadlines are not met. *See* FPL Br. at 87 & n.344. But the draft also states that the parties should agree to extend deadlines due to the "volume of transfers."

[136] Reply Ex. A at ATT00576 (Peters Reply Aff. ¶ 13).

[137] *See* Compl. Ex. B at ATT00017, ATT00024 (Peters Aff. ¶¶ 8, 21); Reply Ex. A at ATT00576 (Peters Reply Aff. ¶ 13); Reply Ex. D at ATT00628 (Ellzey Reply Aff. ¶ 18).

[138] *See, e.g.*, FPL Br. at 76-77; *see also* Answer Ex. A at FPL00009 (Jarro Decl. ¶ 43 n.4).

[139] FPL Br. at 81; *see also* Compl. Ex. 1 at ATT00034 (JUA, § 3.3).

replaced poles subject to "abandonment" in order to impose a 60-day deadline on their transfers.[140] FPL's acknowledged manipulation of the JUA to increase its leverage during rate negotiations is a quintessential unjust and unreasonable practice.[141]

Third, FPL admits AT&T promptly completed "the vast majority of transfers in a matter of [18] months" that ran from the Notice of Abandonment (December 2018) through the end of June 2020.[142] But FPL unilaterally imposed a *60-day deadline* for AT&T to transfer its list of 11,142 poles. FPL's admission that AT&T promptly completed the transfer work in 18 months makes FPL's demand for AT&T to complete the transfer work in 60 days *per se* unreasonable.

Indeed, it was impossible for AT&T to complete the work in 60 days because many of the poles were not ready for AT&T's transfer during those 60 days.[143] FPL doubles down on the unreasonableness of its position and argues that this fact is irrelevant—the poles can be abandoned to AT&T anyway.[144] This is absurd. AT&T must at least have the ability to avoid the pole abandonment when it could not under any scenario complete the transfer within FPL's unreasonably short timeline.[145]

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[140] *See, e.g.*, Answer Ex. A at FPL00009 (Jarro Decl. ¶ 43 n.4) (alleging "AT&T's failure to commit" to an even higher number of transfer tickets per month led FPL "to send the Notice of Abandonment").

[141] *See 2010 NPRM*, 25 FCC Rcd at 11906 (¶ 101) (recognizing "a given term in a pole attachment agreement may not be unreasonable on its face, but may only become so through a utility's later interpretation or application").

[142] FPL Br. at 78-79.

[143] *See* Compl. Ex. B at ATT00025-26 (Peters Aff. ¶¶ 24, 26); *see also* Reply Ex. A at ATT00580 (Peters Reply Aff. ¶ 21); Reply Ex. D at ATT00627-628 (Ellzey Reply Aff. ¶ 17).

[144] *See* Answer Ex. B at FPL00138 (Allain Decl. ¶ 13 n.1) ("[T]he JUA does not limit abandonment rights to only those poles where AT&T is the only attacher. Rather, the JUA requires only that FPL be off the pole prior to the expiration of the 60 days and AT&T still be attached.").

[145] FPL claims AT&T was able to complete transfers on 97% of the poles when FPL served the Notice of Abandonment in December 2018, but relies on a mischaracterization of AT&T's proof.

Fourth, FPL admits "Florida has a cost recovery process to compensate FPL for any expenses incurred as part of its storm hardening efforts" and that FPL nonetheless seeks "to reduce its costs" by having AT&T pay for them.[146] This is unjust and unreasonable. "The public interest is best served, and a competitive marketplace is best encouraged, by policies that promote the recovery of costs from *the cost-causer*."[147] The pole removal and disposal costs FPL seeks to shift to AT&T *are FPL's costs*—incurred to improve FPL's storm resiliency under State regulations that already provide FPL compensation.[148] And FPL does *not* just want to impose its pole removal and disposal costs on AT&T; it wants to also charge AT&T over $1.6 million for FPL's useless assets.[149] FPL's effort is thus a transparent and unreasonable attempt to create a new revenue stream to replace the reductions to its unjust and unreasonable pole attachment rates.

Fifth, FPL announces that it is committed to its pole replacement effort going forward,[150] meaning it can continue to try to abuse the pole abandonment provision to impose costs on AT&T to offset the rental rate reductions required by federal law. The Commission sought

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It was not until the end of June 2020 that 97% of the poles were ready for AT&T's transfer. *See* FPL Br. at 77-78; Answer Ex. B at FPL00138 (Allain Decl. ¶ 13). *But see* Compl. Ex. B at ATT00026 (Peters Aff. ¶ 27); Reply Ex. A at ATT00580 (Peters Reply Aff. ¶ 21); Compl. Ex. 15 at ATT00259 (Letter from J. Thomas, AT&T, to FPL (Jan. 25, 2019) ("AT&T's preliminary review of the 11,142 locations identified shows that for 2,149 (19.3%) locations, AT&T has either completed the transfer or is not the next-to-go, meaning AT&T is waiting on another attacher before we can transfer.").

[146] FPL Br. at 72; *see also* Second Supp. Resp. to Interrogatory No. 4 (Dec. 3, 2020) (listing FPL's pole removal costs).

[147] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd 9088, 9116 (¶ 56 n.155) (2018) (emphasis added).

[148] FPL Br. at 72; *see also* Fla. Admin. Code Ann. r. 25-6.030; Fla. Admin. Code Ann. r. 25-6.0342 (2007).

[149] *See* FPL Resp. to Interrogatory No. 7.

[150] *See, e.g.*, Answer Ex. B at FPL00144 (Allain Decl. ¶ 25).

instead to reduce rental rates *and* "eliminate unnecessary costs or burdens associated with pole attachments" to "promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation."[151] FPL's money-making effort will have the opposite effect. It is unjust and unreasonable.

2. FPL Relies Exclusively on Irrelevant Arguments.

FPL does not argue the actual issue before the Commission—whether its pole abandonment terms, conditions, and practices are just and reasonable. Instead, it focuses on 3 irrelevant arguments that cannot satisfy its burden or change the result of this case.

First, FPL defends its pole abandonment effort with the "plain language of the parties' agreement."[152] This argument is just as "misplaced" as it was in FPL's prior pole attachment dispute.[153] Pole attachment terms and conditions "cannot be held reasonable simply because they have been agreed to."[154] It, therefore, does not matter whether the JUA's pole abandonment provision *allows* FPL to abandon thousands of poles to AT&T mid-way through the replacement process upon 60 days' notice[155] because the relevant question is whether the pole abandonment provision is just and reasonable as written and applied.[156]

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[151] *Pole Attachment Order*, 26 FCC Rcd at 5241, 5243 (¶¶ 1, 6).

[152] *See, e.g.*, FPL Br. at 79-87.

[153] *FPL 1993 Order*, 8 FCC Rcd at 389 (¶ 17) ("FPL relies on the pole lease agreement which allows a higher charge and [argues] that such an agreement was negotiated through arms length bargaining. FPL's reliance on this argument is misplaced.").

[154] *Id.*

[155] *See* FPL Br. at 79-87.

[156] *Mile Hi Cable Partners*, 17 FCC Rcd at 6271 ("The issue in this matter is ... whether the term or condition itself was reasonable.").

Second, FPL repeats its unjustified criticisms of AT&T's maintenance and replacement practices related to *AT&T's poles*.[157] This is irrelevant to the question of whether FPL's application of the pole abandonment provision *to FPL's poles* is unjust and unreasonable. Nothing about the unidentified AT&T poles FPL says "need[ ] to be replaced but do[ ] not present an immediate threat"[158] can change the fact that FPL is unreasonably trying to abandon thousands of *FPL's* useless replaced poles to AT&T.

Third, FPL says AT&T could have transferred facilities to the new poles *before* FPL tried to abandon the replaced poles.[159] But the pendency of a transfer request cannot change the unreasonableness of FPL's decision to unilaterally and abruptly attach a 60-day hard-and-fast deadline to thousands of them in mid-December.[160] Nor does it justify FPL's refusal to discuss any other deadline, despite industry practice to provide notice and an opportunity to plan for such a large job.[161]

The data also disproves FPL's claim that its actions were justified by sluggishness on AT&T's part. According to NJUNS, AT&T completed over 77,000 tickets between 2008 and 2018 that required a transfer of AT&T's facilities to an FPL replacement pole.[162] This volume is

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[157] FPL Br. at 74-75. *But see* Reply Ex. A at ATT00581 (Peters Reply Aff. ¶ 23); Reply Ex. D at ATT00621-626 (Ellzey Reply Aff. ¶¶ 4-11).

[158] FPL Br. at 75; *see also* Answer Ex. A at FPL00008 (Jarro Decl. ¶ 37 n.2); Answer Ex. B at FPL00141 (Allain Decl. ¶ 21(B)). *But see* Reply Ex. D at ATT00622-623 (Ellzey Reply Aff. ¶¶ 6-7).

[159] FPL Br. at 75-76. *But see* Reply Ex. A at ATT00580 (Peters Reply Aff. ¶ 21); Reply Ex. D at ATT00627-628 (Ellzey Reply Aff. ¶ 17).

[160] *See, e.g.*, Compl. ¶¶ 38-40.

[161] *See* Compl. ¶ 41 (citing Comments of Florida IOUs at 14, FCC Docket No. 07-245 (Aug. 16, 2010)); *see also* Compl. Ex. B at ATT00026 (Peters Aff. ¶ 26).

[162] Compl. Ex. B at ATT00020 (Peters Aff. ¶ 16); Reply Ex. A at ATT00577 (Peters Reply Aff. ¶ 16).

extraordinary, but AT&T devoted the resources to meet it.[163] As FPL admits, AT&T was averaging about 1,200 transfers per month before this dispute,[164] an accelerated pace that AT&T's competitors did not match.[165] Nor could FPL meet its own standard. For while it says AT&T had 2,424 transfer requests pending for over 1 year (with an average pendency of 1.28 years),[166] FPL had 11,778 transfer requests pending for over 1 year with respect to AT&T replacement poles, and required more than *2 years* to complete more than half of AT&T's far fewer transfer requests.[167] AT&T has devoted significant resources to accommodating FPL's exceptional pole replacement program, which is already fully funded for FPL.[168] FPL should have applauded AT&T's commitment and diligence, not tried to impose *more* costs on AT&T. The Commission should declare the pole abandonment provision unjust and unreasonable and enjoin FPL's cost-shifting scheme.

E. FPL's Affirmative Defenses Are Meritless.

FPL concludes its Answer with 5 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 proceedings.[169]

First, FPL argues that AT&T should be estopped from receiving relief due to "unclean hands" because AT&T did not immediately make a payment of undisputed charges during the

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[163] Compl. Ex. B at ATT00019-21 (Peters Aff. ¶¶ 13-17).

[164] *See* FPL Br. at 76-77.

[165] *See* Reply Ex. A at ATT00578-579 (Peters Reply Aff. ¶¶ 17-20).

[166] FPL Br. at 75.

[167] Compl. Ex. B at ATT00023 (Peters Aff. ¶ 20).

[168] *Id.* at ATT00019 (Peters Aff. ¶ 13).

[169] *See In the Matter of Improving Pub. Safety Commcns in the 800 Mhz Band New 800 Mhz Band Plan for Puerto Rico & the U.S. Virgin Islands*, 26 FCC Rcd 1058, 1063 (¶¶ 12-13) (2011).

parties' negotiations and FPL does not recall discussing AT&T's claims during the negotiations.[170] Whether an estoppel or unclean hands defense is available in a pole attachment complaint proceeding is doubtful.[171] But if it were available, it fails. AT&T is statutorily entitled to "just and reasonable" rates for use of FPL's poles; that AT&T challenged the unlawful rental rates FPL charged before paying them "is of no consequence."[172] And irrespective of what FPL recalls or fails to recall about the negotiations, AT&T's correspondence shows it has long tried to negotiate a resolution of the issues raised here.[173] FPL at all times demanded payment of its rental invoices in full and refused to discuss a compromise,[174] and AT&T is "not required to

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[170] Answer, Affirmative Defense A.

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

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

[173] *See, e.g.*, Compl. Ex. 7 at ATT00093 (Letter from K. Hitchcock, AT&T, to M. Jarro, FPL (Sept. 13, 2018)) ("[W]e disagree with FPL's claim that AT&T is in default of the Joint Use Agreement as a result of our asking FPL to substantiate its 2017 rental invoice."); Compl. Ex. 15 at ATT00258 (Letter from J. Thomas, AT&T, to FPL (Jan. 25, 2019)) ("Given AT&T's receipt of the Notice [of Abandonment] on the eve of the Christmas holidays, as well as the enormous number of poles involved, it is not reasonable to expect AT&T to be able to respond in 60 days."); Compl. Ex. 32 at ATT00522 (Email from H. Gurland, Counsel for AT&T, to M. Moncada, FPL (Apr. 20, 2020)) ("AT&T considers a contract provision allowing a party to declare itself the victor of the dispute being negotiated—and to require the other to dismantle its network regardless of how the dispute is resolved—to be a quintessential unjust and unreasonable term prohibited by law.").

[174] *See, e.g.*, Compl. Ex. A at ATT00011-12 (Miller Aff. ¶ 25); Compl. Ex. B at ATT00026 (Peters Aff. ¶ 26); Compl. Ex. 32 at ATT00522 (Email from M. Moncaada, FPL, to H. Gurland, Counsel for AT&T (Apr. 20, 2020); Compl. Ex. 33 at ATT00526-27 (Joint Status Report); Reply

engage in extended negotiations when the parties apparently are far apart in their analysis of the issues."[175]

Second, FPL claims that AT&T failed to satisfy the pre-complaint negotiation requirement of 47 C.F.R. § 1.722(g),[176] but the record shows that AT&T repeatedly and exhaustively explained its argument that the default and pole abandonment terms and conditions in the JUA and FPL's related practices are unjust and unreasonable and in good faith tried to negotiate with FPL, including in face-to-face executive-level meetings and private mediations.[177] AT&T thus "notified [FPL] in writing of the allegations that form the basis of the complaint," "invited a response within a reasonable period of time," and "in good faith, discussed or attempted to discuss the possibility of settlement with [FPL]."[178] FPL has provided no valid basis for dismissing or staying this complaint for further negotiations—particularly when FPL has repeatedly refused to negotiate.[179]

Ex. A at ATT00571-574 (Peters Reply Aff. ¶¶ 4-5, 8); Reply Ex. B at ATT606-608, ATT00612-613 (Miller Reply Aff. ¶¶ 3, 7 & Ex. M-1); Reply Ex. C at ATT00616-617 (York Reply Aff. ¶¶ 3-4); Reply Ex. E at ATT00646, ATT00651 (Rhinehart Reply Aff. ¶¶ 7, 14).

[175] *Nevada State Cable Television Ass'n v. Nevada Bell*, 13 FCC Rcd 16774 (¶ 4) (1998).

[176] Answer, Affirmative Defense B.

[177] *See, e.g.*, Compl. Ex. A at ATT00005-12 (Miller Aff. ¶¶ 9-25); Compl. Ex. B at ATT00024-27 (Peters Aff. ¶¶ 23-28); Compl. Ex. 32 at ATT00522 (Email from H. Gurland, Counsel for AT&T, to M. Moncada, Counsel for FPL (Apr. 20, 2020)) ("AT&T would like to take the opportunity at the mediation [about the abandonment dispute] to try again to resolve our dispute over FPL's claims that it may require AT&T to remove its existing facilities from FPL's poles."); *see also* Reply Ex. A at ATT00571-574 (Peters Reply Aff. ¶¶ 3-9); Reply Ex. B at ATT00606-608 (Miller Reply Aff. ¶¶ 2-8).

[178] 47 C.F.R. § 1.722(g).

[179] *See, e.g.*, Compl. Ex. 32 at ATT00522 (Email from M. Moncaada, FPL, to H. Gurland, Counsel for AT&T (Apr. 20, 2020); Compl. Ex. 33 at ATT00526-27 (Joint Status Report); Reply Ex. B at ATT00612-613 (Miller Reply Aff., Ex. M-1); *see also* Pleadings Compilation at ATT00843, *AT&T v. FPL*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (Sept. 25, 2019) (FPL's Opp. to Mot. to Dismiss or Stay at 14, *FPL v. AT&T* (Aug. 20, 2019)) ("Further Mediation would be an exercise in Futility"); *id.* at ATT00844 (FPL's Opp. to Mot. to Dismiss

Third, FPL argues that the Commission should forbear from enforcing its rules here. The Enforcement Bureau previously rejected this forbearance defense and should do so again here.[180] 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"[181] *are* present in this case because "AT&T is, in fact, in an inferior bargaining position and … the JUA [terms and conditions and FPL's practices are] neither just nor reasonable."[182] FPL also has not filed a proper forbearance request and the Commission cannot forbear from applying its rules only to one ILEC's attachments on one electric utility's poles.[183] Forbearance is also precluded by statute because enforcement of AT&T's right to just and reasonable terms, conditions, and practices 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."[184]

Fourth, FPL asks the Commission to change its longstanding sign-and-sue rule, arguing that it is arbitrary and capricious because AT&T should have been required to take exception to

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or Stay at 15, *FPL v. AT&T* (Aug. 20, 2019)) ("To urge mediation once again … is pointless and will serve no purpose but delay these proceedings further.").

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

[181] Answer, Affirmative Defense C.

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

[183] 47 C.F.R. §§ 1.53-1.59.

[184] *See* 47 U.S.C. § 160(a); *see also Pole Attachment Order*, 26 FCC Rcd at 5240 (¶ 208) (finding jurisdiction over ILEC pole attachment rates, terms, and conditions is consistent with the Commission's obligation to "encourage the deployment . . . of advanced telecommunications capability to all Americans by utilizing, in a manner consistent with the public interest . . . measures that promote competition . . . or other regulatory methods that remove barriers to infrastructure investment.") (quoting 47 U.S.C. § 1302(a)).

the pole abandonment and default provisions in the JUA when it was negotiated in 1975.[185] But "the rule is a reasonable exercise of the agency's duty under the statute to guarantee fair competition in the [pole] attachment market,"[186] and this is not the time or the appropriate vehicle to reconsider it.[187] The Commission is required to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and … to hear and resolve complaints concerning such rates, terms, and conditions."[188] The FCC, therefore, must ensure "just and reasonable" terms, conditions, and practices even if "the attacher has agreed, for one reason or another, to … relinquish a valuable right to which it is entitled under the Pole Attachments Act and the Commission's rules."[189] Any other standard "would subvert the supremacy of federal law over contracts."[190]

Fifth, FPL argues that the Commission's assertion of jurisdiction over the pole attachment terms, conditions, and practices imposed on ILECs is "unlawful, ultra vires, arbitrary, capricious and unreasonable" because the statutory term "providers of telecommunications service" should be read as "synonymous with 'telecommunications carrier,'" a term that excludes ILECs.[191] The Commission correctly rejected this argument in its 2011 *Pole*

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[185] Answer, Affirmative Defense D.

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

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

[188] 47 U.S.C. § 224(b).

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

[190] *In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order, 33 FCC Rcd 7705, 7731 (¶ 50) (2018) ("*Third Report and Order*") (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.").

[191] Answer, Affirmative Defense E.

Attachment Order when it found that ILECs, including AT&T, are "providers of telecommunications service" that are statutorily entitled to just and reasonable pole attachment rates, terms, and conditions.[192] The D.C. Circuit affirmed.[193]

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, ensure just and reasonable terms and conditions for AT&T's use of FPL's poles, and enjoin FPL's unjust and unreasonable default and pole abandonment practices.

Respectfully submitted,

By: _____
Robert Vitanza
Gary Phillips
David Lawson
AT&T SERVICES, INC.
1120 20th Street NW, Suite 1000
Washington, DC 20036
(214) 757-3357

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

Christopher S. Huther
Claire J. Evans
Frank Scaduto
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevans@wiley.law
fscaduto@wiley.law

Dated: December 4, 2020

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

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

INFORMATION DESIGNATION

1. The AT&T employees and former employees with relevant information about these operational disputes 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 with relevant information.

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 December 4, 2020, I caused a copy of the foregoing Reply Legal Analysis and Reply 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 Reply Affidavits by hand delivery; public version of Reply Legal Analysis and Reply Affidavits by ECFS)

Charles A. Zdebski
Robert J. Gastner
Cody T. Murphey
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, NW, 12th Floor
Washington, DC 20006
(confidential and public versions of Reply Legal Analysis and Reply Affidavits by email)

Rosemary H. McEnery
Lisa B. Griffin
Lia B. Royle
Federal Communications Commission
Enforcement Bureau
Market Disputes Resolution Division
445 12th Street, SW
Washington, DC 20554
(confidential version of Reply Legal Analysis and Reply Affidavits by email; public version of Reply Legal Analysis and Reply Affidavits by ECFS)

Joseph Ianno, Jr.
Maria Jose Moncada
Charles Bennett
Florida Power and Light Company
700 Universe Boulevard
Juno Beach, FL 33408
(confidential and public versions of Reply Legal Analysis and Reply Affidavits by overnight delivery)

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(public version of Reply Legal Analysis and Reply Affidavits by overnight delivery)

Kimberly D. Bose, Secretary
Nathaniel J. Davis, Sr., Deputy Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426
(public version of Reply Legal Analysis and Reply Affidavits by overnight delivery)

Frank Scaduto

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 20-214 Bureau ID No. EB-20-MD-002

Reply Affidavits

A. Reply Affidavit of Mark Peters (December 3, 2020).

B. Reply Affidavit of Dianne W. Miller (December 3, 2020).

C. Reply Affidavit of Joe York (December 4, 2020).

D. Reply Affidavit of Jonathan Ellzey (December 3, 2020).

E. Reply Affidavit of Daniel P. Rhinehart (December 4, 2020).

Exhibit A

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 20-214 Bureau ID No. EB-20-MD-002

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 July 5, 2020 in support of AT&T's Pole Attachment Complaint against Florida Power and Light Company ("FPL").[1] I am executing this Reply Affidavit to correct certain statements made by FPL in its October 21, 2020 Answer and by Mr. Jarro and Mr. Allain in their Declarations. I know the following of my own personal knowledge and, if called

[1] Compl. Ex. B at ATT00014-27 (Aff. of M. Peters, July 5, 2020).

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. FPL 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 negotiations with FPL since they began in early 2018. I attended AT&T's December 7, 2018 and March 8, 2019 executive-level meetings with FPL and AT&T's May 1, 2019 and May 5, 2020 mediations with FPL and strongly dispute the allegations in FPL's Answer and Mr. Jarro's Declaration that my participation, and the participation of the other team members representing AT&T, was in bad faith, unfair, unreasonable, or somehow "deceitful."[2]

4. I approached each executive-level meeting and non-binding mediation in good faith and with the goal of engaging in a productive discussion that could resolve the parties' disputes. FPL took a much different approach. FPL was resolute in its position that it did not need to discuss federal law and was unwilling to compromise on any of its demands. FPL proclaimed throughout our discussions that its rates and operational demands were consistent with the JUA, so AT&T must comply. For example, at our March 8, 2019 executive level

[2] *See* Answer ¶¶ 3, 9; Answer Ex. B at ATT00003-7 (Jarro Decl. ¶¶ 7-33). The mediations were subject to confidentiality agreements, so I will not disclose any specific statements made during the mediations in this Affidavit.

meeting about the pole abandonments, FPL's representatives seemed pleased with the exceptional pace of AT&T's transfer work—but stated definitively that 5,230 poles were "abandoned" to AT&T about 2 weeks earlier (on February 20, 2019). We detailed the unreasonableness of FPL's position, but FPL's executives simply pointed to the JUA and acted as if there was nothing they could do to change the fact that the "abandonments" had already occurred. This was ridiculous. We were in a mandatory pre-complaint dispute resolution process to discuss a resolution of their unjust and unreasonable pole abandonment claim. FPL's stubborn refusal to discuss our reasonableness arguments or budge from their merits position convinced me that the whole exercise was a ruse to try to provide leverage in the parties' ongoing rate dispute and create a way to offset the required rental rate reductions.

5. FPL was similarly unyielding with respect to the rental rate and access disputes. FPL would not disclose or discuss the new telecom rate that FPL charges AT&T's competitors, refused to discuss federal law or the FCC's orders and regulations, and—until the Enforcement Bureau ordered FPL to negotiate in May 2020—did not make a single rental rate offer. And even that single rental rate offer was in name only,[3] as it would have resulted in [redacted] in rent payments from AT&T and explicitly rejected *any* compromise on the access or pole abandonment disputes.[4] This was consistent with our prior negotiations, where FPL tried to avoid any discussion of AT&T's challenges to FPL's unreasonable access and pole abandonment practices.[5]

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[3] Reply Ex. E at ATT00652-654 (Rhinehart Reply Aff. ¶ 17 & Ex. R-1).

[4] Reply Ex. B at ATT00612-613 (Miller Reply Aff., Ex. M-1).

[5] *See* Compl. Ex. 32 at ATT00522 (Email from M. Moncada, FPL to H. Gurland, Counsel for AT&T (Apr. 20, 2020)); Pleadings Compilation at ATT00843, *AT&T v. FPL*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (Sept. 25, 2019) (FPL's Opp. to Mot. to Dismiss or Stay

6. I was surprised to see that FPL alleged in its Answer that it made an "offer" to purchase AT&T's poles.[6] FPL *never* made an offer, formal or informal, to purchase AT&T's poles during the parties' negotiations. And the Enforcement Bureau already recognized in the parties' rate dispute that "FPL offer[ed] no evidence of any such offer or of what rate would apply."[7] FPL still has presented no such evidence; instead, it points to its September 16, 2019 Answer in the rate proceeding and claims that it was a "public[ ] offer" to purchase AT&T's poles. I find it noteworthy that, when FPL subsequently extended a settlement offer in response to the Enforcement Bureau's interim order, FPL did *not* offer to purchase AT&T's poles.[8]

7. FPL's suggestion that AT&T should have to sell FPL its poles is particularly inane based on the facts of this case. FPL is trying to eject AT&T from over 425,704 FPL poles even though AT&T paid in full FPL's rental invoices based on pole attachment rates the Enforcement Bureau has found unlawful. In light of those facts, why would AT&T sell its 213,210 poles to FPL and hence, position itself to be ejected from those poles, too? This is absurd, which the Enforcement Bureau has evidently already concluded by finding that AT&T does *not* need to sell its poles to FPL to warrant just and reasonable rates, terms and conditions.[9]

8. I also find incredulous FPL's claimed outrage that AT&T did not quickly and unilaterally determine and make a payment of some undisputed amount in response to FPL's rental invoices. I attended every face-to-face meeting with FPL's executives and they did not

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at 15, *FPL v. AT&T* (Aug. 20, 2019)) (arguing that mediation on the pole abandonment dispute "would be an exercise in Futility").

[6] *See* Answer ¶ 43.

[7] *FPL 2020 Order*, 35 FCC Rcd at 5327 (¶ 12).

[8] *See* Reply Ex. B at ATT00612-613 (Miller Decl., Ex. M-1).

[9] *FPL 2020 Order*, 35 FCC Rcd at 5327 (¶ 12) ("AT&T reasonably counters that it should not be required to sell its poles in order to receive a just and reasonable rate").

once ask for payment of an undisputed amount and steadfastly refused to provide AT&T the necessary data to allow AT&T to determine the amount that should be in dispute by calculating rates under the FCC's rate methodology. They also insisted that AT&T pay the invoices in full. There was no middle ground for FPL.

9. FPL knew all along that AT&T was challenging the reasonableness of its rates, as well as FPL's unreasonable response to AT&T's rate challenge using the JUA's default and pole abandonment provisions. FPL's feigned surprise that AT&T has now challenged the default and pole abandonment provisions, and FPL's implementation of them, is simply not credible. We exhaustively and repeatedly explained why FPL's unreasonable misuse of the JUA default and pole abandonment provisions was unlawful and unenforceable. FPL just did not want to engage on the federal law issues. FPL's rigid refusal to discuss federal law—and not any conduct on AT&T's part—made settlement impossible and required the filing of this second complaint.

B. FPL Misrepresents AT&T's Prior Position About the Difference Between Pole Abandonments and Pole Replacements.

10. As I explained in my opening Affidavit, industry practice and the parties' past practice limit pole abandonments to the relatively rare situation when a pole owner removes its facilities from a single pole (or pole line) because it no longer needs a pole in that location—the pole owner either will no longer serve customers from that pole or is going to serve customers by underground means instead. Pole replacements, in contrast, happen regularly when an existing pole is replaced, after which all companies with facilities attached to the pole (including the pole owner) transfer their facilities to the replacement pole, and then the pole owner removes and discards the replaced, and no longer needed, pole.

11. FPL claims that AT&T's position about the difference between pole abandonments and pole replacements is new. It is not. *First*, FPL argues that the parties have

not always handled pole abandonments on a pole-by-pole basis but points only to my statement that a pole owner may abandon a "pole line." FPL's argument is misleading. Prior to this dispute, the parties handled abandonments of a single pole or a single pole line on a pole-by-pole basis. A pole owner may abandon a pole line because it has decided to underground facilities on a particular street, and an attacher wants to continue serving customers from poles on that street. But a pole line *cannot* by definition include 11,142 (or even 5,230) poles dispersed throughout the State of Florida.

12. *Second*, FPL is flat wrong that "AT&T has abandoned poles in an almost identical fashion" to the approach FPL took here.[10] Mr. Allain confirms this is not true. He states that, "[f]or the past twenty years, AT&T has been abandoning its poles to FPL after converting its facilities, e.g. undergrounding or relocating."[11] This is the industry-standard scenario, where AT&T will no longer serve customers from facilities attached to a pole in that location, but FPL will, so the pole abandonment provision gives FPL the opportunity to own the pole. Mr. Allain says that FPL sometimes decides to replace the poles abandoned by AT&T with a stronger pole.[12] It certainly is FPL's prerogative to replace an asset it decided to purchase at its "then value in place."[13] But that does not change the fact that AT&T still is not using a pole in the location of the abandoned pole to serve customers. FPL's post-purchase decision to replace its own pole cannot convert an industry-standard pole abandonment into an "abandonment" of worthless, already replaced assets that must be removed and disposed of, as FPL is attempting here.

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[10] FPL Br. at 86.

[11] Answer Ex. B at FPL00139 (Allain Decl. ¶ 17).

[12] *Id.*

[13] *See* Compl. Ex. 1 at ATT00041 (JUA, § 9.1).

13. *Third*, AT&T did not, as FPL contends, take a different position at a 2006 workshop at the Florida Public Service Commission ("Florida PSC").[14] Both the presentation FPL cites and the transcript from the workshop refute FPL's characterization.[15] In the presentation, AT&T explains that a pole abandonment may occur if an electric company "abandons rear lot construction" to serve customers from a different location and AT&T "elects to remain on [the] existing pole line."[16] AT&T's witness explained:

> The first choice we would assess if the electric company abandoned a rear lot construction and replaced facilities with new streetside aerial facilities, we may elect from an economic standpoint to remain on the existing pole line. At that point, there are provisions within our joint use agreements with the various electric companies that we would assume at a cost the ownership of that old pole. Quite frankly, this does not happen very often, as we have never been in the market for used poles.[17]

This is an industry-standard pole abandonment scenario, where the pole owner no longer requires use of a given pole, but the attacher still needs to use the pole. It is not the situation here, where FPL seeks to abandon to AT&T replaced poles that neither the pole owner nor the attachers need and may not use because the pole must be removed.

C. FPL Is Wrong About the Pace of AT&T's Work Transferring Facilities to FPL's Replacement Poles.

14. FPL ignores the data I provided in my opening Affidavit, which shows the extraordinary volume of transfer work AT&T has completed at FPL's request and the exceptional pace at which AT&T has completed the work, especially as compared to the length of time FPL has required to transfer its facilities to AT&T's poles. That FPL failed to challenge

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[14] *See* FPL Br. at 86 & n.343.

[15] *See* Ex. P-1 at ATT00585-589 (Staff Workshop presentation); Ex. P-2 at ATT00591-599 (Transcript Excerpt).

[16] Ex. P-1 at ATT00587 (Staff Workshop presentation).

[17] Ex. P-2 at ATT00594 (Transcript Excerpt at 10:14-22).

the data, which it has equal access to through the National Joint Utilities Notification System (NJUNS), speaks volumes. FPL's conclusory allegations that AT&T failed to make timely transfers are simply false.

15. *First*, FPL incorrectly tries to reduce the quantity of pole transfers it required within 60 days, arguing that "the true number is 5,230."[18] But FPL included 11,142 poles in its December 2018 Notice of Abandonment, and thereby set a hard-and-fast 60-day deadline on the associated transfer work on all of those poles. The fact that AT&T reduced the list to 5,230 poles by the 60-day deadline is a credit to AT&T, but it does not decrease the enormity or absurdity of FPL's December 2018 demand.

16. *Second*, FPL myopically focuses only on a set of 11,142 poles as if FPL had not been flooding AT&T with extraordinary transfer requests for years. The data I included in my opening Affidavit shows that, from 2008 to 2019, AT&T completed more than 97,000 NJUNS work tickets that required AT&T to transfer its facilities to an FPL replacement pole, an exceptional number that far exceeded the transfer work any other Florida electric utility required of AT&T.[19] That data also refutes Mr. Allain's false claim that AT&T "exhibited a pattern of neglect with respect to transfers" for "at least a decade" before FPL sent its December 2018 Notice of Abandonment. Looking just at 2008 to 2018, AT&T completed over 77,000 of the relevant NJUNS tickets. And in 2018—the year FPL sent its Notice of Abandonment—AT&T completed 16,230 tickets, reflecting an unmatched average of about 1,350 transfers per month. In contrast, in 2018, FPL completed 3,503 tickets requiring a transfer of its facilities to an AT&T replacement pole, reflecting an average of about 292 transfers per month.

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[18] *See, e.g.*, Answer ¶ 33 n.28.

[19] Compl. Ex. B at ATT00020-21 (Peters Aff. ¶ 16).

17. AT&T's competitors did not keep pace with AT&T's rate of transfer. The following table shows the volume of NJUNS tickets completed from 2015 to 2019 for a transfer of facilities to an FPL replacement pole for AT&T compared to the three communications competitors that completed the next highest number of transfers to FPL replacement poles:

NJUNS Tickets Created by FPL & Transfer Completed
Job Type: TRANSFER, ATTACH & REMOVE ATTACHMENT

	Years						
Company	2015	2016	2017	2018	2019	2020	Total
AT&T Florida	9,004	11,877	10,979	16,230	19,690	20,819	88,599
[redacted]	5,616	7,232	10,866	13,679	14,005	20,776	72,174
	2,243	2,098	2,201	2,622	3,041	3,329	15,534
	339	370	1,823	1,556	1,611	2,653	8,352

18. *Third*, FPL misleads when it claims that, "on average, AT&T had 1.28 years to transfer the relevant attachments not 60 days."[20] This statement is meaningless without comparative data, which shows that AT&T has completed its transfer work faster than FPL and its competitors. The data included in my opening Affidavit shows that AT&T required far less time to transfer its facilities to FPL replacement poles than FPL required to transfer its facilities to AT&T replacement poles—as FPL needed *more than 2 years* to complete over half of the far fewer NJUNS tickets AT&T created.[21]

19. As to AT&T's competitors, between 2015 and 2019, NJUNS data shows that AT&T averaged 416 days (1.14 years) between the date it was notified that it was next-to-go on an NJUNS ticket that required AT&T to transfer its facilities to an FPL replacement pole compared to [redacted]'s average of 861 days (2.36 years) and [redacted]'s average of 1,015 days (2.78 years).

[20] *See, e.g.*, Answer ¶ 39.

[21] Compl. Ex. B at ATT00023 (Peters Aff. ¶ 20).

AT&T's quicker transfer pace is further evidenced in the data at a more granular level. The following table compares the time required for AT&T to transfer facilities to an FPL replacement pole as compared to [redacted].[22]

NJUNS Tickets Completed 2015-2020		
Time from Next-to-Go Start Date to Completion Date	**AT&T Florida**	[redacted]
0 - 90 Days	16,918	3,754
91 - 180 Days	9,570	4,394
181 - 240 Days	4,820	3,602
241 - 365 Days	7,363	6,756
> 1 Year - 2 Years	10,597	14,371
> 2 Years	7,258	25,882
Grand Total	**56,526**	**58,759**

In other words, within 90 days AT&T completed 30 percent of its transfer requests versus [redacted]'s 6 percent, and within 1 year AT&T completed 68 percent of its requests whereas [redacted] completed 34 percent of its requests.

20. This is not to say that [redacted] has been slow in completing its transfers. It has also been inundated with transfer requests from FPL and is working through them at a timely pace. The point of the comparison is that FPL has no reasonable basis to contend that AT&T has been unreasonably slow in completing the transfers required to accommodate FPL's extraordinary storm hardening program. AT&T has instead devoted significant resources to the effort, as the data confirms.

[22] This analysis does not include transfer tickets that AT&T and [redacted] completed from 2015 to 2019 where there was no next-to-go date recorded in NJUNS, making it impossible to determine how long AT&T or [redacted] took to complete the ticket.

21. *Fourth*, Mr. Allain is wrong when he says that I admitted AT&T was next-to-go on 5,092 poles, or 97% of the poles, when FPL served its Notice of Abandonment in December 2018.[23] I said nothing of the sort. My testimony was that FPL's December 2018 Notice of Abandonment was so rife with error that there was no possibility that AT&T could complete the work within the 60 days it demanded because many poles still had other companies attached, and AT&T cannot complete its transfer until all other companies have completed their transfers. In the paragraph Mr. Allain cites, I explained that—as of the end of June 2020—AT&T *still* could not complete its transfer for 138 poles on FPL's list because AT&T was still not next to go.[24] In other words, by the end of June 2020, 97% of the poles FPL claimed to have abandoned in February 2019 were finally ready for AT&T's work (5,092 of 5,230 poles).[25] But 97% of the poles were definitely *not* ready for AT&T to complete its work in December 2018 when FPL served the Notice of Abandonment or in February 2019 when FPL claimed the poles were abandoned. AT&T did not become next to go on many of the poles until May or June 2020.[26] And, as of the end of November 2020—almost 2 years *after* FPL served its Notice of Abandonment—AT&T is still *not* next-to-go on 103 of the relevant poles.

22. *Fifth*, I disagree with FPL's conclusory claim that it "furnishes AT&T information regarding FPL's hardening plans each year in advance of doing the work, which provides AT&T an opportunity to prepare."[27] At most, FPL identifies a general geographic area where it expects to focus its hardening efforts. The information is not provided with the level of

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[23] Answer Ex. B at FPL00138 (Allain Decl. ¶ 13).

[24] Compl. Ex. B at ATT00026 (Peters Aff. ¶ 27).

[25] *Id.*

[26] *Id.*

[27] Answer ¶ 29.

granularity that would allow AT&T to know what resources will be required or even how many poles will be impacted. Indeed, until FPL begins its work in a particular area, even it does not know whether it will replace its poles, harden the poles, or take no action at all. As a result, AT&T does not learn of the specific work required until it receives the NJUNS ticket from FPL. And, as the data above shows, AT&T then works promptly and diligently to complete the work FPL has required. There is simply no reasonable basis for FPL's complaints about the pace of AT&T's transfer work.

D. FPL Makes Other Incorrect Operational Claims.

23. I vehemently disagree with FPL's criticism of AT&T's pole maintenance and replacement practices. They are unfounded and at odds with everything I have experienced in my more than 21 years with AT&T-affiliated entities. I understand that Mr. Ellzey will address the allegations with more specificity, however, so I will address three other incorrect operational allegations in FPL's Answer.

24. *First*, Mr. Allain grossly overstates things when he claims that "AT&T has been enjoying and continues to enjoy privileges laid out in the [JUA] that other attachers do not."[28] Mr. Allain, for example, lists a series of alleged "privileges" that do not and cannot apply because FPL terminated the JUA as far as concerns the future granting of joint use under Article XVI, effective September 26, 2019.[29] This means that AT&T *cannot* attach to new pole lines because the JUA is terminated and now in evergreen status. AT&T, therefore, *cannot* "enjoy

[28] Answer Ex. B at FPL00143 (Allain Decl. ¶ 24).

[29] *See* Compl. Ex. 23 at ATT00466 (Letter from M. Jarro, FPL to AT&T (Mar. 25, 2019); *see also* Compl. Ex. 1 at ATT00128 (JUA, Art. XVI). Importantly, FPL's termination of the JUA under Article XVI is fundamentally different from FPL's disputed "termination" of AT&T's right to use FPL's poles under Article XII, the JUA's default provision.

privileges" that only merely reflect a difference in how attachers incur costs when they deploy their facilities, such as the "privileges" Mr. Allain alleges.

25. *Second*, FPL is wrong when it alleges that "by its own choice, AT&T has intentionally decreased its relative percentage of pole ownership between the parties."[30] FPL's sole support for this claim is a report stating that FPL replaced about 2,300 damaged AT&T poles following a 2004 hurricane[31] and, curiously, an FPL pleading stating that "AT&T's [pole] ownership ratio has slowly declined … primarily due to FPL's FPSC-ordered storm hardening initiatives."[32] By definition, FPL's storm hardening program was *not* AT&T's choice. And FPL's replacement of AT&T poles following an emergency cannot reduce AT&T's pole ownership numbers. Rather, under the JUA, FPL invoices AT&T for its "reasonable costs and expenses," and AT&T continues to own the replacement pole.[33] The document FPL relies upon confirms this as well, stating that "[m]any joint-use agreements allow joint users, such as power companies, to replace BellSouth's poles in emergency situations in order to protect the public and enable quicker service restoration. Pursuant to the joint use agreements, the joint user should notify BellSouth and render appropriate billing for the replacement so that ownership of the new pole can be assumed by BellSouth."[34]

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[30] Answer ¶¶ 11, 19.

[31] Answer ¶ 19 & n.18 (citing Fla. Pub. Serv. Comm, Div of Competitive Markets and Enf't, *Review of Pole Inspection and Maintenance Practices of BellSouth, Sprint, and Verizon* at 21 (March 2006) ("2006 Report")). Relevant excerpts of the 2006 Report are attached as Ex. P-3.

[32] Answer ¶ 19 & n.18 (citing Answer Ex. A at FPL00004 (Kennedy Decl. ¶ 8), *AT&T v. FPL*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (Sept. 16, 2019)).

[33] Compl. Ex. 1 at ATT00039 (JUA, § 4.7).

[34] Ex. P-3 at ATT00603 (2006 Report Excerpt at 22).

26. *Third*, FPL is incorrect when it suggests that AT&T does not replace its damaged poles, but "relie[s] on FPL to replace its damaged poles rather than do so itself."[35] AT&T routinely replaces its damaged poles, as confirmed by the 14-year-old 2006 document FPL cites.[36] FPL often 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, FPL reaches the emergency location first and replaces the pole, and then will invoice AT&T for its costs. But FPL's suggestion that AT&T *requires* FPL to replace its poles is wrong.

Mark Peters

Sworn to before me on
this 3rd day of December, 2020

Notary Public

STATE OF Texas
COUNTY OF Tarrant

The foregoing instrument was acknowledged before me this 3rd day of Dec., 2020, by Tyler Mulkey

Notary Public's Signature Tyler Mulkey Notary Name
My Commission Expires 11-09-2024

TYLER LANE MULKEY
Notary Public, State of Texas
Comm. Expires 11-09-2024
Notary ID 132771936

[35] *See* Answer ¶ 19 n.18.

[36] *See* Ex. P-3 (2006 Report Excerpt at 21).

Exhibit P-1

Florida Public Service Commission

Staff Workshop on Electric Rules

Assumptions

- Each Electric Company will ultimately develop its own construction standards that meet or exceed 2002 NESC guidelines.
- Each Electric Company will develop construction standards that will incorporate (if applicable) extreme wind load conditions for:
  1. New builds construction
  2. Major planned work
  3. Targeted critical infrastructure and major thoroughfares
- Each Electric Company will develop construction standards that will deter damage resulting from flooding and storm surge
- Each Electric Company shall seek input from other entities regarding the development of these standards

Cost of Conversion
Scenario 1 – Aerial to Aerial

- Electric Company abandons rear lot construction and replaces facilities with new, street side aerial facilities. BellSouth elects to remain on existing pole line.
  - Abandoned poles – Estimated Cost of $250-$300/pole
  - Acquisition of new easements
  - Pole inspections increase - Estimated Cost of $25-$30/pole
  - Administration of records change

- Electric Company abandons rear lot construction and replaces facilities with new, street side aerial facilities. BellSouth elects to replace rear lot facility and replace on new street side route.
  - BellSouth projected cost of replacement - Estimated Cost of $25-$40/foot

Cost of Conversion
Scenario 2 – Aerial to Buried

- Electric Company abandons rear lot construction and replaces facilities with new, street side buried/underground facilities. BellSouth elects to remain on existing pole line.
  - Abandoned poles - Estimated Cost of $250-$300/pole
  - Acquiring new easements
  - Pole inspections increase - Estimated Cost of $25-$30/pole
  - Administration of records change

- Electric Company abandons rear lot construction and replaces facilities with new, street side buried/underground facilities. BellSouth elects to replace rear lot facility and replace with buried/underground on new street side route.
  - BellSouth projected cost of conversion - Estimated Cost of $25-$50/foot

Additional Cost Consideration
Any Scenario

- Training on standards
- Facility damages
  - 75% of buried damages occur in street side ROW or utility easements
- Damage prevention
- Renegotiations of Joint Use, CATV and CLEC agreements
- Updates or changes to standards
- Additional manpower requirements
- Use of non-wood poles
- Increase in pole rental fees
- Replacing good facilities
- Pole Inspection process
- Recovery of cost
  - BellSouth would not be a 'cost causer'

Exhibit P-2

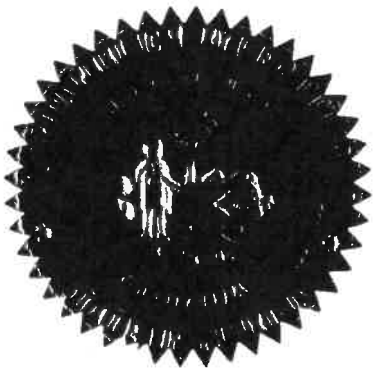
BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 060173-EU

PROPOSED AMENDMENTS TO RULES REGARDING OVERHEAD ELECTRIC FACILITIES TO ALLOW MORE STRINGENT CONSTRUCTION STANDARDS THAN REQUIRED BY NATIONAL ELECTRIC SAFETY CODE.

_____/



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PROCEEDINGS:	STAFF RULE DEVELOPMENT WORKSHOP
DATE:	Thursday, July 13, 2006
TIME:	Commenced at 9:30 a.m. Concluded at 12:49 p.m.
PLACE:	Betty Easley Conference Center Room 148 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	JANE FAUROT, RPR Chief, Hearing Reporter Services Section (850) 413-6732

PRESENTATIONS BY:

environment with providers, including some subsidiaries of the electric companies, who offer the same services utilizing different technologies and will not incur these costs. Consequently, we will be competitively and economically disadvantaged by these changes.

Thank you.

At this time I would like to introduce BellSouth's expert, Kirk Smith.

MR. SMITH: Again, as Dorian said, we appreciate the opportunity to try to address these issues in this forum. The approach that we have taken after we reviewed the rules were to make some general assumptions on what the impact of these proposes rules would mean to us. Very quickly, on the second page of our presentation, these are our assumptions. That each electric company will ultimately develop its own construction standards that meet or exceed the 2002 NESC guidelines. That each electric company will develop construction standards that will incorporate, if applicable, extreme wind load conditions for new build construction, major planned work, targeted critical infrastructure, and major thoroughfares. In addition, each electric company will develop construction standards that will deter damage resulting from flooding and storm surge and that each electric company shall seek from other entities regarding the development of these standards.

Now, this is the framework. Of course, we understand

that the rulemaking was much more extensive than that, but as it applies to our issues, our concerns, those are the assumptions we made as we prepared the feedback for you today.

When we looked at the agenda that was sent for today's workshop, what we attempted to do was try to address each one of the questions specifically. As we saw and analyzed and assessed the impact to BellSouth, we saw two likely scenarios developing, so we will address those scenarios rather than a line item response, if you will, to the agenda.

On the third page of our presentation, the first scenario that we saw that would develop would be a potential of an aerial-to-aerial conversion on the part of the electric company. We would have two choices to make should we see that type of conversion. The first choice we would assess if the electric company abandoned a rear lot construction and replaced facilities with new streetside aerial facilities, we may elect from an economic standpoint to remain on the existing pole line. At that point, there are provisions within our joint use agreements with the various electric companies that we would assume at a cost the ownership of that old pole. Quite frankly, this does not happen very often, as we have never been in the market for used poles. But if you look at potentially what some of the cost differentials would be, you would have to see why we would have to assess that as a possibility.

The cost for us to assume the ownership of a

previously owned electric company pole may run us between 250 to $300 per pole. Accompanying that particular issue is the premise of the acquisition of the easement for the electric company to have been there in the first place. It would not be a safe assumption on our part that that particular easement could be assigned to us as the new owner of that pole. It could be that we would be in the position of having to work to secure an easement for the poles that we would now own. But that is such a variable and such an unknown we couldn't even come up with a reasonable cost estimate to try to put on the table with you today.

As we assume the ownership of these older poles, of course our pole inspection costs would be increasing. This would be an incremental lift to the number of poles that we will own in our forecast of the pole inspection cost. We forecasted our going forward rate of the number of poles that we would add to our inventory versus the number of poles that we would remove by virtue of the fact that the standards that the electrics may come up with are, at this time, very, very vague and unknown to us. We would be unable to quantify what this additional lift to our pole inspection costs would be. If we assume that we could accomplish this for 25 or $30 on a pole, then the delta would be 25 to $30 on a pole times some number. We don't know what that number would be.

When we assume ownership of those poles, then we put

into motion an administrative effort or process, if you will, in terms of BellSouth to actually transfer the ownership of those poles to us and to incorporate those poles into our land base. It is not unlike the effort that is associated with a BellSouth engineer going out and performing a job for a new facility altogether. That effort is there, as well.

The other option that we saw that would exist on an aerial-to-aerial conversion is if we opt not to avail ourselves of the opportunity to purchase the old poles and stay in place, and that would be if we decided to follow the new electric company route to the front property line. At that point in time, we estimate that our cost of providing that new facility is going to be anywhere between 25 to $40 per foot.

And let me speak just very, very briefly on the methodology we use to look at this and to make that estimate. That is a fairly wide range, as you can see, very dependent on the type of facility that we would be using. Are we moving or having to move possibly a remote terminal, some of our electronics, or would it be a simple matter of just relocating a small facility in a residential area. We simply do not know until we get a better idea of what these electric company standards would be.

In looking at trying to come up with this estimate and give you this range, we looked at probably no less than about 20 different work authorizations that we have completed

within BellSouth within the last year that are doing this same type of work to try to be able to come to you with some type of validity, if you will, on some of these costs that we are passing along to you here today, and that is how we established these numbers that we are looking at here.

If you look at, on the second page, the other scenario we saw developing was a removal of an electric company facility from a rear property line to a new buried facility on the street side, okay. Be it right-of-way, be it applicant-provided easement, that was the general work content that we saw. At that point in time, BellSouth would have the same assessment that we would make. If we have a reliable facility, we may opt to assume ownership of the poles that are being abandoned. So as you see here, one of our first options in that scenario was exactly like we would have on the aerial-to-aerial conversion.

However, if we opt to abandon that route and follow the new electric company route on the street side, and remove our aerial facilities and bury our facilities, again, the cost of what we saw in some of our most recently completed work authorization could go up as much as $10 a foot. Those are not insignificant costs. I wish we could do something a little bit better to give you an overall impact to BellSouth of what these would be. These are -- a commonly used term, they are activity-based costs, okay. We just clearly, again, do not

have a clue at this point as to what the order of magnitude may be until we know what those standards are.

On our next page, these are costs that are probably not as clearly defined as some of our incremental costs for assuming an ownership of poles for looking at a range of installation on aerial or buried cable, but they are very, very real costs that will impact us significantly.

Training on standards. We have thousands of employees across Florida. What these standards are, we have joint use agreements with 40-plus electric companies. The potential is there that we may be dealing with 40 different sets of standards. And, again, not knowing what those standards are, by the simple fact that we are going to have to communicate to our thousands of employees, our engineers, our technicians, our management people what these various standards are going to be will absorb an internal cost simply for trying to communicate and train our people.

It is not unreasonable to think as we place a facility, be it an aerial facility or a buried facility, primarily an aerial environment, we could be moving from one electric company's serving area into another. That happens regularly. At that point in time, with the technicians that we have got that are placing an aerial facility, they could be dealing from the standpoint that poles one through five may be one set of standards and poles six through ten may be

STATE OF FLORIDA)

: CERTIFICATE OF REPORTER

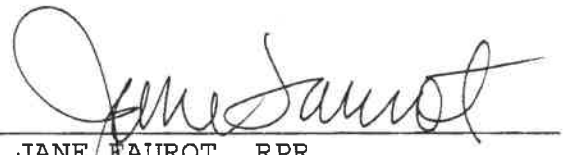
COUNTY OF LEON)

I, JANE FAUROT, RPR, Chief, Hearing Reporter Services Section, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

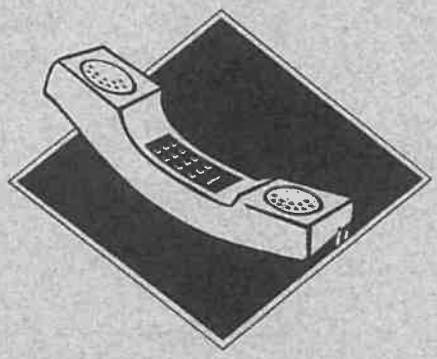
DATED THIS 17th day of July, 2006.



JANE FAUROT, RPR
Official FPSC Hearings Reporter
FPSC Division of Commission Clerk and Administrative Services
(850) 413-6732

Exhibit P-3

PUBLIC VERSION



Review of

Pole Inspection and Maintenance Practices of BellSouth, Sprint, and Verizon

March 2006

By Authority of
The State of Florida for
The Public Service Commission
Division of Competitive Markets and Enforcement
Bureau of Performance Analysis

ATT00601

Continuing Property Records (CPR) system. The CPR system serves as a perpetual inventory of property owned by BellSouth and it maintains information on capital expenditures for these property units. The objectives of the CPR system are:

- To provide for the verification of property record units by physical examination.
- To provide for accurate accounting for retirements.
- To provide data for use in connection with depreciation studies.

BellSouth employs a computerized system to maintain its property records, but it is not used to proactively monitor the condition of its poles. As previously mentioned, the company is developing an interface that would mechanize the reporting process of its Irregular Plant Condition forms to enhance its ability to identify and remedy defective poles. All pole replacements, and some maintenance activities, are currently captured in BellSouth's CPR system.

3.2.2 Inspection Results

Exhibit 1, extracted from BellSouth's CPR system, depicts the number of BellSouth-owned poles treated, braced, and replaced by BellSouth for each year during 2002 through 2005. For the year 2004, approximately 53 percent of the total poles replaced resulted from hurricane damage. In 2005, approximately 80 percent of the total poles replaced resulted from hurricanes.

BellSouth Telecommunications Florida Poles Treated, Braced, and Replaced 2002-2005

Year	Treated	Braced	Replaced	Total
2002	0	0	1853	1853
2003	330	115	1750	2195
2004	56	37	2081[2]	2174
2005	30	66	2276[3]	2372

EXHIBIT 1 *Source: DR 2.1*

In addition to the poles replaced by BellSouth due to hurricane damage, the company reports to have had approximately 2,300 BellSouth poles replaced by Florida Power & Light during 2004 recovery efforts. Although 2005 figures are still being compiled, BellSouth estimates that at least the same number (2,300) of BellSouth's poles were replaced by Florida Power & Light during 2005 recovery efforts.

3.2.3 Audits

With the exception of contracted inspection activities performed by Osmose, BellSouth does not have a specific pole inspection program to audit. However, at a

[2]BellSouth replaced 1,151 poles in 2004 due to hurricanes.
[3]BellSouth replaced 1,887 poles in 2005 due to hurricanes.

minimum, staff believes that a root cause analysis of pole failures could identify the cause of failure. Additionally, specific outage data pertaining to pole failures could be captured, which would provide some indication of the effectiveness of company maintenance efforts. The root cause analysis would help BellSouth in establishing appropriate controls to limit exposure to the company.

3.3 Joint-Use and License Agreements

The facilities of multiple companies may be attached to a single BellSouth-owned pole. The following is a breakdown of the types of companies whose equipment is attached to BellSouth poles and the total number of BellSouth-owned poles to which each are attached.

- Power Companies - [redacted]
- Cable Television - [redacted]
- Competitive Local Exchange Carriers - [redacted]

BellSouth occupies and leases space from electric utilities on 738,737 poles. BellSouth does not track information regarding pole inspection activities performed by the owners of the poles that BellSouth leases.

BellSouth has established joint-use and license agreements with other utilities within its service territory. BellSouth has agreements in place with 62 companies and government agencies that allow these companies to attach equipment to BellSouth-owned poles. Similarly, BellSouth has joint-use agreements in place with 38 companies and government agencies that allow BellSouth to attach equipment to other utility-owned poles.

Under the terms of these agreements, the companies that attach to BellSouth-owned poles are required to notify the company whenever a pole is relocated or a new pole is erected within the territory covered by the agreement. As a general policy and practice, joint users do not perform maintenance on BellSouth-owned poles. If a joint user identifies a BellSouth pole in need of repair or replacement, the joint-user should notify BellSouth. BellSouth, in turn, creates a work order for pole repair or replacement.

Many joint-use agreements allow joint users, such as power companies, to replace BellSouth's poles in emergency situations in order to protect the public and enable quicker service restoration. Pursuant to the joint use agreements, the joint user should notify BellSouth and render appropriate billing for the replacement so that ownership of the new pole can be assumed by BellSouth. Similarly, as a general policy and practice, BellSouth does not perform maintenance on poles owned by others. However, during emergency situations, a pole owned by another company may be replaced by BellSouth and, upon payment of the replacement costs, the other company will assume ownership of the new pole.

Exhibit B

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 20-214 Bureau ID No. EB-20-MD-002

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

STATE OF SOUTH CAROLINA)
) ss.
COUNTY OF BEAUFORT)

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 July 3, 2020 in support of AT&T's Pole Attachment Complaint against Florida Power and Light Company ("FPL").[1] I am executing this Reply Affidavit to respond to certain statements about the parties' negotiations in FPL's October

[1] Compl. Ex. A at ATT00001-12 (Aff. of D. Miller, July 3, 2020).

21, 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 FPL made in its Answer about our negotiations. As an initial matter, I disagree completely with FPL's allegation that AT&T negotiated with FPL in bad faith or failed to explain our arguments.[2] I assumed responsibility for AT&T's negotiations with FPL in November 2018 when I became Director – Construction & Engineering with responsibility for the National Joint Utility Team. I approached, and at all times conducted, the negotiations with FPL in good faith and I know that the rest of the AT&T negotiating team did as well. AT&T also repeatedly explained to FPL our request for just and reasonable rates, terms, and conditions in person and throughout the parties' voluminous email correspondence regarding the rate dispute, FPL's default allegations, and FPL's attempt to abandon its worthless replaced poles.

3. FPL claims that our communications and meetings only covered "certain" of the matters in dispute.[3] This is not true. AT&T sought to discuss and settle each of the parties' disputes through each step of the JUA's mandatory pre-complaint negotiation process and additional discussions. What is true is that FPL refused to discuss "certain" of the matters in dispute when AT&T asked. For example, AT&T provided FPL with a global settlement offer in December 2019 that would have resolved the rate, access, and pole abandonment disputes. FPL

[2] The parties' May 1, 2019 and May 5, 2020 mediations were subject to confidentiality agreements, so I will not disclose any specific statements made during the mediations in this Affidavit.

[3] *See* Answer ¶ 6.

ignored the offer until the Enforcement Bureau directed the parties to negotiate in its May 20, 2020 interim order, and then FPL responded with a refusal to discuss the access and pole abandonment disputes.[4] FPL thus made settlement impossible and forced AT&T to file a second pole attachment complaint.

4. FPL is also just plain wrong when it claims that AT&T somehow created the claims in its complaint based on a footnote in the May 20, 2020 interim order that acknowledged AT&T's right to just and reasonable pole attachment terms and conditions.[5] By the time that order issued, we had been trying to resolve FPL's unreasonable reliance on the JUA's default and pole abandonment provisions for over a year. Throughout our negotiations, I emphasized the unreasonableness of FPL's attempt to use the default provision to gain leverage in a rate dispute, and I know our counsel did too.[6] We also emphasized the unreasonableness of FPL's pole abandonment scheme. Indeed, the reason AT&T initiated the JUA's mandatory dispute resolution process in early 2019 was because FPL's application of the pole abandonment provision was so unreasonable.

5. FPL gets a lot wrong about the parties' rate negotiations. For example, FPL suggests that AT&T, without warning or explanation, simply stopped paying FPL's disputed invoices. This is not true. FPL issued the 2017 rental invoice on March 5, 2018, and FPL admits that AT&T and FPL discussed the invoice "shortly thereafter" in April 2018.[7] By August 2018, the disputed 2017 invoice and FPL's allegation of default based on its nonpayment were the

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[4] *See* Ex. M-1 (Letter from M. Jarro, FPL, to D. Miller, AT&T (June 8, 2020)); *see also* Compl. Ex. 33 at ATT00526-527 (Joint Status Report).

[5] *See* FPL Br. at 17.

[6] *See* Compl. Ex. 32 at ATT00522 (Email from H. Gurland, Counsel for AT&T, to M. Moncada, FPL (Apr. 20, 2020)).

[7] FPL Br. at 6.

subject of the JUA's mandatory pre-complaint dispute resolution process. The disputed 2017 invoice—and later the disputed 2018 invoice—continued to be the subject of active discussions until AT&T paid them in full on July 1, 2019.

6. Mr. Jarro claims that AT&T should instead have immediately and unilaterally paid an undisputed amount. But the invoices were the subject of active discussions in which we were trying to determine the lawful amount that should be paid. That is the whole reason for a mandatory dispute resolution process where there is a billing dispute.

7. In addition, FPL never asked for payment of any undisputed amounts and instead made crystal clear that it would not accept anything but payment in full. At our meetings, FPL's representatives refused to discuss federal law—let alone payment of a rental amount based on federal law. FPL also ignored the global settlement offer AT&T made in December 2019 in which AT&T offered to pay an undisputed amount for 2019 rent, subject to true-up. Rather than accept or discuss AT&T's offer of an undisputed payment, FPL simply chose not to invoice AT&T at all. Given FPL's conduct, it is clear that FPL would not have been satisfied with any payment other than the near $20 million FPL invoiced for 2017 and 2018 rent.

8. Of course, AT&T did ultimately pay the full invoiced amounts at the close of the JUA's pre-complaint dispute resolution process and before filing its pole attachment rate complaint. AT&T was reluctant to pay the disputed invoices even then because it seemed clear that FPL would resist any effort by AT&T to obtain refunds of its overpayments. AT&T's conclusion was well-founded. The Enforcement Bureau found FPL's rates unlawful in May 2020—yet FPL continues to hold [redacted] of millions of dollars of pole attachment rent that it collected from AT&T in violation of federal law.

9. There are also a few things I must clarify about the rent FPL has charged AT&T. Mr. Jarro claims that AT&T "enjoyed … full compensation for FPL's attachments to AT&T's poles" during the parties' negotiations.[8] But, to be clear, FPL never paid AT&T anything. Because FPL owns most of the poles the parties' share, FPL has the responsibility under the JUA to properly invoice *net* pole attachment rent, meaning AT&T's rent for use of FPL's poles less FPL's rent for use of AT&T's poles. As a result, this is not a situation in which FPL paid an invoice and AT&T did not. FPL never received a rental invoice from AT&T, and so it could never be subject to the same operational threats it made using the JUA's default provision.

10. FPL is also wrong when it says that "AT&T receive[d] a full credit for each and every FPL attachment *at the same rate* AT&T pays for its attachments to FPL poles."[9] FPL's invoices show this is not true. FPL has been charging AT&T unlawfully high pole attachment rates under the JUA that have increased each year—and has charged AT&T rates for use of concrete distribution poles and transmission poles that have far exceeded the rates that apply to FPL's use of AT&T's poles. For the 2018 rental year, for example, FPL charged AT&T [redacted] per wood distribution pole, [redacted] per concrete distribution pole, and [redacted] per transmission pole—when FPL's rate for use of AT&T's poles was [redacted] per pole.[10]

[8] *See* Answer Ex. A at FPL00003 (Jarro Decl. ¶ 9).

[9] *See* Answer ¶ 11 (emphasis added).

[10] *See* Compl. Ex. 2 at ATT00066-67 (2018 Invoice). FPL calculates AT&T's rent for use of FPL's poles by assigning a per-pole base rate to all jointly used FPL poles (referred to as "wd pls" on the invoice, even though all types of poles are included) and adding a per-pole premium to two subsets of jointly used FPL poles: (1) concrete distribution poles (referred to as "spc pls" on the invoice) and (2) transmission poles (referred to as "Trans pls" on the invoice).

11. Finally, I found it absurd that Mr. Jarro claims that, in early 2019, "FPL patiently continued to wait for some type of payment from AT&T."[11] That FPL claims to have been simply waiting for a payment at that time is telling because FPL was instead supposed to be actively working with AT&T to determine the lawful amount due through the JUA's mandatory pre-complaint dispute resolution process. But more importantly, FPL did not patiently wait. It ratcheted up the pressure on AT&T at every turn. Its unreasonable use of the default and pole abandonment provisions to increase its leverage and bully AT&T into dropping its justified rate challenge is unprecedented in my experience and utterly incompatible with the reasonableness that joint use requires.

Dianne W. Miller

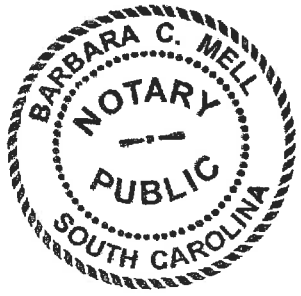
Dianne W. Miller

Sworn to before me on
this 3rd day of December, 2020

Barbara C. Mell

Notary Public

My Commission Expires
June 15, 2027



[11] Answer Ex. A at FPL00006 (Jarro Decl. ¶ 28).

Exhibit M-1

PUBLIC VERSION

700 Universe Boulevard, Juno Beach, FL 33408

FPL

June 8, 2020

Re: Florida Power & Light Company Offer To Resolve BellSouth Communications d/b/a AT&T Florida's Pole Attachment Complaint

Dear Ms. Miller:

Florida Power & Light Company ("FPL") has reviewed the FCC's May 20, 2020 Order on BellSouth Communications d/b/a AT&T Florida's ("AT&T") pole attachment complaint. In short, the FCC determined that "the Old Telecom Rate provides a reference point for a 'just and reasonable rate' for the period ending with the 2018 pole rental year." As you know, the FCC did not address all of the issues before it, choosing instead to direct the parties to confer and attempt to reach a resolution on the rate issue.

Consistent with the FCC's order, FPL offers to resolve AT&T's pole attachment complaint by [redacted] to AT&T's 2017 and 2018 attachments. Using 2017 and 2018 cost information based on FPL's publicly filed FERC data for those years, and using the inputs set forth below, we calculate the rate for AT&T's attachments to FPL's distribution poles to be [redacted] for 2017 and [redacted] for 2018. Additionally, although not addressed in the FCC's order, for purposes of resolution we provide the rates for AT&T's attachments to FPL's transmission structures (transmission attachments comprise about 1% of all attachments). [redacted] to transmission poles using the inputs set forth below results in rates of [redacted] for 2017 and [redacted] for 2018.

[redacted]

T00612

[redacted]

Similar to what we've provided above, we would ask that AT&T provide the 2017 and 2018 Rate for FPL's attachments to AT&T's poles, including identification of the data and sources.

The FCC Order also notes that the validity of FPL's March 25, 2019 Notice of Termination regarding AT&T's existing attachments "is squarely before the district court and is purely a matter of state contract law." So, while this offer would resolve the rate issue, FPL maintains its positions regarding the termination, abandonment and other non-rate related issues. As you know, on numerous occasions over an extended period of time, FPL has communicated to AT&T that AT&T's performance under the JUA was unacceptable – a conclusion based not on a dispute over the rate calculation methodology, but rather on AT&T's longstanding disregard for contractual obligations that are critical to maintaining a reliable pole network to serve FPL's customers. Time and again, we have asked AT&T to comply, at a minimum, with basic operational obligations such as pole inspections and corresponding repairs or replacement, timely transfers of lines and equipment to new poles, and compliance with the appropriate construction standards. Unfortunately, AT&T has fallen considerably short of those obligations for more than a decade. While rates have clearly been the issue for AT&T, reliability and performance have been, and will continue to be, the primary focus for FPL.

In 2018 and 2019, AT&T's disregard for contractual obligations extended to its financial commitments when AT&T failed to provide *any* payment for 2017 – even one under a reservation of rights which would have been consistent with not only the terms of the agreement and the guidelines of the FCC, but also with the characteristics of a good partnership. Our decision to exercise our right to terminate AT&T's attachment rights following your payment default was driven by the accumulation of a series of other contractual failures that FPL has been enduring for years. As I'm sure you know based on prior communications, FPL has been increasingly concerned over the last several years that AT&T does not have the same level of interest in the integrity and reliability of its share of the JUA infrastructure; rather, AT&T has been relying upon FPL to repair and replace poorly maintained AT&T poles as they fail, with little interest in making its own investments in that infrastructure.

Simply put, while we are very interested in resolving the current financial dispute and have endeavored to do so through this offer, [redacted], FPL does not desire to maintain its relationship with AT&T through the Joint Use Agreement. Accordingly, [redacted], FPL intends to pursue the positions set forth in our contract claims pending in federal court and we will reassert our Abandonment claim at the appropriate time.

Thank you. We look forward to your response, and to providing the FCC Staff an update by June 19, 2020. Indeed, we look forward to closing out the terms of the disputed rates at the earliest opportunity.

Sincerely,

Michael Jarro
Vice President, FPL Distribution Operations
(561) 904-3594

Exhibit C

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 20-214 Bureau ID No. EB-20-MD-002

REPLY AFFIDAVIT OF JOE YORK
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF FLORIDA)
) ss.
COUNTY OF DUVAL)

I, Joe York, being sworn, depose and say:

1. I am the President of Complainant BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T"). I have held this role since January 1, 2014, which is also referred to as AT&T's President of Florida and Caribbean for External and Legislative Affairs. In this capacity, I oversee the policy, regulatory, government affairs, and community engagement initiatives for AT&T in Florida, Puerto Rico, and the U.S. Virgin Islands and work with AT&T's network and business teams to ensure the company meets its network transformation and deployment objectives. I have nearly two decades of experience at AT&T, having previously served in roles of increasing responsibility in External Affairs, Legislative & Regulatory Affairs. During my tenure, I have been involved in almost every state regulatory and policy issue that has

impacted AT&T or the communications industry in Florida. I have a bachelor's degree in business from Auburn University and completed additional coursework in broadcast journalism at Troy University.

2. I am executing this Reply Affidavit to correct certain statements made by FPL in its October 21, 2020 Answer and by Mr. Jarro in his supporting Declaration. 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.

3. As President of AT&T Florida, I have come to know and occasionally interact with FPL's President and CEO, Eric Silagy. Well prior to the filing of AT&T's July 1, 2019 rate complaint,[1] Mr. Silagy and I discussed the companies' joint use relationship. During this discussion, Mr. Silagy claimed that AT&T owed FPL a substantial amount for annual pole rent that had been in arrears for many months. Mr. Silagy acknowledged that AT&T disputed the amount FPL invoiced. Although I am not on AT&T's negotiating team, I was well aware that AT&T disputed FPL's pole rental invoice. Mr. Silagy told me that FPL would not begin to have a conversation with AT&T's team about different pole attachment rates until AT&T paid what FPL had invoiced. He said AT&T agreed to the parties' JUA, but was not abiding by its terms.

4. Mr. Silagy and I had a couple of other brief discussions where the topic of FPL's disputed pole rental invoices came up. Each time I spoke with Mr. Silagy, I thought we were trying to see whether we could help the parties reach common ground. Yet in all my conversations with Mr. Silagy, he never once suggested or asked that AT&T pay an amount that

[1] *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.

it thought was an "undisputed amount." Instead, at all times he insisted that AT&T must pay the outstanding amount.

Joe York

Sworn to before me on
this 4th day of December, 2020

Notary Public

Sworn to before me this 4th day of December 2020 by Joe York
who produced DL as identification.

FRANK M. BRENNAN
MY COMMISSION # GG 287369
EXPIRES: April 28, 2023
Bonded Thru Notary Public Underwriters

Exhibit D

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 20-214 Bureau ID No. EB-20-MD-002

REPLY AFFIDAVIT OF JONATHAN ELLZEY
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF FLORIDA)
) ss.
COUNTY OF MIAMI-DADE)

I, Jonathan Ellzey, 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 Florida Power and Light Company ("FPL") claiming that "AT&T has not been a good joint use partner in regard to its important responsibilities of: (a) maintaining and replacing its poles; and (b) timely transferring its facilities onto FPL storm-hardened poles."[1] 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

[1] Answer Ex. A at FPL00007 (Jarro Decl. ¶ 34).

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 Area Manager-Outside Plant Planning and Engineering Design. I am based in Miami, Florida and have outside plant design engineering responsibilities for all of Florida except the Panhandle. In my current role, I manage the engineering of pole relocations, pole replacements, the transfer of facilities to relocated or replaced poles, and pole removal work. My group also handles issues raised by municipalities and customers concerning issues with AT&T's poles. From 2015-2018, my group managed the AT&T pole inspection program administered by Osmose Utilities Services, Inc. ("Osmose"). We continue to handle the replacement of poles identified in the inspection program, although another group now manages inspections, trussing, and invoicing for the program. My group is also the subject matter expert in Florida (excluding the Panhandle) for the National Joint Utilities Notification System ("NJUNS") database. I am familiar with AT&T's Joint Use Agreement ("JUA") with FPL, as well as with agreements and engineering practices governing aerial communications facilities throughout Southeast Florida.

3. I have fifteen years of experience in the telecommunications industry with AT&T and its predecessor companies. I began my career with AT&T in 2005 as Outside Plant Engineer, mainly deploying fiber and digital loop carrier (DLC) equipment to fulfill service orders and new subdivision growth. In 2010, I became a Design Resource Manager and handled the rollout of Project Lightspeed (deployment of 6MB and higher internet speeds) for the Florida Keys. The main aspect of this role was to manage the company's build plan and communicate directly with our engineering vendors to design the placement of VRAD cabinets to avoid flood issues. In 2011, I became Finance Resource Manager and worked within the support group of

the district managing the capital, expense, and force budgets for Construction and Engineering for the state of Florida (minus the Panhandle). I was promoted into my current position as Area Manager-Outside Plant Planning and Engineering Design in 2015. I have a bachelor's degree in electrical engineering from Florida International University.

A. AT&T Properly Maintains and Replaces Its Joint Use Poles.

4. I reviewed Mr. Jarro's and Mr. Allain's declarations. They claim that AT&T has systematically failed to maintain and replace AT&T-owned joint use poles. This is not true. AT&T has robust methods and procedures in place for testing, inspecting, maintaining and replacing its joint use poles. AT&T's protocols incorporate industry-standard practices from the Telcordia Blue Book. AT&T's field engineers are well versed in these procedures, and AT&T is constantly testing, inspecting, maintaining and replacing its poles as necessary and appropriate. I am not aware of any systemic problems that support Mr. Jarro's and Mr. Allain's broad criticism of AT&T's pole ownership practices.

5. There are a number of claims in Mr. Jarro's and Mr. Allain's declarations that I would like to specifically address and correct. *First*, Mr. Allain claims that AT&T "ceased inspecting poles" in 2013 and 2014, and only resumed inspections because FPL was "prepared to initiate arbitration."[2] This is wildly misleading. AT&T had a reason for the pause in the inspection program in 2013; as Mr. Allain admits, Florida deregulated the communications industry in 2013, so the Florida Public Service Commission-required inspection program was no longer mandatory for incumbent carriers like AT&T.[3] But after AT&T briefly suspended the inspection program in 2013, AT&T voluntarily resumed participating in the program in 2014 to

[2] Answer Ex. B at FPL00140-141 (Allain Decl. ¶ 21.A).

[3] *Id.*

supplement its practices and further ensure the safety and stability of its poles for use by AT&T, FPL, and third party attachers. The inspection program continues today, even at its significant cost, which are costs not borne by AT&T's competitors, as they are not pole owners.

6. *Second*, Mr. Jarro and Mr. Allain claim that AT&T has failed to promptly replace poles that receive a "Type 2" or "Type 3" failure classification following an inspection by Osmose.[4] I find this claim outrageous. AT&T is vigilant in the maintenance of its network, and diligently deploys its resources to ensure the prompt replacement of poles that AT&T learns require replacement through the Osmose inspection program, whether due to damage, age, or deterioration. Sometimes, the pole replacements do not occur as quickly as AT&T would like because we often need to seek and obtain a municipal permit to replace a pole This unavoidable step can delay the process, but my team works through the issue as quickly as possible to ensure that poles are replaced as expeditiously as possible .

7. FPL's claim about "Type 2" and "Type 3" poles is hard for me to fully address, though, because neither AT&T nor Osmose in its interactions with AT&T categorizes poles using the "Type 2" and "Type 3" designations contained in Mr. Jarro's and Mr. Allain's declarations. Mr. Jarro and Mr. Allain also do not identify by pole number or location any of the poles they are discussing, so we could not arrange for a field visit to the locations that presented a concern to them. My team did, however, raise the issue with Osmose and, while we still did not learn the pole locations, we learned that the "Type 2" and "Type 3" categorizations were developed and defined by FPL for its internal dealings with Osmose. They are not categorizations that FPL or Osmose has shared with AT&T and I still do not know what the

[4] Answer Ex. B at FPL00141 (Allain Decl. ¶¶ 21.C-21.D).

terms mean aside from what Mr. Allain reports. I do note that Mr. Allain describes "Type 2" poles as those that do "not present an immediate threat but the pole needs to be replaced."[5] This definition suggests that his outrage about these poles is wildly exaggerated. In any event, AT&T categorizes poles requiring replacement as "priority" or "non-priority" poles.[6] AT&T ensures prompt replacement of each by opening an NJUNS ticket for the work, and it aggressively works to quickly replace poles listed as a "priority."

8. Mr. Allain says FPL does not even give AT&T a chance to replace a pole that has a "Type 3" classification, but instead "immediately dispatches a crew to remove and replace" the pole,[7] and then invoices AT&T for the work. He claims that FPL does this because "AT&T does not staff resources or materials to perform" the kind of work required by the most acute pole replacements.[8] This is also completely wrong. AT&T has ample resources to replace its own poles and does so promptly when alerted to a pole that requires replacement. It also has a dedicated After-Hours Service Restoration Group that manages damage and construction-related service outages in the middle of the night, 365 days a year. Municipal officials, fire and police departments, electric utilities, and first responders can contact the After-Hours Service Restoration Group via a special phone line following an accident or other emergency that has damaged a pole. There is also a 1-800 number for the public to report incidents. The Group has all the resources, equipment, and personnel necessary to respond to emergencies that damage AT&T's poles, including third-party contractors at the ready to assist as appropriate. Despite all

[5] Answer Ex. B at FPL00141 (Allain Decl. ¶ 21.B).

[6] There is no way to know how the alleged "Type 2" and "Type 3" failures correlate to the "priority" and "non-priority" categories (if at all).

[7] Answer Ex. B at FPL00141 (Allain Decl. ¶ 21.B, D).

[8] Answer Ex. B at FPL00141 (Allain Decl. ¶ 21.D).

of AT&T's dedicated resources, FPL typically receives a call to respond to an emergency first because its facilities pose a safety hazard when downed and power needs to be cleared first. But I could not disagree more with Mr. Allain's suggestion that AT&T does not have a devoted team ready to restore poles during the workday, after hours, or under emergency conditions.

9. *Third*, Mr. Jarro and Mr. Allain go on at length about a single AT&T pole in the City of Coral Gables that AT&T supposedly neglected.[9] However, the email exchange about this pole confirms AT&T visited the pole "*the same day*" it learned the City was concerned about its condition and that AT&T was prepared to replace it immediately.[10] Before that time, AT&T tried on several occasions to replace the pole, but had encountered permitting roadblocks that prevented AT&T from completing the work. Given AT&T's diligence with respect to this pole, I am not sure why FPL's witnesses think it is a "good example of how AT&T does not maintain the integrity of its poles."[11] To the contrary, it confirms the responsiveness of AT&T's team when it learns that its pole requires repair.

10. It is also interesting to me that Mr. Jarro and Mr. Allain put such singular focus on one pole, while FPL admits it has no cause for complaint if an extensive network of utility poles shows "a few ad hoc instances of neglect."[12] FPL, of course, has not shown even that because AT&T quickly responded when notified about the Coral Gables pole. But FPL is correct that the

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[9] Answer Ex. A at FPL00008 (Jarro Decl. ¶ 38); Answer Ex. B at 00142-143 (Allain Decl. ¶ 22).

[10] *See* Answer Ex. A at FPL00127-132 (Jarro Decl., Ex. 16).

[11] Answer Ex. B at FPL00142 (Allain Decl. ¶ 22). The only other example Mr. Allain cites concerns two allegedly deteriorated AT&T poles that failed on October 26, 2019 and "caus[ed] an outage impacting 2,400 FPL customers." *Id.* (Allain Decl. ¶ 22). In stark contrast to the photographs and detail provided with respect to the Coral Gables pole, Mr. Allain provides no specifics about the location of these poles or other identifying information. It is therefore impossible for me to assess this other purported example.

[12] FPL Br. at 60.

mere ability to identify a problem pole in the field is *not* sufficient to disrupt a joint use relationship. Neither AT&T nor FPL can monitor their facilities on all 639,000 jointly used poles on a daily basis, so we rely on each other to alert one another to problems observed in the field and customer complaints received. AT&T routinely alerts FPL to problems with FPL's poles, as shown in the attached recent email correspondence about the following FPL poles, which present a hazard and require replacement:[13]

11. *Fourth*, Mr. Allain claims that AT&T poles have failed at greater rates than FPL poles during storms and that AT&T has been slower to replace storm-damaged poles.[14] In particular, Mr. Allain asserts that AT&T replaced none of its poles damaged during Hurricanes Wilma and Katrina in 2005 and Hurricane Irma in 2017. This assertion is false, and I do not know what Mr. Allain is basing it on. AT&T used a database called Ideal to track damage

[13] *See* Ex. E-1 (Email Correspondence).

[14] Answer Ex. B at FPL00145 (Allain Decl. ¶ 29).

caused by Hurricanes Wilma and Katrina. While AT&T no longer actively maintains that database, I was able to find a backup copy of Ideal data for damage that occurred in Broward County. That data shows AT&T replaced 581 joint use poles in Broward County alone as a result of Hurricanes Wilma and Katrina. In 2017, AT&T used NJUNS to track pole replacements necessitated by Hurricane Irma. NJUNS data shows AT&T replaced 533 joint use poles as a result of Hurricane Irma.

B. AT&T Has Not Engaged In Transfer Delays That Have Prevented FPL from Removing Poles Replaced As Part of FPL's Storm Hardening Plan.

12. Mr. Jarro and Mr. Allain also claim that AT&T has failed to make timely transfers of its facilities from poles FPL replaced as part of its storm hardening program.[15] These claims are baseless.

13. *First*, AT&T transfers its facilities promptly, and devotes significant resources to doing so. I understand that Mr. Peters will provide the data that confirms the diligence and exceptional pace of AT&T's field and engineering teams, so I will simply say that I vehemently disagree with FPL's claim that AT&T has been slow in its transfer work.

14. *Second*, Mr. Allain claims that FPL has supposedly received municipal and customer complaints "about AT&T poles that are not FPL's responsibility and should have been addressed by AT&T."[16] FPL may have received complaints, as residents and municipalities are not always able to distinguish between poles owned by FPL and by AT&T. We also receive complaints about FPL's poles, and pass them along to FPL. I cannot speak to any specific complaints relied on by Mr. Allain because he provides no specifics, such as the location of the

[15] Answer Ex. A at FPL00009-10 (Jarro Decl. ¶¶ 41-46); Answer Ex. B at FPL00138-139, FPL0000144 (Allain Decl. ¶¶ 14-16, ¶ 27).

[16] Answer Ex. B at FPL00139 (Allain Decl. ¶ 16).

poles, the name of the complainant, the date, a case number, the nature of the allegations, or any other identifying information. But I can say that AT&T strives to respond quickly to resolve complaints about its plant and that a search of AT&T's records did not turn up unresolved customer complaints that could conceivably match what Mr. Allain describes.

15. *Third*, Mr. Allain asserts that "AT&T refuses to allow FPL to make its transfers and remove our poles while on the job site."[17] I am not sure why this matters when AT&T is promptly completing its transfer work. And, as AT&T has repeatedly explained to FPL, AT&T cannot just all allow FPL to do whatever work it wants on AT&T assets without making sure the work is performed consistent with AT&T's technical standards to avoid service interruptions, facility damage, and safety risks to workers and the general public.

16. *Fourth*, FPL makes an unsupported and conclusory allegation that AT&T somehow failed to perform transfer work "in such a manner as not to interfere with the service of the other party."[18] This is a baseless allegation. I am not aware of a single circumstance in which AT&T transferred its facilities to a replacement pole and interfered with FPL's electric service when doing so. AT&T's field technicians are skilled and trained to avoid such a situation.

17. *Fifth*, Mr. Allain claims that AT&T "misrepresent[ed]" that FPL tried to abandon poles to AT&T "where AT&T was not the only attacher" on the replaced pole.[19] This is flat wrong. In the last two years, AT&T's field technicians have repeatedly visited poles that FPL claimed to have "abandoned" to AT&T only to find other attachers still attached to the pole.

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[17] Answer Ex. B at FPL

[18] Answer ¶ 31.

[19] Answer Ex. B at FPL00138 (Allain Decl. ¶ 13).

This has increased AT&T's costs and diverted resources AT&T could have devoted to transfers that could be made, as it has required AT&T to make trips to poles that it turned out were not ready for AT&T to complete a transfer.

18. *Finally*, FPL's effort to "abandon" thousands of worthless replaced poles that must be removed and disposed of is unprecedented in my experience, and I think it is noteworthy that Mr. Jarro and Mr. Allain do not say it has previously occurred. A pole owner may "abandon" a single pole or a pole line when it is truly abandoning use of a pole at that location. But, except for this dispute, I have never been approached by an electric utility with a notice of abandonment that involved poles mid-way through the process of replacement, let alone thousands of poles dispersed throughout a service area. FPL's attempt to foist its removal and disposal work and costs on AT&T is unreasonable and inconsistent with my decades of relevant experience.

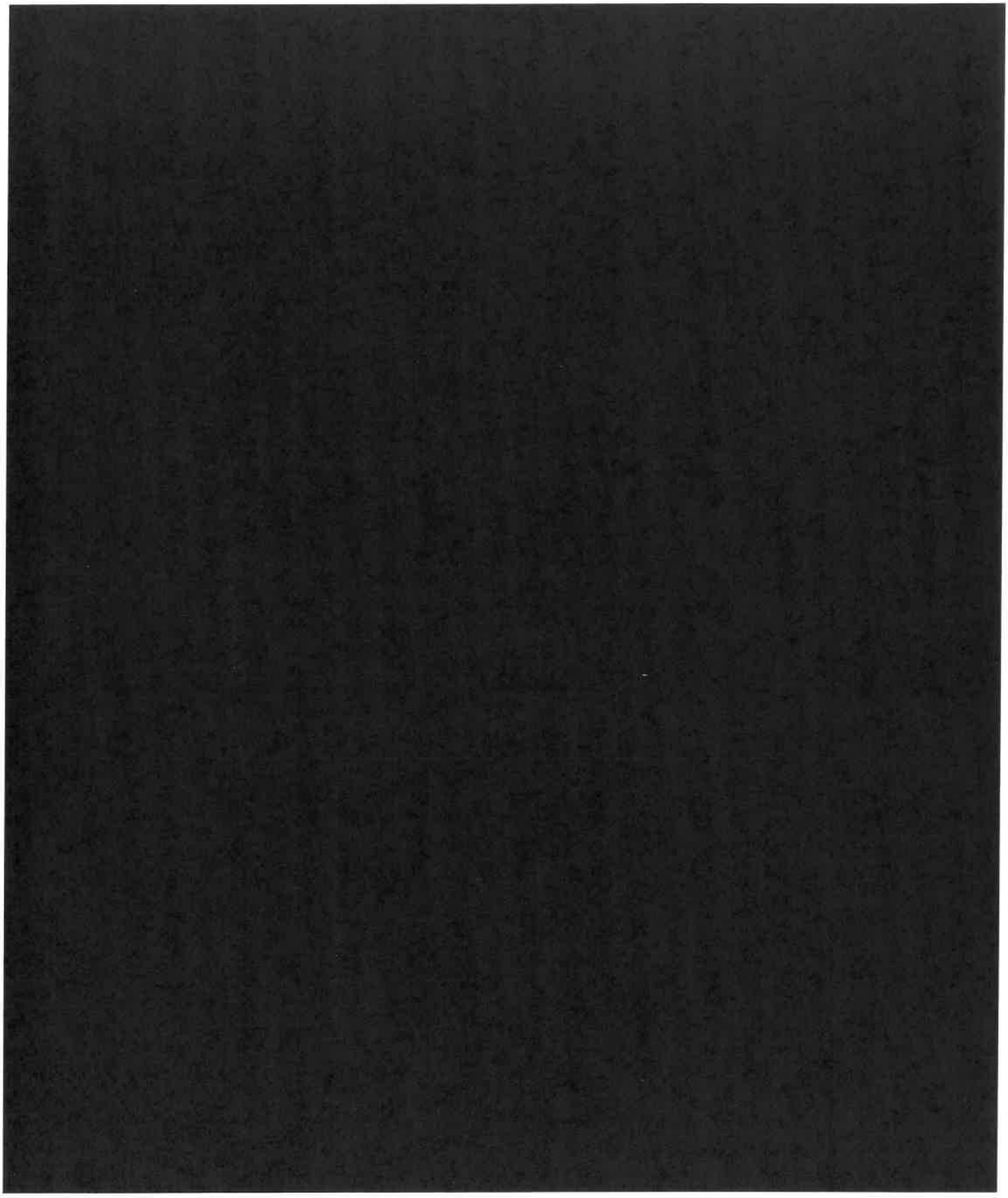
Jonathan Ellzey

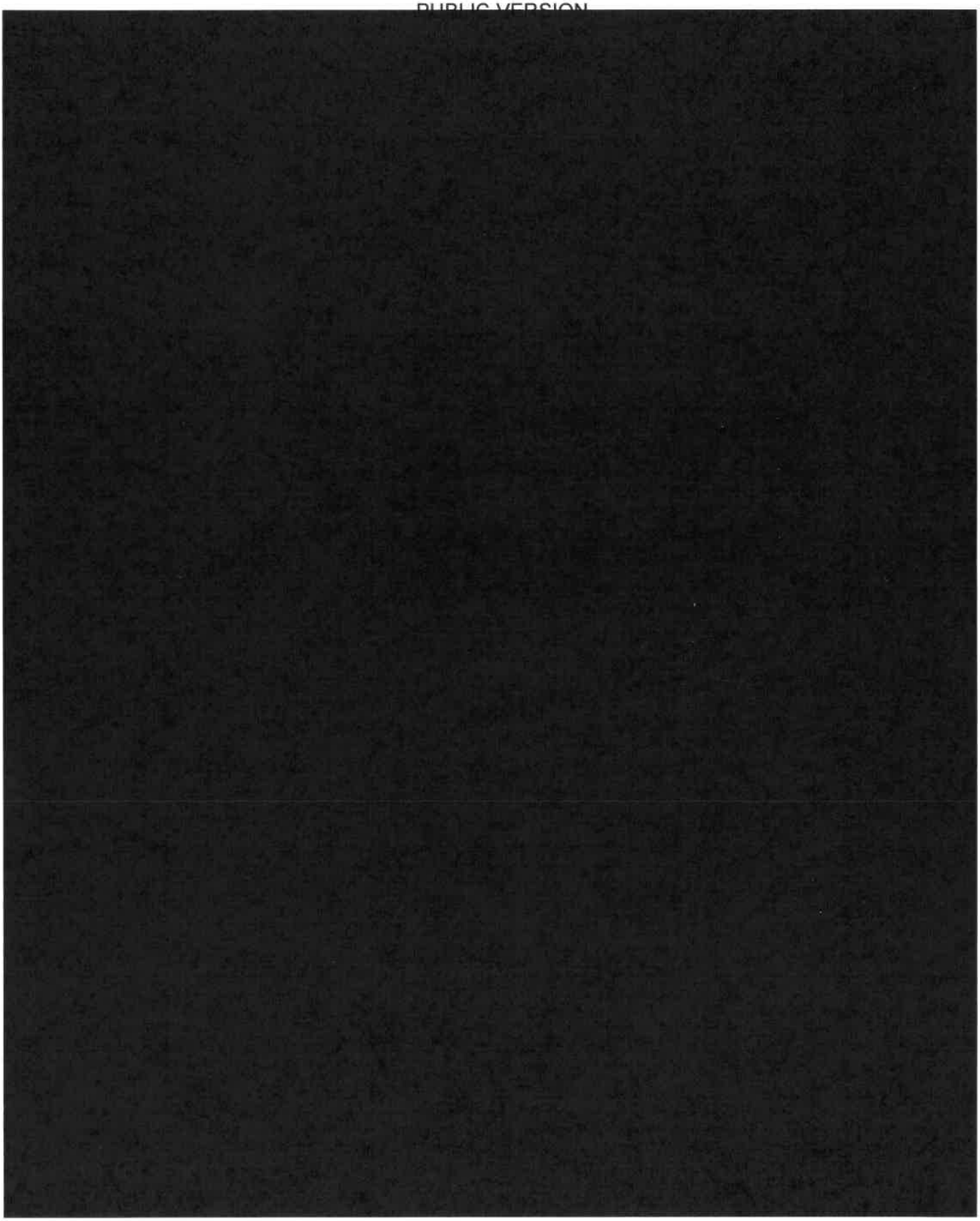
Sworn to before me on
this 3rd day of December, 2020

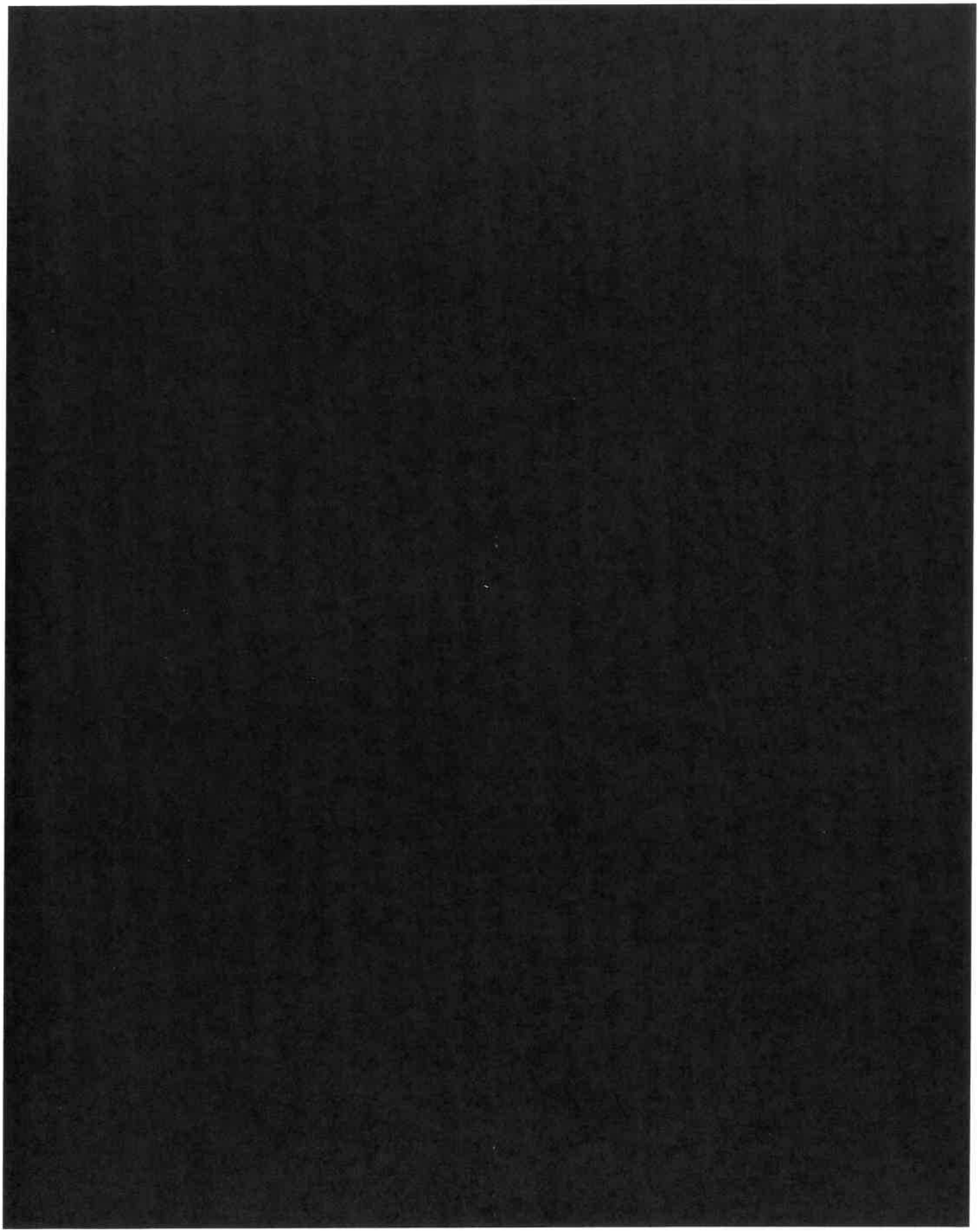
Notary Public

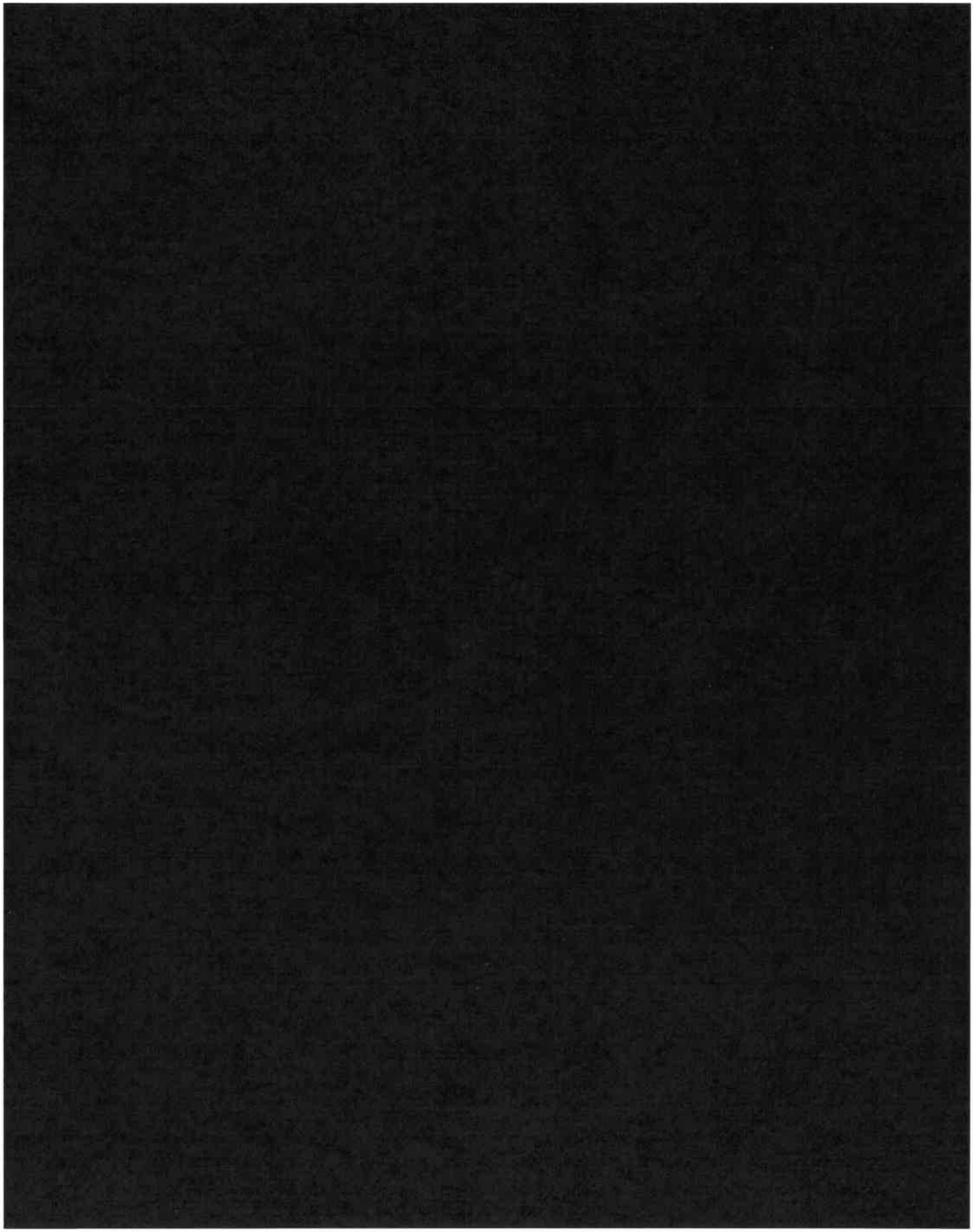
GABRIÉL COLON
MY COMMISSION #GG331641
EXPIRES: AUG 23, 2023
Bonded through 1st State Insurance

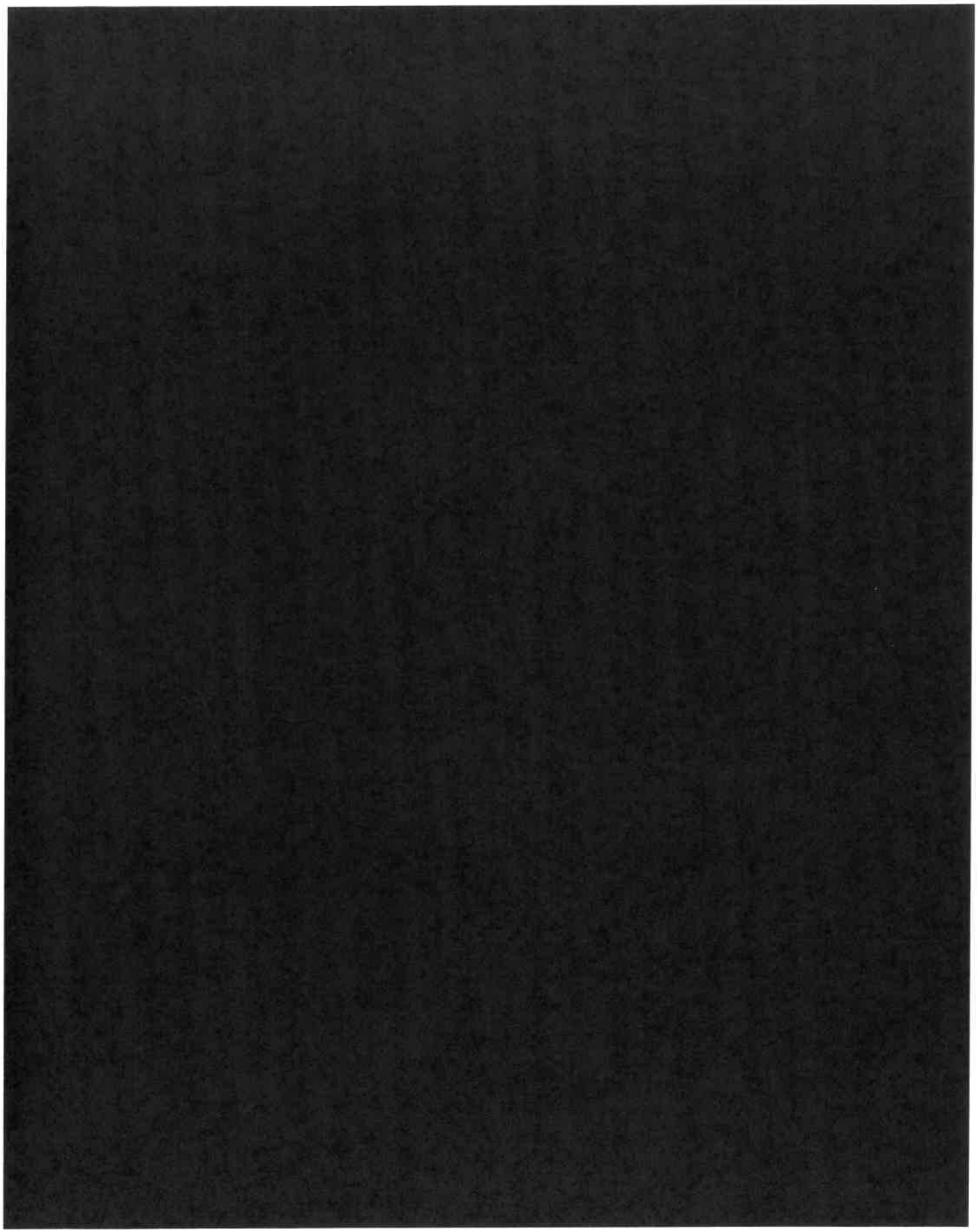
Exhibit E-1

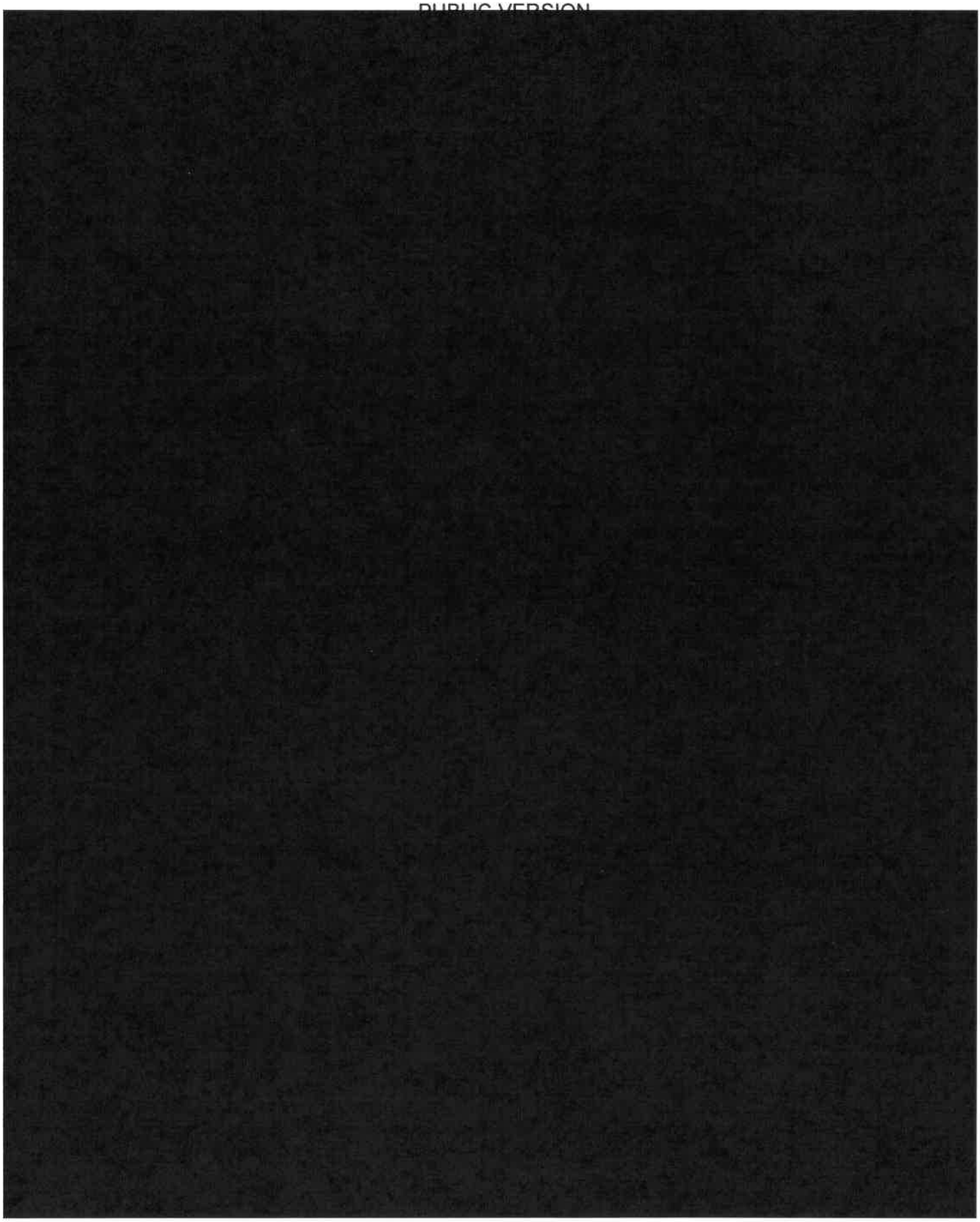


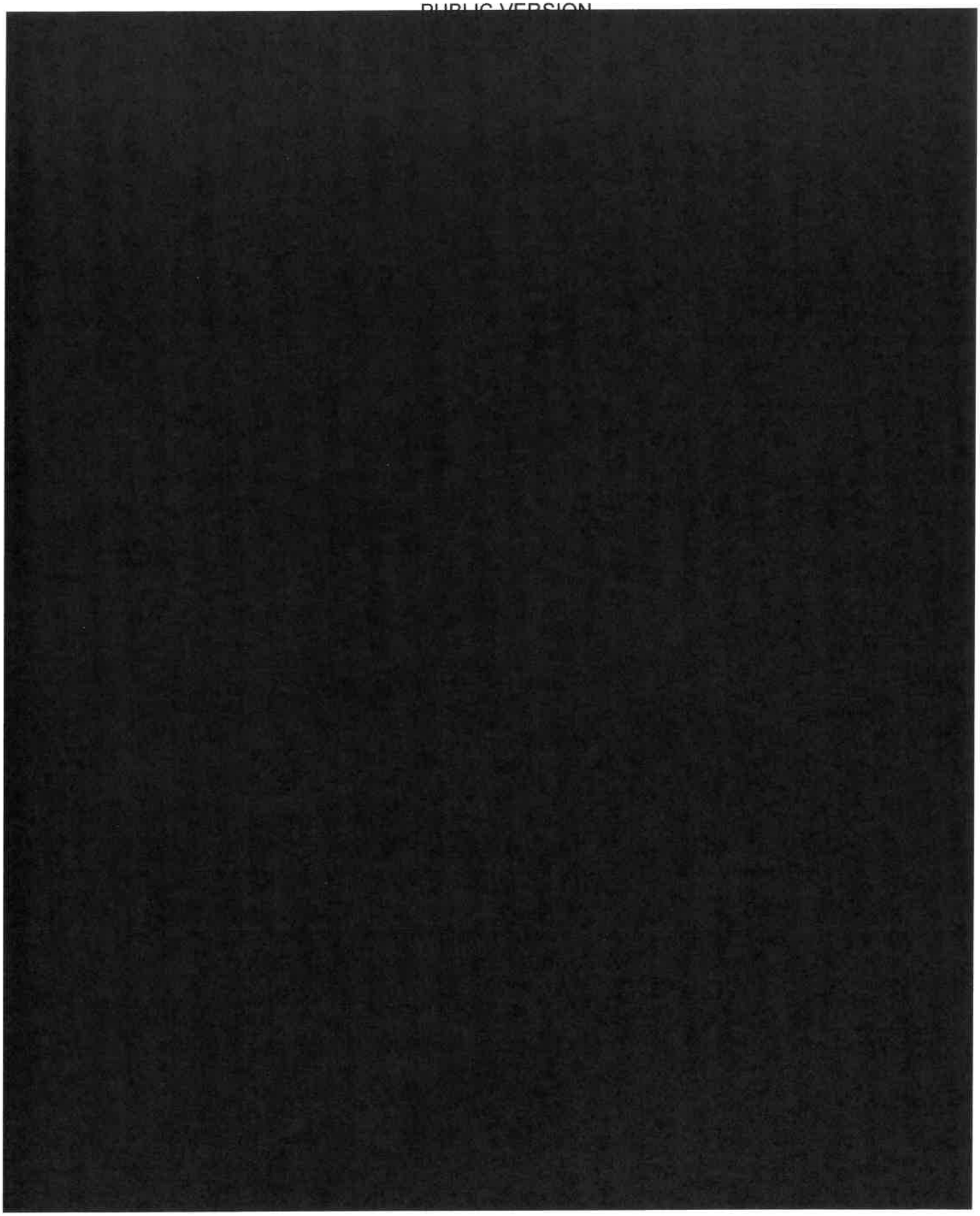


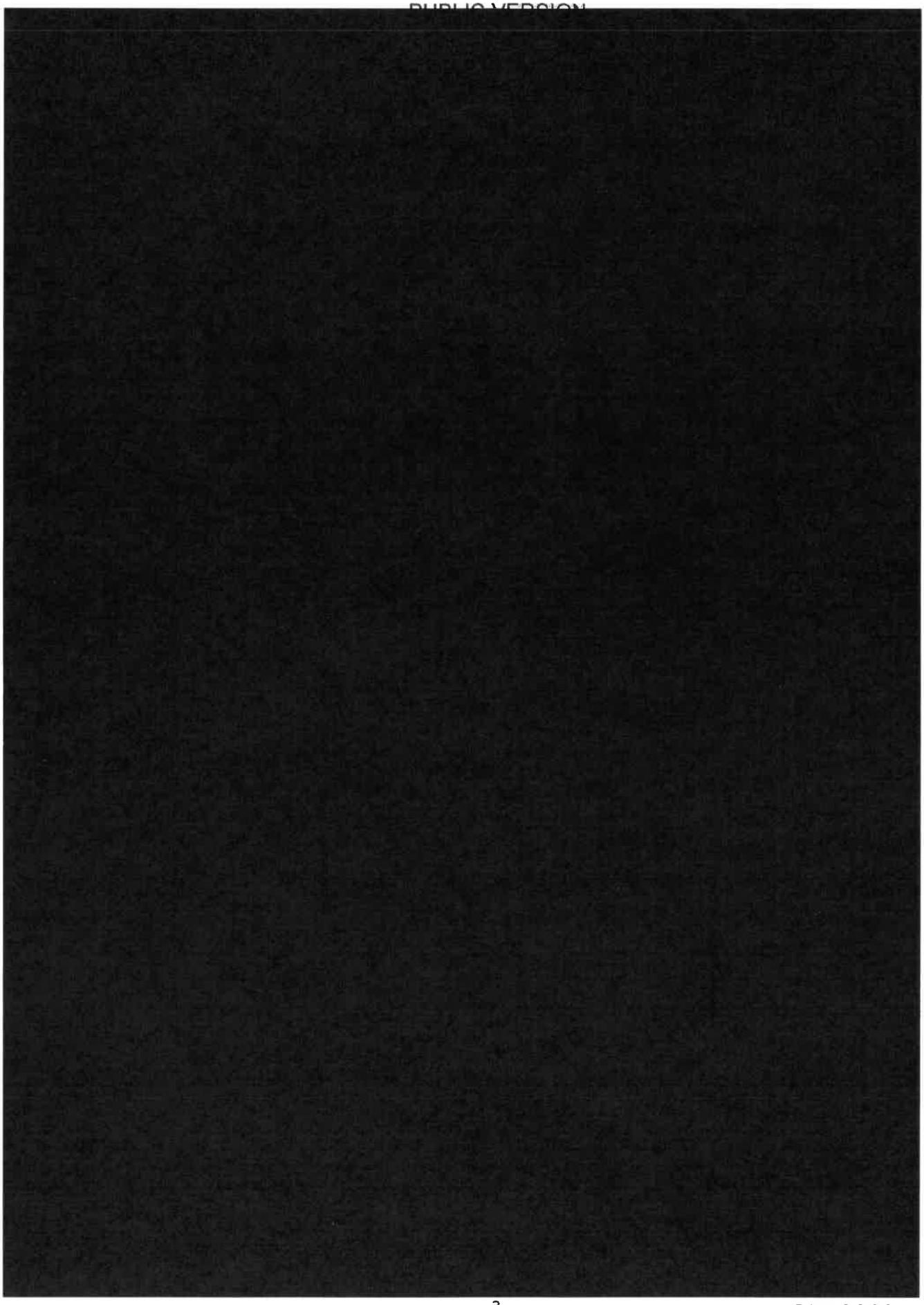


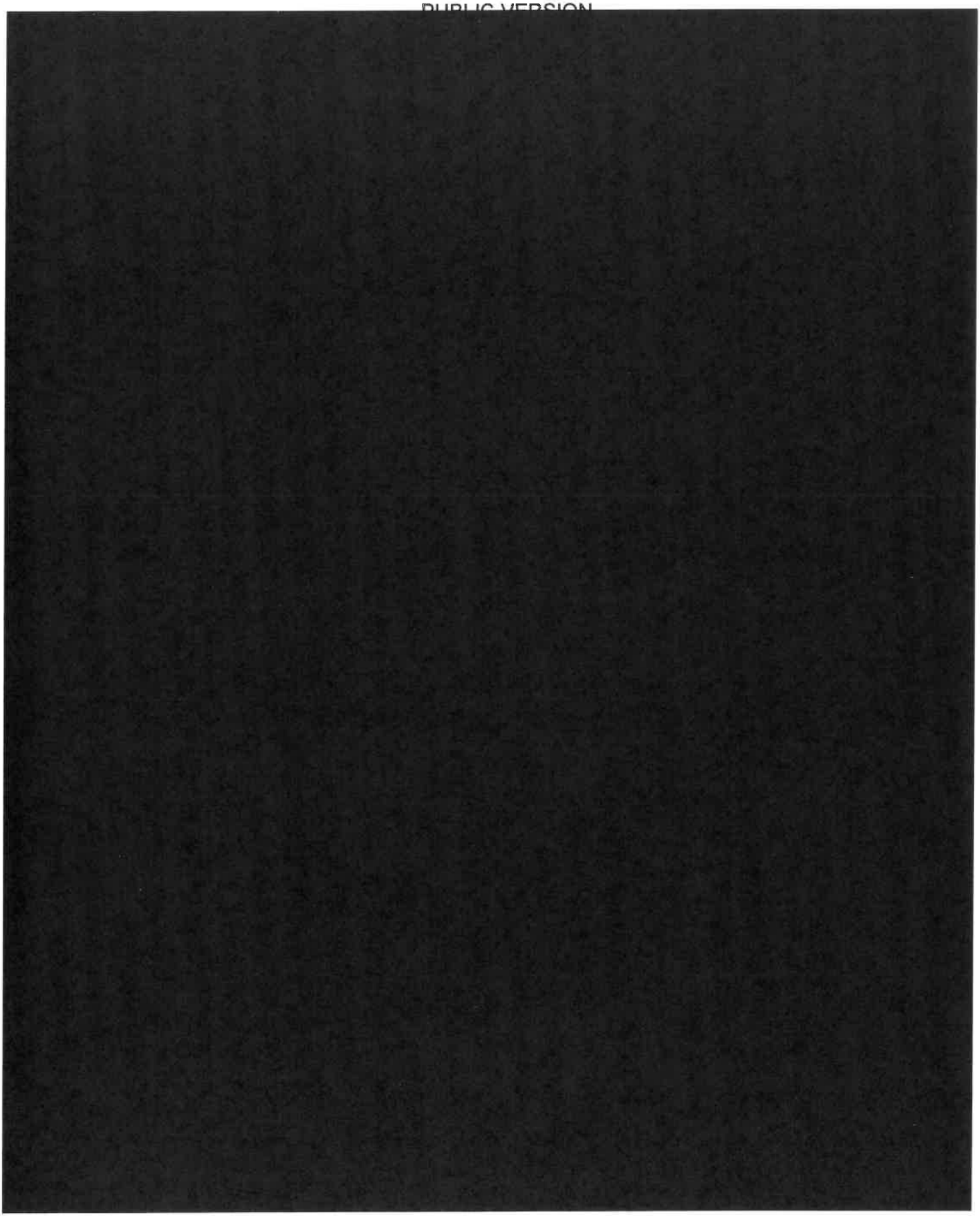


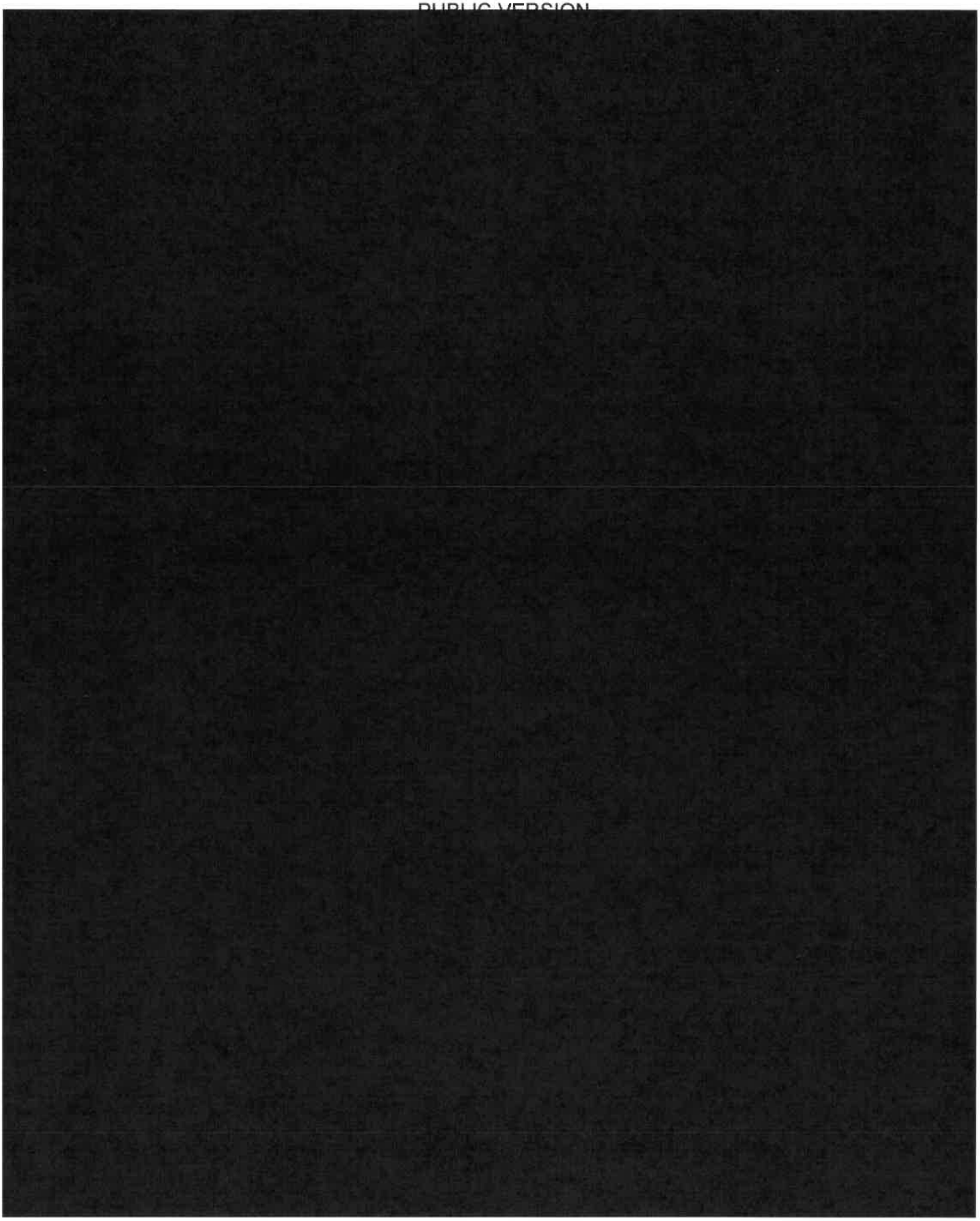


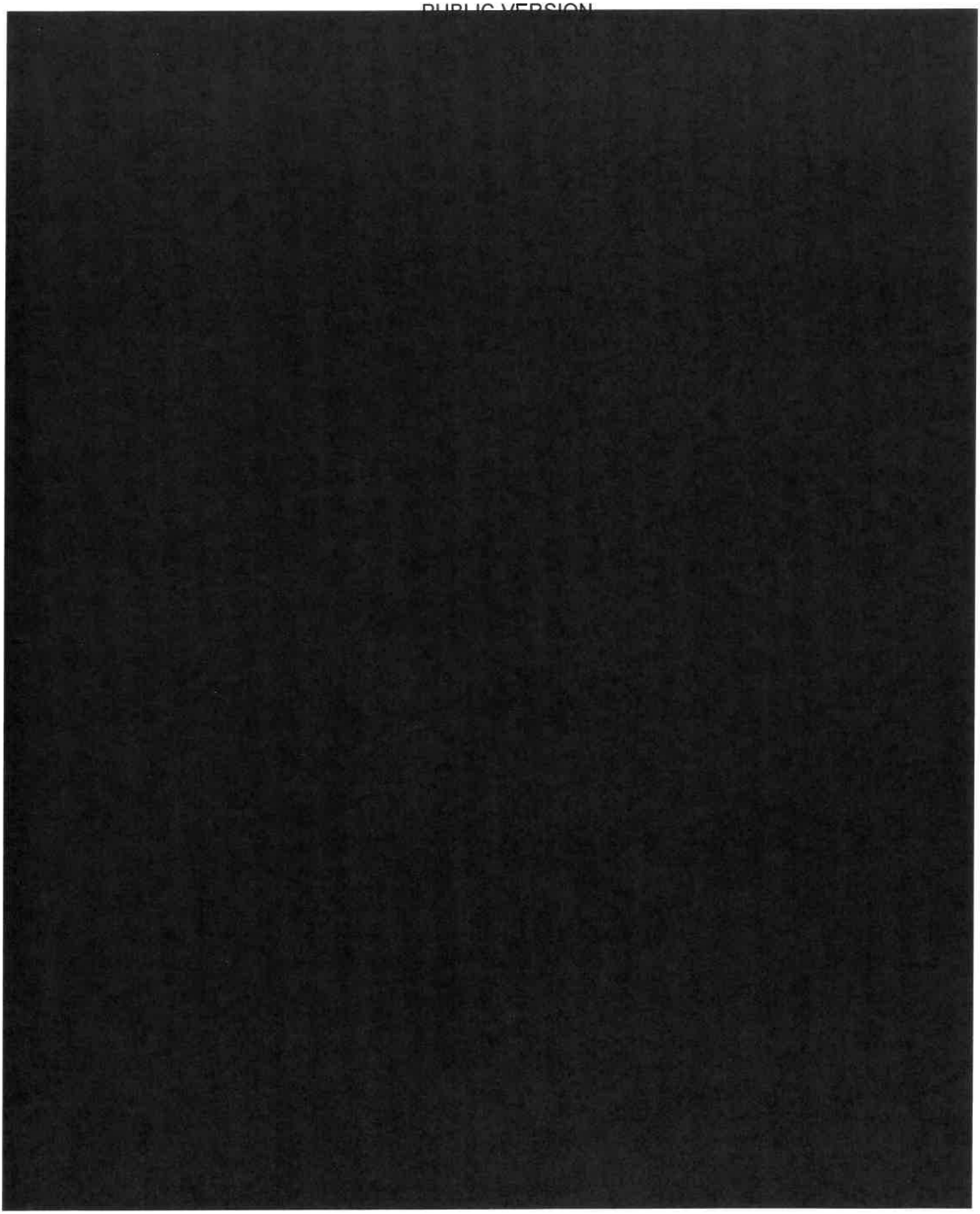












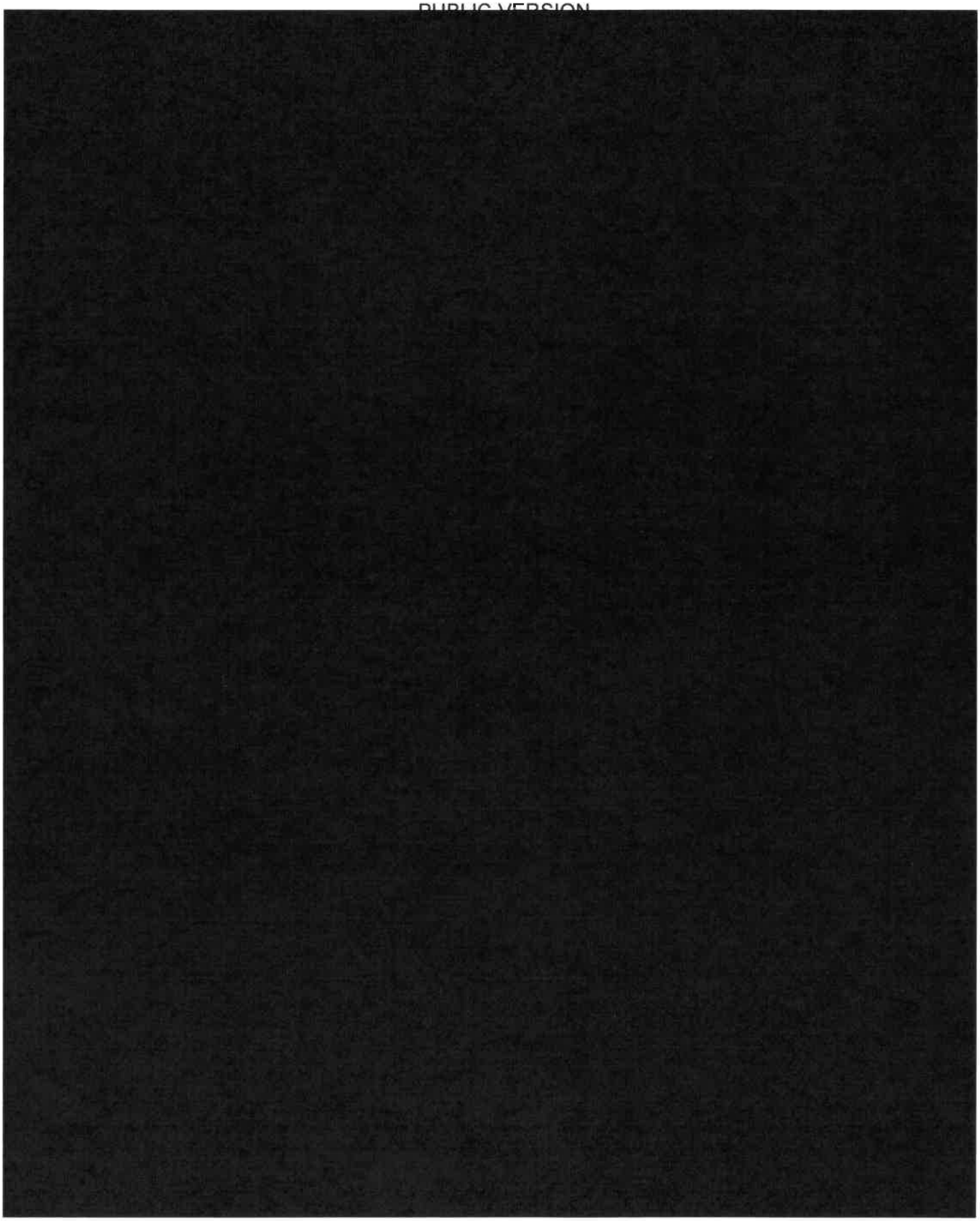


Exhibit E

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 20-214 Bureau ID No. EB-20-MD-002

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"). I am executing this Reply Affidavit in support of AT&T's Reply to the Answer filed by Florida Power and Light Company ("FPL") on October 21, 2020 in the above-referenced pole attachment complaint proceeding. 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.

2. My job title is Director – Regulatory. My current responsibilities include supporting AT&T and various affiliated entities in the areas of cost analysis, rate development, and universal services. In this role, I direct the development of the pole attachment and conduit occupancy rates charged by AT&T and affiliated operating companies pursuant to Federal

Communications Commission ("FCC") and state formulas, including the calculation of the rental rates that AT&T charges cable and CLEC attachers in Florida. In my role, I also review and evaluate the propriety of pole attachment rates paid by AT&T and affiliated entities and the impact of settlement offers provided to AT&T in the course of rate negotiations. I have also testified in a number of federal and state cases regarding the reasonableness of a variety of rates and charges during the 41 years that I have worked in the telecommunications industry. I received a BS – Education with high distinction from the University of Nevada – Reno, where I majored in math, and an MBA with honors from St. Mary's College in Moraga, California.

3. I have personal knowledge of AT&T's negotiations with FPL for just and reasonable pole attachment rates, terms, conditions, and practices and attended a face-to-face executive-level meeting with FPL on December 7, 2018 and a private mediation on May 1, 2019.[1] In this Affidavit, I will correct and respond to several statements made by FPL and its Vice President of Distribution Operations for the Power Delivery business unit, Michael Jarro.[2] I reserve the right to supplement or revise this Affidavit as additional information becomes available.

4. I disagree totally and completely with Mr. Jarro's allegation that I, or any other member of the AT&T team, failed to participate fully and transparently in the parties' negotiations.[3] I also entirely disagree with the many other unsupported allegations throughout FPL's pleadings stating that AT&T did not approach the negotiations in good faith and with the

[1] The mediation was subject to a confidentiality agreement, so I will not disclose any specific statements made during the half-day mediation in this Reply Affidavit.

[2] *See* Answer Ex. A (Jarro Decl.).

[3] *See, e.g.*, Answer Ex. A at FPL00003-07 (Jarro Decl. ¶¶ 9-33).

express request for a "just and reasonable" rate for AT&T's use of FPL's poles consistent with the Commission's regulations and orders.[4] FPL's self-serving assertions are simply untrue.

5. From the start of the parties' rate negotiations, AT&T and FPL had diametrically opposed views about AT&T's right to a just and reasonable rate for use of FPL's poles under the parties' joint use agreement ("JUA"). FPL's representatives refused to discuss federal law unless AT&T invoked an inapplicable provision in the JUA that would automatically terminate the JUA six months thereafter. FPL's demand was transparently designed to increase FPL's leverage in the negotiations by trying to prod AT&T into terminating the JUA, which FPL could then use to complicate and increase the expense of AT&T's future deployment in Florida. But FPL's position was at odds with the JUA, and so we pointed them to the JUA's requirement that the invoiced rates be "at all times … in conformity with all applicable provisions of law."[5]

6. Throughout the negotiations, FPL relied on the inapplicable JUA provision, which would have triggered termination of the JUA,[6] to try to avoid discussing just and reasonable rates for AT&T. I was surprised when it appeared again in Mr. Jarro's declaration in this case, however, because the FCC's Enforcement Bureau recognized that FPL's refusal to discuss federal law prevented AT&T from negotiating just and reasonable rates and justified rate relief.[7] Mr. Jarro nonetheless resorts to the same rejected argument when he claims that AT&T "did not request a new rate from FPL as required under the terms of the JUA" and that AT&T stated

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[4] *See, e.g.*, Answer ¶¶ 3, 6, 8 n.11.

[5] *See* Compl. Ex. 1 at ATT00039 (JUA, Art. VI).

[6] *See* Compl. Ex. 1 at ATT00044 (JUA, Art. XI, Section 11.2).

[7] *See BellSouth Telecommunications, LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, 35 FCC Rcd 5321, 5326 (¶ 11) (EB 2020) ("*FPL 2020 Order*").

"unambiguously that it was not seeking a new rate."[8] But AT&T did ask repeatedly for a JUA rental rate that complies with federal law, as required by federal law and the plain language of the JUA.[9]

7. Mr. Jarro is also disingenuous in his claim that FPL did not understand "exactly what rate" AT&T was seeking.[10] We made clear that AT&T was seeking the new telecom rates to which it was presumptively entitled under the FCC's 2018 *Third Report and Order*, unless FPL could show that a higher rate was justified under the Commission's regulations and orders.[11] FPL refused to disclose the new telecom rates it charges, its new telecom rate calculations, or any support for a higher rate in spite of our repeated requests.[12] This denied us insight into the rates FPL charges AT&T's competitors. It also prevented us from discussing the range of rates referenced in the Commission's 2011 *Pole Attachment Order* and 2018 *Third Report and Order* because a pre-existing telecom rate (also referred to as the old telecom rate) can be easily derived from a new telecom rate.[13]

8. Indeed, one aspect of our negotiations that I found especially frustrating was FPL's refusal to disclose its new telecom rates and calculations. It was not unreasonable for us

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[8] *See* Answer Ex. A at FPL00004-05 (Jarro Decl. ¶¶ 16, 21).

[9] *See, e.g.*, Answer Ex. A at FPL00004, FPL00058 (Jarro Decl. ¶ 16 & Ex. 6).

[10] *See* Answer Ex. A at FPL00004-05 (Jarro Decl. ¶¶ 16, 21).

[11] *See, e.g.*, Answer Ex. A at FPL00058, FPL00077-78 (Jarro Decl., Exs. 6, 10).

[12] *See, e.g.*, Answer Ex. A at FPL00083 (Jarro Decl., Ex. 10).

[13] In particular, a properly calculated new telecom rate for use of FPL's poles using the Commission's presumptive inputs is 0.66 times the pre-existing telecom rate (which means the rate that results from the telecom rate formula in effect prior to the 2011 *Pole Attachment Order*). 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.

to ask for this information. By rule, FPL is required to supply "all information necessary" to calculate rates using the FCC's formulas within 30 days of a request from a CLEC or cable company.[14] And the Commission's 2011 and 2018 Orders both make the new telecom rate relevant to the determination of a just and reasonable rate for an ILEC.[15] But FPL refused to disclose its new telecom rate and calculations during our negotiations—thereby forcing AT&T to file a pole attachment complaint to obtain the information that should have been part of a good faith effort to resolve the parties' dispute.

9. FPL's refusal to disclose its new telecom rates and calculations complicated and extended the negotiations and made them more costly for AT&T and more burdensome for my team. It fell on us to find and interpret FPL's publicly available data, and it was impossible to know the confidential aspects of FPL's calculations, such as the distribution pole counts upon which they are based. I find it particularly ironic that Mr. Jarro now complains that AT&T did not give FPL new telecom rate calculations for use of FPL's poles,[16] when FPL was the only party to our negotiations that had all of the data needed to calculate those rates and knew what new telecom rates FPL was charging AT&T's competitors. It has since become clear that FPL knew what its new telecom rates were all along because FPL finally identified its standard pole attachment rates for CLECs (i.e., the new telecom rate) after AT&T filed its rate complaint.[17]

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[14] 47 C.F.R. § 1.1404(f).

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

[16] *See, e.g.*, Answer Ex. A at FPL00007 (Jarro Decl. ¶¶ 31, 32).

[17] *See* Public Version, FPL Resp. to Interrogatory No. 5, *AT&T v. FPL*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (Aug. 21, 2019).

10. It is also untrue that AT&T raised only conclusory concerns with the invoiced rates.[18] Mr. Jarro attaches some of our concerns to his declaration—along with FPL's description of them as "detailed."[19] I also find it absurd that Mr. Jarro says that our concerns were fully addressed by FPL.[20] Mr. Jarro provides evidence that this is not true. In one email attached to his declaration, for example, FPL refused to provide much of the information we requested, including the new telecom rates FPL charged and information about basic rate inputs, such as the depreciation rate and carrying charge rate.[21]

11. Mr. Jarro is also wrong that AT&T somehow "fabricate[d] reasons for the delay in making payment" when we referred to a new internal vetting process for joint use rental invoices.[22] In 2018, my team began providing support to Dianne Miller's team's new vetting process. My team reviews selected joint use rental invoices with an eye to providing a recommendation regarding whether the billed amounts are properly invoiced under the terms of the particular joint use agreement. The FPL invoice was one such invoice my team addressed and we determined that FPL's invoicing was inadequately documented. Mr. Jarro also claims that we referred to this new internal process at our December 2018 executive-level meeting as the result of an "internal audit."[23] But as we explained to FPL on several occasions, there was no formal "audit," just a new internal vetting process created to supplement AT&T's focus on fiscal

[18] *See, e.g.*, Answer Ex. A at FPL00004-07 (Jarro Decl. ¶¶ 16, 20, 29).

[19] *See* Answer Ex. A at FPL00081 (Jarro Decl., Ex. 10).

[20] *See* Answer Ex. A at FPL00004-07 (Jarro Decl. ¶¶ 15, 20, 22, 23).

[21] *See* Answer Ex. A at FPL00082-83 (Jarro Decl., Ex. 10).

[22] *See* Answer Ex. A at FPL00007 (Jarro Decl. ¶ 33).

[23] *See, e.g.*, Answer Ex. A at FPL00005 (Jarro Decl. ¶ 21).

responsibility. Its creation was not specific to FPL or to the rates FPL charged, and Ms. Miller quickly clarified these points to FPL in January 2019.[24]

12. I also take issue with the suggestion that AT&T somehow dragged out the negotiations or did anything else to "string[ ] FPL along for more than a year."[25] FPL admits the parties discussed FPL's March 2018 invoice twice in April 2018.[26] The negotiations then proceeded apace, though AT&T was of course amenable to accommodating FPL's schedule. For example, FPL requested that we postpone a scheduled October 10, 2018 executive-level meeting for about 2 months due to Hurricane Michael, so it was held on December 7, 2018. AT&T also agreed to a later mediation date to accommodate the schedule of a mediator proposed by FPL. But AT&T never improperly delayed the negotiations, and it paid the invoiced rental amounts—even though AT&T correctly believed that the invoiced rental rates were *not* just and reasonable—when it became clear that the parties would not resolve their differences through the executive-level negotiation and nonbinding mediation processes. AT&T participated in the entire process in good faith and with a sincere desire to avoid the need for litigation.

13. Mr. Jarro is wrong when he repeatedly claims that AT&T owed FPL $9,244,141.74 for 2017 rent and $10,532,283,79 for 2018 rent.[27] This is not true. The FCC's Enforcement Bureau agreed with AT&T that the rates FPL invoiced are unjust and

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[24] *See* Answer Ex. A at FPL00116 (Jarro Decl., Ex. 13). Ultimately in an effort to limit the areas of dispute between the parties, the decision was made to pay in full FPL's 2017 and 2018 invoices despite my concerns, which the FCC's Enforcement Bureau has since confirmed were well-founded. *See* Compl. Ex. A at ATT00009, ATT00011 (Miller Aff. ¶¶ 18, 25); *see FPL 2020 Order*, 35 FCC Rcd at 5321 (¶ 1).

[25] *See, e.g.*, Answer Ex. A at FPL00004, FPL00007 (Jarro Decl. ¶¶ 12, 33).

[26] FPL Br. at 4.

[27] *See, e.g.*, Answer Ex. A at FPL00003-07 (Jarro Decl. ¶¶ 8, 10, 16, 17, 19, 27, 28, 33).

unreasonable.[28] FPL is also wrong when it claims without support that "that the Old Telecom Rate is consistent with the contract rate" or "may be more than the rate under the 1975 JUA."[29] This is impossible. The FCC's Enforcement Bureau found that "AT&T is entitled to a lower rate."[30] Indeed, between 2014 and 2018, FPL charged AT&T rates that were, on average, [redacted] times the properly calculated old telecom rates for use of FPL's poles.[31] As a comparison, when AT&T challenged FPL's invoice for 2017 rent, a properly calculated new telecom rate for use of FPL's poles was $13.32 per pole and a properly calculated old telecom rate was $20.18 per pole.[32] FPL instead charged AT&T [redacted] per wood distribution pole, [redacted] per concrete distribution pole, and [redacted] per transmission pole.[33]

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[28] *FPL 2020 Order*, 35 FCC Rcd at 5328 (¶ 13).

[29] Answer ¶¶ 8, 24.

[30] *FPL 2020 Order*, 35 FCC Rcd at 5328 (¶ 13).

[31] The rates FPL charged AT&T for use of wood distribution poles averaged about [redacted] times the properly calculated old telecom rates and the rates FPL charged AT&T rates for use of concrete distribution poles averaged more than [redacted] times the properly calculated old telecom rates. For more information about these calculations, *see* Amended Pole Attachment Complaint, Ex. A at ATT00012 (Aff. of D. Rhinehart ¶¶ 24-25), Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (July 12, 2019).

[32] *See id.* at ATT00008, ATT00012 (Rhinehart Aff. ¶¶ 14, 23). The properly calculated new and old telecom rates for use of FPL's poles for the 2018 rental year were $15.80 per pole and $23.94 per pole, respectively. FPL identified, in discovery responses, that the rate it charged to CLECs (i.e., the new telecom rate) as $14.84 in 2017 and $16.85 in 2018. *See* Public Version, FPL Resp. to Interrogatory No. 5, *AT&T v. FPL*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (Aug. 21, 2019). These rates translate to old telecom rates of $22.48 and $25.53, respectively. Particularly noteworthy in FPL's computation of its $14.84 and $16.85 rates is its reliance on standard default inputs to the space factor (i.e., 1 foot of occupancy, 13.5 feet of usable space, 37.5 foot average pole height, 24 feet of unusable space and 5 attachers commensurate with an "urbanized" assumption).

[33] *See* Compl. Ex. 2 at ATT00065 (2017 Invoice).

14. Mr. Jarro's claim that AT&T should have, "at the very least" made a payment of some undisputed sum[34] is a convenient made-for-litigation argument, as one would think that FPL would have said something if it were willing to accept payment of an undisputed amount. It never did during any of my interactions with its representatives. It seemed to me that the only acceptable payment from AT&T was a payment in full. FPL's representatives never suggested or implied that a payment of some undisputed amount would have been acceptable.

15. Mr. Jarro's contention that AT&T should have paid an "undisputed" amount for 2017 and 2018 rent is also wrong because it ignores the many prior years when AT&T overpaid FPL millions of dollars of rent in excess of the just and reasonable rent that was lawfully due. These overpayments more than covered any lawful amount due for 2017 and 2018.

16. In particular, the maximum rent under federal law for AT&T's use of FPL's poles is rent properly calculated at proportional old telecom rates. Since 2011, AT&T has paid millions of dollars more each year. Focusing only on the five years from 2014 through 2018, AT&T paid FPL about [redacted] million to [redacted] million more each year than net rent calculated using proportional old telecom rates.[35] As a result, AT&T's overpayments for 2014 through 2016 rent totaled [redacted] million—which is nearly [redacted] *more* than maximum net rent AT&T could have owed FPL for the 2017 and 2018 rental years calculated at proportional old telecom rates. In other words, when the negotiations began, *FPL owed AT&T a refund*—and AT&T owed FPL nothing. Now, because AT&T paid the disputed 2017 and 2018 invoices in full, FPL owes AT&T over [redacted] as compared to properly calculated proportional old telecom

[34] Answer Ex. A at FPL00006 (Jarro Decl. ¶ 29).

[35] *See* Amended Pole Attachment Complaint, Ex. A at ATT00013 (Aff. of D. Rhinehart ¶ 27), Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (July 12, 2019).

rates for the 2014 through 2018 rental years.[36] The only company financially harmed in this dispute has been AT&T. It is therefore impossible that a "burden" has been "placed upon FPL's rate payers" due to this rental rate dispute, as Mr. Jarro wrongly contends.[37]

17. Finally, simple math refutes FPL's suggestion that it made a settlement offer that was consistent with the Commission's regulations and the Enforcement Bureau's interim order in the parties' rental rate proceeding. In its offer, FPL refused to discuss the access and pole abandonment disputes at issue in this proceeding, failed to offer any refunds for prior overpayments, and offered "old telecom" rates that were so inflated that AT&T would have [redacted] for the 2017 and 2018 rental years [redacted].[38] The Enforcement Bureau held that "AT&T is entitled to a lower rate."[39] Instead, and consistent with its unyielding approach throughout negotiations, FPL asked AT&T to pay even more.

Daniel P. Rhinehart

Sworn to before me on
this 4th day of December, 2020

Notary Public

HEATHER PARKS
My Notary ID # 126875060
Expires April 20, 2021

[36] The exact overpayment amount is [redacted] for the 2014 through 2018 rental years. *See id.*

[37] *See* Answer Ex. A at FPL00006 (Jarro Decl. ¶ 27).

[38] *See* Exhibit R-1.

[39] *FPL 2020 Order*, 35 FCC Rcd at 5328 (¶ 13).

Exhibit R-1