PUBLIC VERSION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

DUKE ENERGY FLORIDA, LLC'S ANSWER AND AFFIRMATIVE DEFENSES TO AT&T'S POLE ATTACHMENT COMPLAINT

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I. EXECUTIVE SUMMARY

- The overarching flaw in AT&T's complaint is the baseless allegation that AT&T occupies the same one foot of pole space on DEF's poles as DEF's CATV and CLEC licensees. This assertion is incorrect under both the contract and the field data. The joint use agreement allocates feet of space to AT&T's "exclusive use" and allows AT&T to occupy additional space without additional payment. Further, the field data reveals that **AT&T occupies, on average, at least feet of space on DEF's poles**—before even considering the proper allocation of the safety space.

- In addition to this feet of space that AT&T physically occupies through its facilities, AT&T is also the cost-causer of an additional 3.33 feet of safety space on jointly used poles owned by DEF. **DEF does not need safety space on its own poles**. Unless the cost of this space is either shared per the terms of the existing joint use agreement, or allocated to AT&T, it will result in DEF's electric ratepayers bearing the cost of pole space that has absolutely nothing to do with the provision of electric service.

- If AT&T was paying for feet of space +3.33) in the same way that a CATV or CLEC licensee would pay for feet of space on DEF's poles, AT&T would be paying an annual rate of approximately $ per pole—in other words, a rate roughly equivalent to the rate AT&T pays under the existing joint use agreement.

- Unlike DEF's CATV and CLEC licensees, AT&T for the most part did not pay make-ready for access to DEF poles. **DEF built a network of poles taller and stronger than necessary to provide electric service specifically to accommodate AT&T**. This not only saved AT&T more than $ dollars in make-ready costs, permitting fees and inspection costs, but it also indefinitely burdened DEF with the carrying cost of a network of poles that is taller, stronger and more expensive than necessary for its own service requirements. This $ in avoided make-ready, permitting and inspection costs, even after netting out the corresponding benefit to DEF, amounts to more than $ per pole on an annualized basis—an amount that exceeds AT&T's annual rate by approximately %.

- AT&T's complaint also alleges, as AT&T dogmatically contended during the pre-complaint negotiations, that it enjoys no net advantages under the joint use agreement as compared to DEF's CATV and CLEC licensees. AT&T makes no effort to quantify the net advantages. Instead, AT&T relies upon the false premise that, because the benefits of the joint use agreement are reciprocal, they cancel each other out. Even assuming this was conceptually true, it ignores a huge mathematic fact: **AT&T reaps the benefit of being the licensee on 62,000 jointly used poles; DEF only reaps the benefit of being the licensee on 5,000 joint use poles**. In other words, AT&T enjoys a 57,000-pole advantage over DEF when it comes to the "reciprocal" benefits of being the licensee under the joint use agreement.

- Though the joint use agreement provides numerous benefits to AT&T, perhaps none is greater than the contractual right to remain attached to DEF's poles even in the event of termination. **AT&T, in essence, has a unilateral option on a perpetual license to remain attached to 62,000 DEF poles**. Under the joint use agreement, DEF cannot evict AT&T. AT&T, on the

other hand, can choose at any time to remove its facilities from DEF's poles. AT&T has a choice. DEF does not. This unilateral option on a perpetual license eliminates the need (or even the contingency) of constructing a new network of 62,000 poles in the event of a termination. This provides a net benefit to AT&T of more than $ per pole on an annualized basis—an amount that exceeds AT&T's actual joint use rental rate by more than %.

- AT&T's complaint also recycles the contrived argument that the infrastructure cost-sharing arrangement set forth in the joint use agreement is somehow the product of unfair bargaining leverage. AT&T makes this claim (1) without a shred of evidence, (2) notwithstanding the fact that the fundamental premise of the cost-sharing arrangement (a split of the costs) has remain unchanged since 1969, and (3) despite that the fact that **the cost-sharing methodology in the joint use agreement falls squarely within what AT&T's own internal documents described as the "most equitable" means of cost allocation**. Moreover, in today's dollars, AT&T is paying a lower per pole rate than it was in 1990 when the joint use agreement was last amended.

- AT&T first gave notice of this dispute on May 22, 2019. In all years prior to 2019, AT&T also reviewed detailed rate calculation worksheets and, on its own accord, sent its "Form 6407" certifying the correctness of the rate calculations. Nonetheless, AT&T seeks refunds for alleged overpayments going back to 2015. Despite the obvious factual problems with AT&T's refund claim, it also suffers from severe legal problems for either of two reasons. First, the applicable statute of limitations (if a claim for refund has any merit at all) is the two-year statute of limitations under 47 USC § 415. If a state law statute of limitations has any relevance to this proceeding, it is Florida's 4-year limitations period on actions to rescind a contract: a 4-year period that began to run no later than July 12, 2011.

- For all of the reasons set forth above, and for all of the reasons set forth herein, the Commission should deny AT&T's complaint.

II. PARTIES AND JURISDICTION

1. DEF admits that AT&T is an ILEC within some parts of the state of Florida, including parts of DEF's service territory. DEF further admits that AT&T provides telecommunications services, and that it has used its power of incumbency (including but not limited to its benefits under the joint use agreement with DEF) throughout the state of Florida to offer numerous other services and compete in additional markets. On information and belief, DEF admits that AT&T is a Georgia limited liability company with its principal place of business at the address stated in the second sentence of paragraph 1. DEF denies any remaining allegations in paragraph 1.

2. DEF admits the allegations in paragraph 2. DEF is an electric utility that serves approximately 1.8 million electric customers in Florida.[1] DEF's service area covers approximately 20,000 square miles in west central Florida, including the densely populated areas around Orlando, as well as the cities of St. Petersburg and Clearwater. DEF owns 65,000 miles of distribution lines, 1.2 million distribution poles, 2,400 miles of transmission lines, and 63,000 transmission poles/structures.[2]

3. DEF admits that AT&T and DEF are parties to a joint use agreement with an effective date of June 1, 1969. DEF further admits that the parties have amended the joint use agreement twice (with both amendments addressing cost sharing obligations for jointly uses poles), once on October 16, 1980 and again on January 2, 1990. DEF denies the allegation that the joint use agreement "renewed after the March 11, 2019 effective date of the Third Report and Order." The notion of a "renewal" presupposes that the parties have a right to terminate the agreement. No

[1] *See* Ex. A at DEF000128 (Declaration of Gilbert Scott Freeburn, Oct. 30, 2020 ("Freeburn Declaration") ¶ 4).

[2] *See id*.

such right exists with respect to existing joint use poles. The agreement only allows for termination with respect to **future** jointly used poles.[3] For this reason, there is no such thing as a "renewal" with respect to existing joint use poles, because neither party has a corresponding right of termination with respect to existing joint use poles.[4] DEF further admits that the parties share approximately 67,500 jointly used poles, with DEF owning approximately 62,300 and AT&T owning approximately 5,200. DEF denies any remaining allegations in paragraph 3.

4. DEF admits that, under the current state of the law (and without waiving its rights to later seek a change in the law), the Commission has jurisdiction over at least some of the issues raised in AT&T's complaint. For reasons set forth more fully at paragraphs 10 and 35 *infra*, the Commission should forbear from exercising its jurisdiction if the Commission believes that the existing state of the law would prohibit it from upholding the rates, terms and conditions in the joint use agreement between DEF and AT&T.

5. DEF admits that the state of Florida has not reverse preempted the Commission's jurisdiction over the rates, terms and conditions for pole attachments, but denies that means the state of Florida lacks jurisdiction over this particular dispute. The admission set forth above is made without prejudice towards DEF's right to seek the intervention of the Florida Public Service Commission, if necessary, to avoid a massive shift of the cost of the jointly used network to DEF's electric customers and/or to avoid being "assigned" the cost of any space on its own poles that has no relevance to the provision of electric service. The dispute between the parties involves at least four "buckets" of substantive issues: (1) the rates AT&T pays for access to DEF's poles; (2) the

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[3] *See* Ex. 1 at DEF000259 (Joint Use Agreement, Article XVI, Section 16.1) ("…and provided, further, that notwithstanding any such termination other applicable provisions of **this Agreement shall remain in full force and effect with respect to all poles jointly uses by the parties at the time of such termination**").

[4] This issue is addressed more fully in response to paragraph 11 *infra*.

rates DEF pays for access to AT&T's poles; (3) AT&T's access rights to DEF's poles; and (4) DEF's access rights to AT&T's poles. The Commission's jurisdiction extends only to the first of these four "buckets" of issues. DEF denies any remaining allegations in paragraph 5.

6. DEF admits that there is no other action between the parties currently pending in the Commission or any court or other government agency based on the same set of facts at issue here. DEF denies that AT&T's complaint does not overlap with any issue in a notice-and-comment rulemaking proceeding that is currently before the Commission. The Commission is currently considering a petition for reconsideration which raises, among other issues, the viability of the very rule upon which a portion of AT&T's complaint is based.[5] The comment cycle in the above-referenced proceeding closed on November 19, 2018 and the Commission has not yet reached a decision.

7. DEF denies the allegations in the first sentence of paragraph 7. As noted in the Enforcement Bureau's August 28, 2020 Letter Ruling, the letter upon which AT&T relies to support the allegation that it "notified Duke Energy Florida in writing of the allegations that form the basis of this Complaint and invited a response within a reasonable period of time" was insufficient to meet the requirements of Rule 1.722(g).[6] With respect to the allegations in the second sentence of paragraph 7, DEF admits that the parties met in-person on two separate occasions but lacks knowledge or information sufficient to form a belief as to whether AT&T's participation was in good faith. Even after the first meeting between the parties, at which numerous issues were discussed and after which various pieces of data were exchanged between the parties,

[5] Petition for Reconsideration of the Coalition of Concerned Utilities at 4-7, WC Docket No. 17-84, WT Docket No. 17-79 (Oct. 15, 2018).

[6] *See* Enforcement Bureau Letter Order at 2 (Aug. 28, 2020) (citing 47 C.F.R. § 1.722(g)).

AT&T still insisted that it was entitled to the one-foot new telecom rate.[7] From DEF's perspective, at least, AT&T's position would have been akin to DEF refusing to consider a deviation from the cost-sharing methodology in the parties' long-standing joint use agreement. DEF, for its part, voiced its willingness to consider alternative cost-sharing structures.[8]

III. THE JOINT USE AGREEMENT PROVIDES NET VAULE TO AT&T THAT FAR EXCEEDS AT&T'S NET PAYMENTS UNDER THE AGREEMENT.

8. DEF denies that AT&T "attaches to DEF's poles on terms and conditions that are materially comparable to those of a telecommunications carrier or a cable operator." AT&T attaches to DEF's poles on terms and conditions that materially advantage AT&T over CATVs and CLECs. The three primary material advantages are as follows: (1) DEF has built and maintained, and continues to build and maintain, poles of sufficient height and strength to accommodate AT&T with *de minimis* make-ready cost to AT&T; (2) DEF has contractually agreed that, even in the event of a termination, AT&T can remain attached to DEF's poles; and (3) AT&T occupies space on DEF poles in a much different way than DEF's CATV and CLEC licensees—*i.e.*, AT&T does not occupy one foot of space like DEF's CATV and CLEC licensees; instead, AT&T is allocated feet of space under the joint use agreement, and as set forth *infra*, DEF's data indicates that AT&T is actually occupying almost all of (and perhaps even more than) its allocated space. AT&T also enjoys other valuable advantages under the joint use agreement, as compared to DEF's CATV and CLEC licensees, including the fact that DEF absorbs the costs of permitting, engineering and inspections in connection with AT&T's attachments.[9]

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[7] *See, e.g.*, Ex. 4 at DEF000269 (Letter from Dianne Miller, AT&T, to Scott Freeburn, DEF (Sep. 5, 2019)).

[8] *See* Ex. B at DEF000157-58 (Declaration of David Hatcher, Oct. 29, 2020 ("Hatcher Declaration") ¶ 17).

[9] *See* Ex. A at DEF000135-36, DEF000137-38 (Freeburn Declaration ¶¶ 18, 24).

DEF also denies that it "continues to charge AT&T pole attachment rates significantly higher than the [new telecom] rates charged to similarly situated telecommunications attachers." Even if the new telecom rate applied here (which it does not given the circumstances), it would need to be applied on a per foot basis to avoid discriminatory effect on CATV licensees occupying a similar amount of space. If the new telecom rate is applied on a per foot basis, the result would be that AT&T pays roughly the same per pole rate as set forth in the joint use agreement.[10] Further, at no point between January 2, 1990 (when the parties last amended the cost sharing methodology) and May 22, 2019 (when AT&T first gave notice that it wanted to discuss a revised cost sharing methodology), did AT&T request a revision to the cost sharing set forth in the January 2, 1990 amendment, or otherwise contend that the cost sharing set forth in the January 2, 1990 amendment was unfair, unreasonable, unlawful or unjust.[11]

As more fully described in the Affidavit of Kenneth P. Metcalfe, CPA, CVA, and as further discussed herein, the annualized net benefit to AT&T of (1) avoided make-ready, permitting and inspections costs, and (2) avoided system replacement costs are as follows:[12]

	Annualized Net Benefit to AT&T	Annualized Net Benefit to AT&T (Per Pole)
Avoided Make-Ready, Permitting and Engineering Costs	$	$
Avoided System Replacement Costs	$	$

DEF denies any remaining allegations in paragraph 8.

[10] *See* chart *infra* ¶ 12.

[11] *See* Ex. A at DEF000136-37 (Freeburn Declaration ¶ 21).

[12] *See* Ex. E at DEF000212-13, DEF000234-236 (Declaration of Kenneth P. Metcalfe, CPA, CVA, Oct. 30, 2020 ("Metcalfe Declaration") ¶¶ 18-22, Ex. E-1, Ex. E-2).

9. DEF admits that the Commission revised its ILEC complaint rule in 2018 to create two rebuttable presumptions applicable to "pole attachment contracts entered into or renewed after [March 11, 2019]": (1) that an ILEC is similarly situated to a CATV and non-ILEC telecom carrier; and (2) that an ILEC may be charged a rate no higher than a rate determined in accordance with the Commission's telecom rate formula.[13] DEF denies that its joint use agreement with AT&T is either a "pole attachment contract" or that it was "entered into or renewed after [March 11, 2019]." The joint use agreement has an effective date of June 1, 1969. The most recent amendment to the agreement (which adopted the cost-sharing provisions currently in-place) had an effective date of January 2, 1990. Neither party has terminated the agreement, and neither party requested renegotiation of the cost sharing provisions in the 1990 Amendment at any time prior to May 22, 2019. DEF denies any remaining allegations in the first sentence of paragraph 9.

With respect to the second sentence in paragraph 9, DEF denies that it "offered no valid basis to rebut that presumption, only positing a handful of possible and undocumented competitive advantages that do not in fact exist." In two separate face-to-face meetings between representatives of the parties, DEF offered numerous valid reasons to retain the existing cost-sharing relationship, including but not limited to, the three specific reasons set forth in paragraph 8 above.[14] They are not "possible" competitive advantages—they are actual, quantifiable competitive advantages. Though DEF had not, at the time of those face-to-face meetings, endeavored to perform any kind of precise economic quantification of those competitive advantages, it made clear to AT&T that it would do so if the parties were unable to reach an

[13] 47 C.F.R. § 1.1413(b).

[14] *See* Ex. B at DEF000153-54 (Hatcher Declaration ¶ 9).

amicable resolution.[15]

AT&T appears to be creating a construct that would justify its refusal to negotiate unless and until an electric utility presents its entire "case in chief" before a complaint is even filed. Good faith negotiation demands more. Good faith negotiation demands a level of vision and intellectual honesty that allows both parties an opportunity to achieve an efficient resolution of a dispute. AT&T's "not until you show me" approach is neither intellectually honest nor efficient. AT&T is free to disagree with DEF's positions, but to suggest that DEF offered "no valid basis to rebut the presumption" isn't just wrong—it is dishonest. DEF denies any remaining allegations in paragraph

A. AT&T Is Not Entitled to the New Telecom Rate Because It Is Not Similarly Situated to DEF's CATV and CLEC Licensees.

10. DEF admits that, under the Commission's rules, similarly situated attaching entities should pay similar pole attachment rates for comparable access, but DEF denies that AT&T is similarly situated to the attaching entities who pay the new telecom rate for attachments to DEF's poles. Among other things: (1) AT&T occupies far more space; (2) AT&T gained access through a built-to-suit network, rather than expensive make-ready; and (3) AT&T enjoys an indefinite contractual right to remain attached to DEF's poles even in the event of a termination (in other words, AT&T does not bear any contractual risk of displacement unlike other attaching entities). DEF further denies that "AT&T is entitled to rate relief in this case."

Under the "rate" formula set forth in Section 10.4 of the 1990 Amendment to the joint use agreement, if each party owned its "objective percentage" of the joint use network, neither party would make a net annual payment to the other.[16] More specifically, **if AT&T owned % of the**

[15] *See id.* at DEF000154 (Hatcher Declaration ¶ 11).

[16] *See* Ex. 1 at DEF000247 (Joint Use Agreement, Article I, Section 1.1.15); Ex. 3 at DEF000266 (1990 Amendment, Section 10.4(b)).

poles in the jointly used network, AT&T's annual "rental" payments to DEF would be $0.[17] This arrangement is further evidenced by the fact that the cost-sharing methodology preceding the 1990 Amendment required that "the party having less than its objective percentage ownership of jointly used poles shall pay an equity settlement to the other party for that calendar year equal to the number of poles it is deficient from its objective percentage ownership…."[18] This arrangement is economically no different than a provision that **requires** each of the parties to buy their way back into an "objective percentage" of joint use pole ownership (to ensure each party is carrying its contractual share of the annual ownership costs of the joint use pole network). Under these circumstances, AT&T could not complain about the need for "rate relief" because its actual concern would be with the share of the joint use network it was contractually required to carry. The Commission should not engage in blue-penciling the joint use agreement here simply because AT&T enjoys the contractual benefit of **not** being required to maintain ownership of % of the jointly used network. Under AT&T's postulation of how the Commission's rules should work, this contractual **benefit** to AT&T (*i.e.*, not being required to buy its way back into parity) would entitle AT&T to "rate relief" when the benefit should, instead, be a basis for upholding the bargain. If AT&T's postulation is correct, then the Commission should forbear from applying its rules in this situation in order to avoid a grossly inequitable result.[19]

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[17] *See* Ex. 3 at DEF000266 (1990 Amendment, Section 10.4(b)); *see also* Ex. A at DEF000129-30 (Freeburn Declaration at ¶ 7).

[18] *See* Ex. 2 at DEF000262-63 (1980 Amendment, Section 10.4); Ex. 1 at DEF000254 (Joint Use Agreement, Article X, Section 10.4).

[19] *See* 47 U.S.C. § 160(a) (The Commission "shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services . . . if the Commission determines that - - (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection

1. The new telecom rate presumption does not apply, but even if it did, it would warrant a rate roughly equivalent to the current rate under the joint use agreement.

11. DEF denies that its joint use agreement with AT&T is a "newly-renewed" agreement as defined in the Third Report and Order. The initial term of the joint use agreement expired on June 1, 1979. Following June 1, 1979, the joint use agreement "shall continue in force thereafter until partially terminated as above provided in this Section by either party at any time upon six (6) months' notice in writing to the other party as aforesaid; and provided further, that notwithstanding any such termination, other applicable provisions of this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."[20] Thus, the joint use agreement at issue here "renewed," if at all, in June 1979, subject to either party's right to terminate (which neither has expressly exercised).[21]

More importantly, though, the joint use agreement makes clear that, even in the event of a termination, the provisions of the agreement "remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."[22] In other words, as it relates to existing joint use poles, the joint use agreement cannot be "renewed" because there is no

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of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest."); *see also*, 47 C.F.R. § 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.").

[20] Ex. 1 at DEF000258-59 (Joint Use Agreement, Article XVI, Section 16.1).

[21] Though neither party has given express notice of termination, DEF reserves all rights with respect to whether AT&T's May 22, 2019 letter triggered a termination of the agreement on or around November 22, 2019 (after which AT&T would be responsible for the cost of all subsequent pole replacements). *See id.* at DEF000255 (Joint Use Agreement, Article XI, Section 11.2).

[22] Ex. 1 at DEF000258-59 (Joint Use Agreement, Article XVI, Section 16.1).

corresponding right of termination. A "renewal" requires some sort of voluntary action by the parties (even if merely acquiescence). In this situation, there is no such voluntary action. Neither party (as pole owner) can decline to renew the agreement with respect to existing joint use poles. Similarly, with respect to existing joint use poles, the joint use agreement cannot be in "evergreen" status because an "evergreen" contract is one that "does not renew, but continues until such time as one party takes affirmative action to terminate it."[23] Without the right of termination, a contract cannot be in "evergreen" status.

To put it more specifically, DEF is stuck with AT&T on roughly 62,000 poles unless and until AT&T decides that it wants to remove its facilities.[24] AT&T, on the other hand, can remove

[23] *Bentley Systems, Inc. et al. v. Intergraph Corp.*, 922 So. 2d 61, 75 (Ala. 2005); *see also Trustees. of the B.A.C. Local 32 Ins. Fund v. Fantin Enters.*, 163 F.3d 965, 968-69 (6th Cir. 1998) (characterizing the following language as an evergreen clause: "It is agreed by both parties that this Agreement shall remain in full force and effect through May 27, 1992 and from year to year thereafter unless written notice of intent to terminate or modify the Agreement be submitted, at least sixty (60) days prior to the expiration date by either party to the other."); *Cibro Petroleum Products, Inc. v. Sohio Alaska Petroleum Co.*, 602 F. Supp. 1520, 1530 n.9 (N.D.N.Y 1985) ("[A]n 'evergreen contract' is the customary trade usage term in the petroleum industry for a contract which continues indefinitely until terminated by either party pursuant to a particular notice period specified in the contract."); *Cent. States v. Sara Lee Bakery Grp., Inc.*, 660 F. Supp. 2d 900, 917 (N.D. Ill. 2009) ("A contract containing an 'evergreen' clause binds an employer to subsequent [collective bargaining agreements] until the contract is properly terminated."); *N. New Eng. Carpenters Pension Plan & Tr. v. H.P. Cummings Constr. Co.*, No. 02-180-P-H, 2003 U.S. Dist. LEXIS 5923, at *4-5 (D. Me. Apr. 10, 2003) ("This agreement included an 'evergreen' clause, which provided that it would continue in effect from year to year after the stated expiration date unless and until notice of intent to terminate was given at least 60 days prior to an expiration date."); *Sherwin Alumina, L.P. v. Aluchem, Inc.*, Civil Action No. C-06-183, C-06-210, 2007 U.S. Dist. LEXIS 21237, at *3-4 (S.D. Tex. Mar. 23, 2007) ("The Supply Agreement is 'evergreen,' meaning that the Agreement continues in effect for subsequent two-year terms unless either party terminates the Agreement in writing twelve months prior to the end of the current contract term."); John C. Muhs, *Contract: Evergreen Clauses: Still a Useful Commercial Contracting Tool, but Not Without Pitfalls*, 97 MI Bar Jnl. 22, 23 (Sept. 2018) ("A typical evergreen clause generally provides that the term of an agreement will automatically renew for subsequent periods of the same length unless either party provides written notice of termination to the other party within some minimum period before the current term expires.").

[24] Even though this provision is reciprocal, it is one of the many provisions in the joint use agreement that disproportionately benefits the party owning less than its "objective percentage" of

its facilities from any or all of those 62,000 poles whenever it chooses and it will no longer be required to pay a "rate" with respect to such poles. Given this, and under the specific joint use agreement at issue here, the Commission's presumptions cannot, as a matter of law and logic, apply to joint use poles in existence as of the effective date of the new rule. Otherwise, this would be tantamount to forced access at regulated rates—a result that all parties and the Commission agree is inconsistent with the scope of the Pole Attachments Act.[25] As it relates to new joint use poles—in other words poles to which AT&T has not yet gained access under the terms of the existing joint use agreement—DEF is willing to allow AT&T to gain access to such poles under rates, terms and conditions identical to DEF's CATV and CLEC attachers, a point which DEF made clear in the July 26, 2019 and October 24, 2019 meetings between the parties.[26] DEF denies any remaining allegations in paragraph 11.

12. DEF denies that AT&T is entitled to a "rate determined in accordance with Commission rule 1.1406(d)(2)" under the law and facts of this case. With respect to the second sentence of paragraph 12, DEF denies that AT&T has properly calculated the one-foot rate applicable to CATV and CLEC licensees, and denies that a "5-year statute of limitations period"

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the joint use network. As set forth above, AT&T owns only 5,000 of the jointly used poles, meaning AT&T is only "stuck" with DEF on 5,000 poles (versus the 62,000 poles on which DEF is "stuck" with AT&T).

[25] *See* 47 U.S.C. § 224(f)(1), (a)(5) (restricting mandatory access to "cable television system[s] or any telecommunications carrier" and expressly excluding ILECs from the definition of "telecommunication carrier" for purposes of section 224); *Implementation of Section 224 of the Act*; *A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5327-28 at ¶ 202 (Apr. 7, 2011) ("*2011 Order*") (noting that "incumbent LECs have no right of access to utilities' poles pursuant to section 224(f)(1)"); Reply Comments of AT&T, Inc. at 20, *Implementation of Section 224 of the Act*; *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket 07-245 (Apr. 22, 2008) (noting that "the right of access to poles under section 224(f)," is something "which ILECs do not enjoy").

[26] *See* Ex. B at DEF000156 (Hatcher Declaration ¶ 15).

has any applicability in this case. If a "statute of limitations" of any sort has applicability in this case (and it does not), then it is the 2-year limitations period set forth in 47 U.S.C. § 415.[27]

With respect to the third sentence of paragraph 12, DEF admits that AT&T has correctly stated the contract rates applicable to AT&T's use of DEF's poles but denies the remaining allegations. DEF's one-foot CATV and CLEC rates, based on a single attachment occupying one-foot of usable space for the 2015-19 billing years, are as follows:[28]

	2015	2016	2017	2018	2019
CATV	$5.14	$5.20	$5.35	$4.99	$4.97
CLEC	$7.74	$7.81	$5.37	$5.00	$4.99

AT&T, though, occupies significantly more space on DEF's poles than the one foot occupied by CATV and CLEC licensees. Under the joint use agreement, AT&T is allocated the lowest feet of space at "sufficient height above the ground to provide the proper vertical clearance."[29] Field data indicates that AT&T actually occupies, on average, at least feet of space on DEF's poles (excluding any portion of the safety space).[30] On average, AT&T's highest attachment on DEF poles is at feet (measured at the pole),[31] and the Commission presumes that the lowest point of attachment is at 18 feet.[32] AT&T is also permitted to use space in excess of its allocated

[27] *See* discussion *infra* ¶ 32.

[28] *See* Ex. D at DEF000173 (Declaration of Marcia Olivier, Oct. 29, 2020 ("Olivier Declaration") ¶ 10).

[29] Ex. 1 at DEF000246 (Joint Use Agreement, Article I, Section 1.1.6).

[30] *See* Ex. A at DEF000130 (Freeburn Declaration ¶ 8).

[31] *See id.* at DEF000132 (Freeburn Declaration ¶ 12).

[32] *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-98, 15 FCC Rcd 6453, 6456 at ¶ 16 (Apr. 3, 2000) ("In the *Third Order*, the Commission relied on *NESC* guidelines and data received in its rulemaking proceedings to affirm the presumption of an average 18 feet for minimum ground clearance…").

space, without additional charge.[33]

Moreover, on poles owned by DEF, AT&T is the cost causer of the safety space (also known, perhaps more appropriately, as the "communication worker safety zone") which is typically 40 inches (3.33 feet).[34] Given this, AT&T is actually or constructively occupying between and feet of space on joint use poles owned by DEF. The one-foot CATV and CLEC rates, if they apply at all, should be applied on a per foot basis in the same manner as the CATV rate would be applied (otherwise, the application of the new telecom rate would discriminate against CATVs).[35] Under this scenario, the "rates" actually paid by AT&T to DEF

[33] Ex. 1 at DEF000246 (Joint Use Agreement, Article I, Section 1.1.6(C)).

[34] DEF does not need the communication workers safety zone without communications attachments on its poles. Given that AT&T was the "first comer" to DEF poles, and given that the Commission has already determined that CATV and CLEC attachers should not bear this cost, this cost must fall to AT&T—to put this cost on DEF's electric ratepayers would be requiring the electric ratepayers to pay for something that is not necessary (or even useful) in the provision of electric service. *See* Ex. A at DEF000133-34 (Freeburn Declaration ¶¶ 15-16); Ex. B at DEF000152-53, DEF000156-57 (Hatcher Declaration ¶¶ 7, 16); *See* Ex. C at DEF000163-64 (Declaration of Steven D. Burlison, P.E., (Oct. 28, 2020) ("Burlison Declaration") ¶¶ 7-10); Ex. D at DEF000175 (Olivier Declaration ¶ 14); Ex. E at DEF000217, DEF000219 (Metcalfe Declaration ¶¶ 31-32, 36); *see also infra* ¶ 25.

[35] Of the approximately 575,292 non-ILEC attachments on DEF's poles, 453,850 of them (79%) are CATV attachments. *See* Ex. A at DEF000128 (Freeburn Declaration ¶ 4). In other words, it is the CATVs—not the CLECs—with whom AT&T is competing in DEF's service area. More importantly, the entire purpose of the Commission's 2011 and 2015 revisions to the telecom rate was to put non-ILEC telecom carriers on equal footing with CATVs. *See 2011 Order*, 26 FCC Rcd at 5305, ¶ 151 (noting that the new telecom rate formula would "generally recover a portion of the pole costs that is equal to the portion of costs recovered in the cable rate" and further noting that "this approach will significantly reduce the marketplace distortions…that rose from disparate rates"); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 30 FCC Rcd 13731, 13738 at ¶ 16 (Nov. 24, 2015) ("[The Commission] take[s] this step…to bring cable and telecom rates for pole attachments into parity at the cable-rate level."). To apply the new telecom rate as proposed by AT&T not only would discriminate against CATVs but also would frustrate the Commission's entire purpose for revising the telecom rate. *See also* AT&T's Pole Attachment Complaint, Ex. E at ATT00050, ATT00053-54, ATT00055, ATT00057-58 (Affidavit of Christian M. Dippon, Ph.D., Aug. 24, 2020, ¶¶ 7, 7 n.2, 15, 18 n.22, 21-22) (noting that AT&T competes with CATVs in the markets covered by the joint use agreement at issue in this case).

between 2015-2019 compare to the new telecom rate (multiplied by the conservatively expressed 6 feet of usable space occupied by AT&T) as follows:[36]

	2015	2016	2017	2018	2019
Contract Rate paid by AT&T (per pole)	$	$	$	$	$
CATV Rate	$	$	$	$	$
CLEC Rate	$	$	$	$	$

Thus, the contract rate paid by AT&T is roughly equivalent to what a CATV or CLEC would have paid for the same burden on the pole. For this reason, DEF denies that the contract rates are "excessively and unreasonably high." For all it appears, they were about right under the Commission's formulas—and this is before even accounting for the massive net benefits AT&T enjoys under the joint use agreement.[37] DEF denies any remaining allegations in paragraph 12.

2. The joint use agreement provides AT&T significant material advantages over DEF's CATV and CLEC licensees.

13. DEF admits that the "new telecom rate presumption is rebuttable" but denies the allegation that DEF "cannot meet its burden here." The clear language of the joint use agreement itself rebuts the presumption. But in addition to the clear language of the joint use agreement, the actual data from the field, the testimony of DEF's witnesses, and the economic evaluation submitted by Mr. Kenneth P. Metcalfe, CPA, CVA rebut the presumption in this case. DEF further admits that, with respect to claims following the March 11, 2019 effective date of Rule 1.1413(b), the revised rule requires "clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the

[36] The CATV and CLEC rate calculations use the more conservative feet of space, rather than the feet of space. For 2015 and 2016, the "CLEC Rate" values stated are based on the applicable CATV rate because the one-foot CLEC rate was higher than the one-foot CATV rate in those years. *See* first chart in ¶ 12 above. The Commission's 2015 revisions to the telecom rate formula did not take effect until March 2016.

[37] *See* Ex. E at DEF000234 (Metcalfe Declaration, Ex. E-1).

incumbent local exchange carrier over other telecommunications carriers or cable television systems..." The evidence submitted by DEF herewith satisfies this burden.[38] Moreover, since it first asserted jurisdiction over the rates, terms and conditions for ILEC attachments on electric utility poles, the Commission has consistently found that the joint use agreement at issue provided net benefits to the ILEC complainant.[39]

14. DEF denies the allegations in the first sentence of paragraph 14. AT&T cites the 2011 Order for the proposition that "the electric utility must weigh and account for all of the different rights *and responsibilities* placed on the ILEC as compared to its competitors" (emphasis in original) and specifically quotes paragraph 216 n.654 of the 2011 Order as follows: "A failure to weigh, and account for, the different rights and responsibilities in joint use agreement[s] could lead to marketplace distortions." DEF completely agrees that "[a] failure to weigh, and account for, the different rights and responsibilities in joint use agreement[s] could lead to marketplace distortions." The Commission's point in this statement, which immediately followed a lengthy

[38] AT&T's complaint glosses over the fact that the new presumptions and new burden of proof apply only with respect to AT&T's claim for post-March 11, 2019 relief. No such presumptions exist for the period prior to March 11, 2019, and the burden of proof for that period lies with AT&T. *See* 47 C.F.R. § 1.1424 (2011) ("In complaint proceedings where an incumbent local exchange carrier (or an association of incumbent local exchange carriers) claims that it is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system for purposes of obtaining comparable rates, terms or conditions, **the incumbent local exchange carrier shall bear the burden of demonstrating that it is similarly situated** by reference to any relevant evidence, including pole attachment agreements.") (emphasis added).

[39] *See, e.g.*, *In the Matter of BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Memorandum Opinion and Order, Docket No. 19-187, 35 FCC Rcd 5321, 5329 at ¶ 14 (May 20, 2020) ("*AT&T v. FPL Decision*") (finding that ILEC "receives significant benefits under the [joint use agreement] not afforded competitive LECs and cable attachers"); *In the Matter of Verizon Florida, LLC v. Florida Power and Light Company*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1150 at ¶ 26 (Feb. 11, 2015) (noting that ILEC "received benefits under the [joint use agreement] that were not available to other attachers").

acknowledgement of the many benefits to ILECs under joint use agreements, was that simply giving ILECs the same one-foot rate paid by CATVs and CLECs would give ILECs an unfair advantage over their CATV and CLEC competitors.[40] For this reason, the Commission stated in the very next sentence following the sentence quoted by AT&T: "**We therefore reject arguments that rates for pole attachments by incumbent LECs should always be identical to those of telecommunications carriers or cable operators**."[41]

DEF denies the allegation in the second sentence of paragraph 14 that "an ILEC that bears the cost to perform a service itself (e.g., a pole inspection) is not advantaged relative to its competitor that pays the utility pole owner to perform the same service." This allegation is generically incorrect and specifically incorrect in the particular relationship at issue in this case. First, it is generically incorrect because it incorrectly assumes that CATVs and CLECs are not incurring similar internal costs for things like pre-construction inspections, post-construction inspections and quality control. CATVs and CLECs **should** be performing these tasks on their own (1) before submitting permit applications to DEF and (2) after completion of construction. The inspections performed by DEF during the CATV and CLEC attachment process are *in addition to* the inspections performed by the CATVs and CLECs themselves and are performed because CATVs and CLECs are not afforded the same deference as ILECs (given their historical, but fading, position as joint custodians of shared infrastructure). Second, and more importantly, it is specifically incorrect in the context of the relationship between DEF and AT&T because, when AT&T submits a permit application, DEF performs the same pre-construction and post-

[40] *2011 Order*, 26 FCC Rcd 5240, 5335 at ¶ 216 n.654.

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

construction inspections as it performs for CATV and CLEC permit applications.[42] The difference is that AT&T (unlike DEF's CATV and CLEC licensees) does not get charged for this work.[43] As explained in the Affidavit of Mr. Kenneth P. Metcalfe, CPA, CVA, AT&T has avoided nearly in permitting, inspection and engineering costs that a CATV or CLEC licensee would pay for access to DEF's poles.[44]

With respect to the third and fourth sentences of paragraph 14, DEF admits that the joint use agreement affords AT&T certain benefits and imposes certain burdens that differ from those in a CATV or CLEC license agreement. But the actual scope of those benefits and burdens is directly tied to pole ownership. As one party's pole ownership increases, the burdens on that party under the joint use agreement increase, and the benefits to that party under the joint use agreement decrease. Correspondingly, as a party's pole ownership decreases, the burdens on that party decrease and the benefits to that party increase. Here, where AT&T enjoys those benefits on 62,000 poles and DEF enjoys them only on 5,000 poles, DEF is 57,000 poles "in the hole" on the reciprocal burdens and benefits. The reciprocal benefits—benefits AT&T seems to acknowledge—disproportionately benefit AT&T given the parties' relative pole ownership. And this is where the cost sharing provisions of the joint use agreement step in to level the field. If the pole ownership burden were in equilibrium with the "objective percentage" of ownership set forth in the joint use agreement,[45] then the net annual rental payment by AT&T would be $0. DEF

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[42] *See* Ex. A at DEF000135-36, DEF000137-38 (Freeburn Declaration ¶¶ 18, 24).

[43] *See id*. at DEF000135-36 (Freeburn Declaration ¶ 18).

[44] *See* Ex. E at DEF000240 (Metcalfe Declaration, Ex. E-3.2). This "nets out" to an annual benefit to AT&T in the amount of $, or $ on an annual per pole basis. *See id.* at DEF000215, DEF000240 (Metcalfe Declaration ¶ 27, Ex. E-3.2).

[45] *See* Ex. 1 at DEF000247 (Joint Use Agreement, Article I, Section 1.1.15); Ex. 3 at DEF000266 (1990 Amendment, Section 10.4(b)).

denies any remaining allegations in paragraph 14.

15. To the extent the first sentence of paragraph 15 alleges that DEF rejected the suggestion that AT&T should pay a rate identical to the one-foot rate paid by DEF's CATV and CLEC licensees, DEF admits the allegations. As set forth above, AT&T occupies significantly more space on DEF poles than CATV and CLEC licensees.[46] DEF denies the allegation in the first sentence that it merely "theorized" at the July 26, 2019 and October 24, 2019 meetings that AT&T enjoys significant net benefits under the joint use agreement. At these meetings, DEF specifically discussed at least three issues of consequence relating to the benefits AT&T enjoys under the joint use agreement as compared to CATV and CLEC licensees:

- AT&T's allocated space under the joint use agreement (feet per Section 1.1.6(B) of the joint use agreement) and the amount of space it actually occupies on DEF's poles (feet), as compared to the one-foot of space allocated to CATV and CLEC licensees;
- The make-ready costs AT&T avoided through DEF's construction of a built-to-suit network of poles with sufficient vertical and loading capacity to accommodate AT&T's attachments (40 foot Class 5 poles, in most instances, per Section 1.1.5(A) of the joint use agreement), as compared to the CATV and CLEC licensees who take the pole as they find it; and
- The perpetual license enjoyed by AT&T even in the event of a termination (per Section 16.1 of the joint use agreement), as compared with the removal-upon-termination provisions in CATV and CLEC license agreements.[47]

With respect to the second sentence of paragraph 15, DEF admits that it did not endeavor to specifically quantify the value of these significant benefits to AT&T during the discussions between the parties. As set forth in DEF's September 10, 2020 letter to AT&T:

> Though we never provided AT&T with any sort of precise quantification of those net benefits, we do not think such an undertaking is either necessary for intellectually honest settlement discussions or an efficient use of resources outside of a litigated dispute. If AT&T required, as a condition to settlement discussions, visibility into the complete financial valuation

[46] *See supra* ¶ 12.

[47] *See* Ex. B at DEF000158-59 (Hatcher Declaration ¶ 19).

> Duke Energy would intend to offer in a litigated dispute, then there was minimal hope for fruitful discussions.[48]

DEF specifically denies that it "never identified relevant language in the joint use agreement or its operative license agreements" regarding the immense net benefits to AT&T under the joint use agreement. As set forth above, DEF specifically identified (by substance, if not by section) the relevant provisions of the joint use agreement and how similar subjects were addressed in DEF's CATV and CLEC license agreements.[49]

DEF denies the allegations in the third sentence of paragraph 15 that the benefits set forth above "are non-existent or not competitive benefits at all." DEF understands that this is AT&T's position, but as set forth herein and as quantified literally by feet and dollars, AT&T is just plain wrong. DEF further denies that any of the net benefits discussed by the parties at the July 26, 2019 and October 24, 2019 meetings have been "previously rejected by the Commission." This allegation makes no sense for several reasons. First, existing Commission authority supports, rather than undermines, accounting for the space occupied by an attachment.[50] The space presumptions, after all, are presumptions—and rebuttable presumptions at that. Second, the Commission has not yet addressed how the avoided make-ready costs or perpetual license

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[48] Ex. 5 at DEF000272 (Letter from Scott Freeburn to Dianne Miller, AT&T (Sep. 10, 2020)).

[49] *See* Ex. B at DEF000153-54 (Hatcher Declaration ¶¶ 9-10).

[50] *See, e.g.*, *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-151, 13 FCC Rcd 6777, 6799 at ¶¶ 41-42 (Feb. 6, 1998) ("*1998 Report and Order*") (acknowledging the differences between wireline and wireless attachments and stating that "[w]hen an attachment requires more than the presumptive one-foot of usable space on the pole, or otherwise imposes unusual costs on a pole owner, the one-foot presumption can be rebutted"); *2011 Order*, 26 FCC Rcd at 5306, ¶ 153 (reaffirming that, for purposes of calculating annual rental, pole owners can rebut the one-foot presumption by demonstrating that a wireless attachment occupies more than one foot of space on a pole).

provisions in a joint use relationship impact the assessment of just and reasonable rates—nor could it categorically "reject" either given that these are actual, quantifiable benefits that are specific to a particular relationship. Here the testimony of Mr. Kenneth P. Metcalfe demonstrates the following:[51]

- The annualized per pole net benefit to AT&T of avoided make-ready costs (not including the avoided permitting, engineering and inspection costs) is $.
- The annualized per pole net benefit to AT&T of the perpetual license (not including contingency costs) is $

What AT&T really means in paragraph 15 (and as corroborated by the allegations in paragraphs 16-20) is that it was not willing to earnestly consider anything DEF said during the July 26 and October 24, 2019 meetings. This is the substantive and functional equivalent of DEF simply rejecting AT&T's request to meet, which Rule 1.722(g) deems to be "an unreasonable practice under the Act."[52] DEF denies any remaining allegations in paragraph 15.

16. DEF admits the allegations in the first sentence of paragraph 16 with one exception: DEF explained that it installed taller poles than necessary for electric service specifically to accommodate AT&T—not just "communications attachers" generally. **The reason DEF and its predecessors-in-name built a network of taller and stronger poles in its overlapping service area with AT&T was because of the joint use agreement**.[53] The joint use agreement explicitly

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[51] *See* Ex. E at DEF000212-13, DEF000216, DEF000234, DEF000239 (Metcalfe Declaration ¶¶ 20, 30, Ex. E-1, Ex. E-3.1).

[52] 47 C.F.R. § 1.722(g).

[53] *See* Ex. C at DEF000162-63, DEF000164-65 (Burlison Declaration ¶¶ 5, 11-13); *see also* Ex. 1 at DEF000246 (Joint Use Agreement, Article I, Section 1.1.5). The fact that DEF built a network of poles that was taller and stronger than necessary, specifically for AT&T's benefit, is not credibly in dispute. AT&T offers no facts to the contrary and acknowledges that "in the early days of joint use [*i.e.*, when DEF's network was initially constructed]…AT&T was the only consistent communications attacher on utility poles at that time." AT&T's Pole Attachment Complaint, Ex. C at ATT00041 (Affidavit of Mark Peters, Aug. 24, 2020, ¶ 21).

identified a 40-foot Class 5 pole as the "normal joint use pole" along "public streets, alleys, or road" in order to accommodate AT&T's attachments and the required separation space (a/k/a the "communication worker safety zone").[54] DEF, in its overlapping service area with AT&T, has always installed poles taller and stronger than necessary to meet only DEF's service needs.[55] DEF would not have installed taller and stronger poles but for the joint use agreement (and its infrastructure cost sharing provisions), because DEF could not have justified the additional investment without the joint use agreement (and its infrastructure cost sharing provisions).[56] AT&T did not just happen upon a network of poles in DEF's territory that accommodated its service needs. DEF specifically constructed its network, and has continued to construct and maintain its network, in a way that accommodates AT&T's needs.[57]

DEF denies the allegations in the second and third sentences of paragraph 16 because DEF does not build capacity in its network for CATV and CLEC licensees. This built-to-suit privilege is uniquely enjoyed by AT&T in the parties' overlapping service areas. CATV and CLEC

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[54] *See* Ex. 1 at DEF000246 (Joint Use Agreement, Article I, Section 1.1.5).

[55] *See* Ex. C at DEF000162-63, DEF000164-65 (Burlison Declaration ¶¶ 5, 11-13).

[56] *See* Ex. B at DEF000152 (Hatcher Declaration ¶ 6).

[57] To this point, AT&T cites the *AT&T v. FPL Decision* for the proposition that "FPL did not build its poles just to accommodate AT&T." *AT&T v. FPL Decision*, 35 FCC Rcd at 5330, ¶ 15. So what? DEF did. And whether FPL built taller and stronger poles to accommodate AT&T is of no consequence to the outcome in this case where the evidence is undisputed that DEF built, and has continued to build and maintain, a taller and stronger network of poles than it would have built in the absence of the joint use agreement (62,000 of them). A case such as this requires the finder or fact to ascertain what the parties would have done in the absence of the joint use agreement. On this issue, DEF's testimony is unequivocal. *See* Ex. A at DEF000131-32 (Freeburn Declaration ¶¶ 10-11); Ex. B at DEF000152 (Hatcher Declaration ¶ 6); Ex. C at DEF000164-65 (Burlison Declaration ¶ 12-13). DEF expects that AT&T would concede that AT&T would not have built and maintained the taller/stronger poles occupied by DEF (approximately 5,000 of them) but for the joint use agreement. AT&T did not need 40-foot Class 5 poles to provide its service, much as DEF did not need 40-foot Class 5 poles (and currently does not need AT&T's allocated space or the communication worker safety zone) in order to provide electric service. This issue is not even close.

licensees take the pole as they find it. And, as NCTA's recent Petition for Declaratory Ruling suggests, CATVs and CLECs are often required to pay for pole replacements—even to accommodate an attachment that presumptively occupies only one foot.[58]

17. DEF denies the allegations in the first and second sentences of paragraph 17. To the extent the Duke Energy and AT&T representatives discussed any "excusal" of permitting requirements, this discussion related to relationships between AT&T and DEF's affiliates (such as Duke Energy Progress, LLC).[59] DEF requires permits for new loads on its pole lines for a variety of reasons, not the least of which are DEF's Florida storm hardening commitments.[60] If the parties discussed permitting in Florida at all, it would have been to remind AT&T that it does not pay for permitting as distinguished from DEF's CATV and CLEC licensees; instead, DEF bears these costs (including pre-construction inspection, engineering and post-construction inspection).[61]

DEF also denies the allegations in the third sentence of paragraph 17. Like the discussion

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[58] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Petition for Expedited Declaratory Ruling at 9, WC Docket 17-84 (Jul. 16, 2020) (claiming that broadband deployment "frequently triggers the need for replacement poles" and that new attachers are generally required to bear the cost of pole replacements); *see also In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Initial Comments of Charter Communications, Inc. at 3, WC Docket 17-84 (Sep. 2, 2020) (stating that it is a "common utility practice" to require new attachers to bear the cost of make-ready pole replacements); *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Initial Comments of Crown Castle Fiber LLC at 8, WC Docket 17-84 (Sep. 2, 2020) (claiming that "utilities routinely insist that a new attacher pay the full cost to replace an old pole") (internal quotation marks omitted). The position taken by NCTA (whose members attach to electric distribution poles via pole license agreements rather than joint use agreements) **underscores** the value of joint use agreements by demonstrating the costly and time-consuming nature of make-ready pole replacements. This is precisely why joint use agreements are superior infrastructure solutions as compared to pole license agreements—they eliminate the very cost/time that NCTA alleges to be a barrier to deployment. *See also* Ex. B at DEF000158-59 (Hatcher Declaration ¶ 19).

[59] *See* Ex. A at DEF000137-38 (Freeburn Declaration ¶ 24).

[60] *See id*. at DEF000135 (Freeburn Declaration ¶ 18).

[61] *See id*. at DEF000137-38 (Freeburn Declaration ¶ 24), *see also supra* ¶ 14.

about permitting referenced above, any discussion about payment of scheduled costs (sometimes called tabulated costs) would have been in reference to relationships between AT&T and DEF's affiliates (such as Duke Energy Progress, LLC).[62] DEF also denies the allegations in the fourth sentence of paragraph 17. Whatever inspection, engineering and make-ready work AT&T performs on its own does not reduce the amount of inspection, engineering and make-ready work performed by DEF. As AT&T's own complaint alleges (and as DEF acknowledges), AT&T is required to submit a permit when making a new attachment. DEF performs the inspections and engineering the same as it would for a CATV or CLEC applying for a new attachment. The differences are that: (1) AT&T does not pay for the inspections or engineering work; and (2) the new attachment does not alter the per pole rate paid by AT&T.

With respect to the fourth sentence of paragraph 17, DEF denies that AT&T completes any make-ready work that DEF would otherwise perform (such as rearrangements within the electric supply space or pole replacements). On this point, DEF just has no idea what AT&T is talking about. If electric supply space make-ready or pole replacements within energized lines are required to accommodate AT&T's modification or expansion of facilities, DEF performs this work.[63] With respect to the fifth sentence of paragraph 17, DEF lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding AT&T's cost for "make-ready, engineering, and survey work," but these internal costs incurred by AT&T are irrelevant. The costs that matter are the costs that AT&T is required (or not required) to pay to DEF as compared to what DEF's CATV and CLEC licensees are required to pay.

[62] *See* Ex. A at DEF000138 (Freeburn Declaration ¶ 25).

[63] *See id*. at DEF000138 (Freeburn Declaration ¶ 26).

18. DEF admits the allegations in the first sentence of paragraph 18 and admits that "AT&T has historically defended the allocation of space in the joint use agreement, which places AT&T at the bottom of the communications space on a pole." DEF denies the allegations in the second sentence of paragraph 18. AT&T's service affiliate, in comments filed in connection with CTIA's petition for declaratory ruling, was not addressing wireline attachments at all (the subject of the joint use agreement). AT&T's service affiliate, and the CTIA petition more broadly, was addressing ancillary wire**less** equipment in the so-called "unusable" space—things like equipment boxes, meter bases and radios.[64] In fact, the specific portion of the declaratory ruling cited by AT&T quotes AT&T's service affiliate as saying: "The Commission has already found that wireless attachments to the bottom portions of poles can be safe and feasible, and thus has emphasized that inadequately justified blanket prohibitions against attachments are not permitted, even for portions of the pole that a utility deems 'unusable.'"[65] This had nothing to do with AT&T conceding its allocated space under the joint use agreement at issue in this case, or any joint use agreement for that matter. Regardless, this is a red herring because AT&T is attached in the lowermost position of the communications space, and it is occupying, on average, almost all of (or perhaps more than) its allocated space.

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[64] *See generally*, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Initial Comments of AT&T at 27, WC Docket No. 17-84 (October 29, 2019); *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, CTIA's Petition for Declaratory Ruling, WT Docket No. 17-79, WC Docket No. 17-84 (Sep. 6, 2019).

[65] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Initial Comments of AT&T at 27, WC Docket No. 17-84 (October 29, 2019) (citing *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705, 7773 at ¶ 134 (Aug. 3, 2018) (hereinafter referred to as the "2018 Order")).

19. The thrust of paragraph 19 is an effort to explain away the benefits of occupying the lowest position on DEF's poles. This is a specious claim given that: (a) AT&T obtained the right to occupy the lowest position on the pole in the 1969 joint use agreement, (b) AT&T has never sought to renegotiate this provision (including but not limited to when the agreement was amended in 1980 and 1990), and (c) AT&T has never suggested it should raise its wireline facilities on DEF's poles in order to make room for third-party wireline facilities beneath.[66] Though there may, indeed, be certain costs and risks attendant to the lowest position on the pole, it is safe to assume that those costs and risks are outweighed by the benefits of occupying the lowest position on the pole, including ease of access (no need to work through the lines of other attaching entities) and the ability to sag cable (which provides greater operational flexibility).[67] To be sure, AT&T has not attempted to quantify either the costs or benefits of its preferred pole position, and DEF does not intend to quantify those costs or benefits, either. So, to the extent AT&T was seeking some sort of "credit" against its other (and immense) per pole net benefits under the joint use agreement, there is nothing to offset.

20. With respect to the first, second and third sentences of paragraph 20, DEF admits that AT&T benefits when DEF replaces AT&T poles following an emergency and further admits that AT&T pays for these pole replacements. DEF denies that "there is no financial benefit to AT&T." As DEF explained during the July 26 and October 24, 2019 meetings, the benefit to AT&T is that AT&T is able to get this work completed in a timely manner without the cost of carrying crews, equipment, inventory, dispatchers, engineers and all of the other things necessary

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[66] *See* Ex. 1 at DEF000246 (Joint Use Agreement, Article I, Section 1.1.6) (allocating the lowermost feet of usable space on joint use poles to AT&T); *see also* Ex. A at DEF000134-35 (Freeburn Declaration ¶ 17).

[67] *See* Ex. A at DEF000134-35 (Freeburn Declaration ¶ 17); Ex. C at DEF000166 (Burlison Declaration ¶ 17).

to replacing a pole in the middle of the night at a moment's notice.[68] AT&T postulates that this benefit is really a disadvantage because its competitors are not required to own any poles at all. This postulation misses the point for at least two reasons. First, AT&T is not required to own poles. If it were required to own poles, it would own % of the jointly used network (AT&T's "objective percentage" in the joint use agreement), no net rentals would exchange hands, and there would not be a complaint proceeding. It is precisely because AT&T is **not** required to own poles that the parties are here in the first place. Second, the financial benefit of AT&T being able to rely on DEF crews, equipment, etc. in times of need supports, rather than undermines, the consideration within the joint use agreement. DEF denies the allegations in the fourth sentence of paragraph 20 for the reasons set forth above.

21. DEF denies the allegations in paragraph 21 and specifically rejects AT&T's interpretation of the 2018 Order. The Commission identified the pre-existing telecom rate as a "hard cap" only with respect to "contracts entered into or renewed after the effective date of [Rule 1.1413]."[69] As set forth above in paragraph 11, the joint use agreement at issue here was neither "entered into" nor "renewed" after March 11, 2019. The joint use agreement was "entered into" in 1969, and the cost-sharing methodology was last amended in 1990. It continues in effect today. Even if the joint use agreement could subsequently be "renewed" after March 11, 2019, this "renewal" could not apply to existing joint use poles because neither party has the right to terminate the agreement with respect to joint use poles existing at the time of termination. Without a corresponding right to termination, there can be no "renewal." Similarly, without a right of termination, the joint use agreement cannot be in "evergreen" status. The Commission implicitly

[68] *See* Ex. A at DEF000138-39 (Freeburn Declaration ¶ 27).

[69] 47 C.F.R. § 1.1413(b); *see also 2018 Order*, 33 FCC Rcd at 7770-71, ¶¶ 127-29.

recognized the necessity of voluntary acquiescence to the "renewal" when it stated: "We recognize that this divergence from past practice will impact privately negotiated agreements and so the presumption will apply only, as it relates to existing contracts, upon renewal of those agreements."[70]

To be clear, DEF would never have negotiated an agreement like its joint use agreement with AT&T if the most it could recover was the one-foot CATV or telecom rate (old or new).[71] And even more to the point, DEF would never have agreed to give AT&T the right to remain attached to DEF's poles even in the event of a termination.[72] Perhaps this is why the Commission's new ILEC complaint rule is intended to apply to "newly negotiated," "new" or "renewed" agreements—there has to be some sort of voluntary acquiescence by both parties. With respect to existing joint use poles, there is no such acquiescence.

Further, in outlining the protocol for implementing its new rule, the Commission clearly identified two distinct temporal categories of joint use agreements and, by implication, an important third category. First, paragraph 127 of the 2018 Order states: "We extend this rebuttable presumption to newly-negotiated and newly-renewed joint use agreements."[73] And it was with reference to this presumption that the Commission stated: "if the presumption we adopt today is rebutted, the pre-2011 Pole Attachment Order telecommunications carrier rate is the maximum rate that the utility and the incumbent LEC may negotiate."[74] Second, the Commission specifically carved-out a different—and more flexible—approach for "agreements that materially advantage

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[70] *2018 Order*, 33 FCC at 7770, ¶ 127.

[71] *See* Ex. A at DEF000136 (Freeburn Declaration ¶ 19-20).

[72] *See id.* at DEF000136 (Freeburn Declaration ¶ 19-20).

[73] *2018 Order*, 33 FCC Rcd at 7770, ¶ 127.

[74] *Id.* at 7771, ¶ 129.

an incumbent LEC and which were entered into after the 2011 Order and before the effective date of the Order we release today."[75] For this category of agreements, the pre-existing telecom rate serves only as a "reference point"—not a "hard cap."[76] The third temporal category of agreements, by implication, are those agreements "entered into" or "renewed" prior to the effective date of the 2011 Order, which would include the joint use agreement at issue here. And if the rules are progressively more flexible as the temporal category becomes more distant in time, then it stands to reason that an even more flexible approach (*i.e.,* even more flexible than the old telecom rate serving as a mere reference point) would apply to this oldest category of agreements. Further, even if the pre-existing telecom rate serves as a "hard cap" in this case, the pre-existing telecom rate is not a fixed number—it is the product of a formula that depends on a number of variables, as explained in paragraph 22 below.

22. DEF denies the allegations in paragraph 22. The pre-existing telecom rate formula validates, rather than undermines, the justness and reasonableness of the cost sharing arrangement in the 1990 amendment to the joint use agreement. Even assuming AT&T occupies only feet of usable space (as set forth in paragraph 12 above), and utilizing for the average number of attaching entities (which is the actual average on DEF poles to which AT&T is attached),[77] then the pre-existing telecom rate applicable to AT&T under the Commission's formula would yield the following results:[78]

	2015	**2016**	**2017**	**2018**	**2019**
Pre-Existing Telecom Rate	$	$	$	$	

[75] *Id.* at 7770, ¶ 127 n. 475.

[76] *Id.*

[77] *See* Ex. A at DEF000139 (Freeburn Declaration ¶ 28).

[78] *See* Ex. D at DEF000175 (Olivier Declaration ¶ 13).

Contract Rate Paid by AT&T	$	$	$	$	$

In each year above (with the exception of 2017), the pre-existing telecom rate was within $ of the contract rate for AT&T's use of DEF poles. The fundamental flaw in all of AT&T's calculations within its complaint is the presumption that AT&T occupies (and should be allocated) only one foot of pole space on DEF's poles. As set forth above, this presumption is wrong both under the joint use agreement (which allocates feet of space to AT&T) and the field data (which indicates AT&T is actually occupying at least feet of space). And it fails entirely to address the allocation of the safety space which, as set forth above, would not have been built into DEF's joint use poles but for the joint use agreement with AT&T. Moreover, simply comparing the per pole rates above glosses over the enormous offset paid by DEF to AT&T on a per pole basis. Even accepting as accurate the data submitted by AT&T, DEF has paid AT&T a per pole rate that exceeds, on average, % of AT&T's actual annual pole cost as calculated under the Commission's formula (and in excess of % in the most recent year). The chart below identifies the per pole rate paid by DEF to AT&T each year, along with AT&T's actual corresponding annual pole cost:

	2015	**2016**	**2017**	**2018**	**2019**
Contract Rate paid by DEF	$	$	$	$	$
AT&T Annual Pole Cost	$	$	$	$	$
Rate as % of AT&T Annual Pole Cost				%	%

B. The Cost-Sharing Arrangement in the Existing Joint Use Agreement Is Just and Reasonable and Has Been Just and Reasonable Since Long Before 2011.

1. AT&T never challenged or otherwise questioned the cost-sharing methodology in the 1990 Amendment until May 22, 2019.

23. DEF admits that AT&T could have filed a pole attachment complaint as early as July 12, 2011 if it believed that its rates under the joint use agreement were unjust or unreasonable, but DEF denies that the cost-sharing arrangement within the existing joint use agreement yields unjust or unreasonable rates. Perhaps more importantly, **for all it appears, AT&T itself viewed the joint use agreement as just and reasonable until very recently**. Despite its rights under the law since July 12, 2011, AT&T first challenged the cost sharing methodology in the existing joint use agreement on May 22, 2019.[79] Further, AT&T expressly affirmed the correctness of both the rate methodology and the rate itself each year through 2018. Per Section 11.1 of the joint use agreement (as amended in 1990), DEF sends the rate calculations and methodology to AT&T each year for "review and acceptance."[80] After review and approval, AT&T sent its "Form 6407" to DEF indicating its agreement with the calculations.[81] Then, after receiving the "Form 6407" from AT&T, DEF sent the invoice for annual rentals. DEF denies any remaining allegations in paragraph 23 for all of the reasons set forth above and all of the reasons set forth below in paragraphs 24-30.

24. DEF denies the allegations in paragraph 24. First, as set forth above, the contract rates paid by AT&T since 2015 are roughly equivalent to the rate a CATV or CLEC licensee

[79] *See* Ex. A at DEF000136-37 (Freeburn Declaration ¶¶ 21-22).

[80] *See* Ex. 3 at DEF000266 (1990 Amendment, Section 11.1).

[81] *See id*. at DEF000144-48 (Freeburn Declaration, Ex. A-2).

occupying the same amount of space would have paid under the Commission's cable and new telecom rate formulas.[82] Second, as also set forth above, the contract rates paid by AT&T since 2015 are within $ of the rates yielded by the Commission's pre-existing telecom rate formula.[83] In short, **the Commission's formulas affirm rather than undermine the justness and reasonableness of the contract rates under the joint use agreement**.

25. DEF denies that the cost-sharing arrangement in the joint use agreement "disproportionately divide[s] annual pole cost between AT&T and Duke Energy Florida." Rather, the rates paid by each party are based on DEF's pole cost. In other words, the rate DEF pays to AT&T is based on DEF's pole cost—not AT&T's pole cost. In every year since 2015, DEF's pole cost has been appreciably higher than AT&T's pole cost, which has led to overpayments by DEF (as set forth above in paragraph 22). That said, the merits of basing each party's rate on one party's pole cost are that, if each party owns its "objective percentage" of joint use poles (defined in the joint use agreement to mean % for AT&T and % for DEF), then $0 changes hands in net annual rental. The original premise of the joint use agreement was that AT&T and DEF could both save money and right-of-way clutter by sharing a single network of poles, rather than each party constructing a redundant network.[84] For this reason, it makes sense that the parties would evenly divide those network costs that inured equally to the parties' benefit—such as the underground portion of the pole necessary for vertical support, the above ground portion of the pole up to the point of minimum grade clearance, and the safety space—while allocating pro rata

[82] *See supra* ¶ 12.

[83] *See infra* ¶ 22.

[84] *See* Ex. A at DEF000129 (Freeburn Declaration ¶ 6).

the portions of the network that did not. This is, in essence, what the "objective percentage" in the joint use agreement is designed to reflect.[85]

For this reason, DEF denies that it is "occupying far more space on a pole" than AT&T. The space "occupancy" levels were carefully balanced between the parties when they negotiated their agreement in 1969 (and again in the rate-related amendments in 1980 and 1990). Moreover, on DEF-owned poles, the parties occupy roughly the same amount of space. Even setting aside the appropriate allocations for unusable space, AT&T (as set forth above) occupies and/or should be allocated at least feet of space on DEF poles.

DEF also denies that it cannot "reserve" space on its poles for AT&T. This certainly has not been AT&T's historical position nor is it consistent with the language of the joint use agreement which, in the very section of the contract describing the parties' space allocations, refers to the allocated space as "**reserved** for the other party."[86] AT&T further argues that it "does not

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[85] *See* Ex. E at DEF000217 (Metcalfe Declaration ¶ 31 n.46).

[86] Ex. 1 at DEF000246 (Joint Use Agreement, Article I, Section 1.1.6 ("Standard space on a joint use pole for the use of each party shall not be less than that required by the CODE and **shall be for the exclusive use of the parties** except as set forth in the CODE whereby certain attachments of one party may be made **in the space reserved for the other party**.") (emphasis added). Though the data regarding AT&T's actual utilization of its reserved space renders the point moot, AT&T appears to argue in footnote 62 that the contractual reservation of space set forth in the joint use agreement is somehow contrary to the law. AT&T misunderstands the law and its purpose, as it relates to the reservation of space. The portion of the Local Competition Order cited by AT&T related specifically to an ILEC's reservation of space for itself on its own poles. The preceding paragraph in the same order is the portion that actually addresses an electric utility's reservation of space on its poles. There, the Commission stated: "We will permit an electric utility to reserve space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket No. 96-98, CC Docket No. 95-185, 11 FCC Rcd 15499, 16078 at ¶ 1169 (Aug. 8, 1996) ("*Local Competition Order*"). The Commission went on to specifically distinguish this principle from the reservation of space rules relating to ILEC pole owners. The Commission stated, with respect to ILEC poles owner, that "we believe the statute requires a different result" given the ILEC's anti-competitive

want, use or require feet of space for its current or future attachments."[87] This is just plain wrong, at least with respect to AT&T's **existing** attachments.[88] AT&T submitted no data at all to support this assertion (because no such data exists). Moreover, the actual data from the field demonstrates that AT&T actually occupies at least feet of its reserved space.[89]

2. If the Commission unwinds the cost-sharing arrangement in the joint use agreement, then the safety space on joint use poles owned by DEF should be assigned to AT&T.

DEF also specifically denies that it "occupies 10.5 feet of space" on its own poles "under the FCC's rate assumptions." This allegation is premised on the false and unlawful notion that the

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motives towards other attaching entities. *Id.* at 16079, ¶ 1170. Joint use agreements (and the reservation of space for an ILEC counterparty that comes with them) are a crucial component of an electric utility's plan for ensuring ubiquitous shared infrastructure that allows it to deliver electric service to its customers at low cost. *See* Ex. B at DEF000151-52 (Hatcher Declaration ¶ 5). But perhaps more importantly, AT&T has lost sight of the fact that the reservation of space rules are cost allocation rules that protect CATVs and CLECs—they don't impose any costs on ILECs when it comes to reserved space on electric utility poles. For example, if a CATV attachment is occupying space reserved for the ILEC on an electric utility pole, and the ILEC later seeks to reclaim its reserved space, then the cost of restoring the reserved space would likely fall on either (a) the CATV/CLEC (depending on the notice provided to the CATV or CLEC regarding the nature of the space it was occupying) or (b) the electric utility (if, for whatever reasons, the reservation was deemed insufficient or unlawful). Section 14.5 of the joint use agreement specifically addresses this situation:

> Third party space requirements must be accommodated without permanent encroachment into the standard space allocation of the Licensee; therefore, neither party hereto shall, as Owner, lease to any third party, space on a joint use pole within the allocated standard space of Licensee without adequate provision for subsequent use of such standard space by Licensee **without cost to Licensee**.

Ex. 1 at DEF000258 (Joint Use Agreement, Article XIV, Section 14.5 (emphasis added)). Though this is an important point to understanding the immense value of the joint use agreement to AT&T (insofar as it represents a continuing liability to the pole owner), it is largely unimportant on a practical level in a case like this where the ILEC actually occupies most or all of its reserved space.

[87] AT&T's Pole Attachment Complaint at ¶ 25 n.62.

[88] As set forth above in paragraph 11, DEF is willing to enter into a standard pole license agreement with AT&T for AT&T's use of DEF poles that are not already in joint use.

[89] *See* Ex. A at DEF000130 (Freeburn Declaration at ¶ 8).

communication worker safety zone (a/k/a "safety space") on DEF poles should be assigned to DEF. As set forth above, **DEF does not need and does not use safety space on its own poles**.[90] This space, which is typically 40" (3.33 feet), would not have been built into DEF's pole network in its overlapping service area with AT&T but for the joint use agreement.[91] The safety space on DEF poles serves no purpose in the provision of electric service—it exists only to benefit attaching entities within the communications space.[92] Given that the safety space is deemed to be "usable space" under the Commission's rules, and given that the Commission has decided not to assign any of this space to CATV or CLEC attachments, then the cost of the space must be assigned to AT&T. It would make no sense at all for DEF and its electric ratepayers to bear any portion of this cost—let alone all of it—given that it has no relevance to the provision of electric service. Moreover, if the Commission is abandoning the negotiated cost-sharing arrangements of the joint use agreement, it makes sense to assign the costs of the safety space to the "cost causer,"[93] which in this case is AT&T (as AT&T was almost always the first communications attachment on DEF's poles in their overlapping service areas).[94]

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[90] *See* Ex. A at DEF000133-34 (Freeburn Declaration ¶¶ 15-16); Ex. B at DEF000152-53, DEF000156-57 (Hatcher Declaration ¶¶ 7, 16); Ex. C at DEF000163-64 (Burlison Declaration ¶¶ 7-10).

[91] *See* Ex. C at DEF000163-64 (Burlison Declaration ¶¶ 6-10).

[92] *See id.* at DEF000163 (Burlison Declaration ¶¶ 7-8).

[93] *See, e.g.*, *In the Matter of Investigation of Interstate Access Tariff Non-Recurring Charges*, Memorandum Opinion and Order, Docket No. 85-166, 2 FCC Rcd 3498, 3502 at ¶ 34 (Jun. 11, 1987) ("Absent a convincing showing, [the Commission] believe[s] 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."); *2011 Order*, 26 FCC Rcd at 5301, ¶ 143 ("Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer—the cost causer—pays a rate that covers this cost."); *2018 Order*, 33 FCC Rcd at 7766, ¶ 121 (clarifying that new attachers cannot be held responsible for the costs of correcting preexisting violations because the new attacher *did not cause* the preexisting violations).

[94] *See* AT&T's Pole Attachment Complaint, Ex. C at ATT00041 (Affidavit of Mark Peters, Aug. 24, 2020, ¶ 21) (noting that "in the early days of joint use [*i.e.*, when DEF's network was

Though DEF will reserve full briefing on this issue for later in the case, suffice it to say that the law regarding the allocation of safety space is remarkably misunderstood and misapplied. In its original order deciding not to allocate the safety space to CATVs, the Commission stated:

> [W]e believe that the risk for maintaining this safety space effectively falls squarely on the CATV operator. Therefore, it is difficult to accept, in equity, arguments that seek to further assign part of the 40-inch safety space to the CATV operator.[95]

This rationale, of course, does not apply to AT&T because, as it relates to AT&T, the risk of maintaining the safety space falls on DEF. Moreover, underlying the Commission's decision to not allocate the safety space to CATVs was the recognition that the cost of this space was already addressed in ubiquitous joint use agreements: "In joint-use agreements that involve the assignment of muniments of ownership and use between electric and telephone utilities, sharing responsibility for the safety space may be an issue."[96] The ILECs (then simply known as the "telephone companies") actually sought reconsideration of the Commission's decision not to allocate any of the safety space to CATVs on the grounds that it required them to bear the entire cost of the safety space on their poles. In rejecting the ILECs' request for reconsideration, the Commission stated:

> Moreover, as the record shows, **telephone companies in the past have worked out their own agreements with the electric companies as to how much of the remaining space is to be allocated to each utility**. Under these circumstances, the claim by the telephone companies that they are bearing responsibility for the entire safety space is simply untenable.[97]

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initially constructed]…AT&T was the only consistent communications attacher on utility poles at that time"); *see also supra* ¶ 25.

[95] *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, Docket No. 78-144, 72 F.C.C.2d 59, 71 at ¶ 24 (May 23, 1979) ("*1979 Order*").

[96] *Id.* at 71, ¶ 25.

[97] *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Order, CC Docket No. 78-144, 77 F.C.C.2d 187, 190 at ¶ 9 (Mar. 10, 1980) (emphasis added).

In other words, a significant part of the Commission's rationale for not assigning any part of the safety space to CATV attachments (and later, CLEC attachments) was the fact that the cost of this space was already addressed and shared in joint use agreements. It would be the ultimate bootstrap to excuse AT&T from bearing the cost of the safety space because of a rule applicable to CATVs that was built on the foundation of joint use agreements like the one between DEF and AT&T.

AT&T also alleges in the last sentence of paragraph 25 that the safety space is "usable and used by the electric utility." AT&T cites two authorities in support of this proposition: (1) the Enforcement Bureau's order in the *AT&T v. FPL Decision*; and (2) a 2001 Commission order. Whatever the facts may have been that supported such a finding in the *AT&T v. FPL Decision* or in the 2001 Commission order, those facts are not present (or are no longer relevant) in the case at bar. The *AT&T v. FPL Decision*, for its part, relies on the following statement from a 2000 Commission order: "It is the presence of the potentially hazardous electric lines that makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers."[98] Though this is indeed a fair statement when it comes to poles owned by AT&T, this rationale cannot withstand legitimate scrutiny with respect to poles owned by DEF. **On poles owned by DEF, it is the presence of communications attachments—not the presence of electric lines—that makes the communication worker safety zone necessary**. The 2001 Commission order, which of course in no way addresses whether or to what extent the safety space should be allocated to ILECs, relies on the Commission's original decision in 1979 not to allocate the safety space to CATVs.[99] This 1979 order, which as noted above,

[98] *AT&T v. FPL Decision*, 35 FCC Rcd at 5330, ¶ 16 (quoting *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-98, 15 FCC Rcd 6453, 6467 at ¶ 22 (Apr. 3, 2000)).

[99] *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of*

presumed electric utilities and ILECs were already sharing the cost of safety space through their joint use agreements, found that some electric utilities were utilizing the safety space "by mounting street light support brackets, step-down distribution transformers, and grounded, shielded power conductors" within the safety space.[100] Though street lights are occasionally mounted within the safety space on DEF's poles, the safety space is not necessary for the proper installation of a streetlight.[101] Streetlights can be, and often are, safely mounted within the electric supply space.[102] In other words, if there is no safety space on a distribution pole, DEF can still safely install a streetlight on that pole. AT&T's attachments on DEF's poles—not DEF's streetlights—caused the need for the safety space. The safety space is not necessary for proper installation of a streetlight. Also, transformers are not mounted in the safety space.[103] The presence of a transformer may change the **location** of the safety space, and even reduce the safety space from 40" to 30" in certain circumstance, but the transformer is never within the safety space.[104] Finally, the presence of vertical shielded conductors cannot be considered the utilization of space. If it is, then it means that communications attachments with risers to the bottom of the pole (including but not limited to pole top small cell attachments) are "using" the entire pole.

1996, Consolidated Partial Order on Reconsideration, CS Docket No. 97-98, CS Docket No. 97-151, 16 FCC Rcd 12103, 12130 at ¶ 51 n.186 (May 25, 2001) (citing *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-98, 15 FCC Rcd 6453, 6467 at ¶¶ 21-22 (Apr. 3, 2000) (citing *1979 Order*, 72 F.C.C.2d at 69-71))).

[100] *1979 Order*, 72 F.C.C.2d at 71, ¶ 24.

[101] *See* Ex. A at DEF000134 (Freeburn Declaration ¶ 16); Ex. C at DEF000163-64 (Burlison Declaration ¶ 9).

[102] *See id*. at DEF000163-64 (Burlison Declaration ¶ 9).

[103] *See* Ex. A at DEF000134 (Freeburn Declaration ¶ 16); Ex. C at DEF000164 (Burlison Declaration ¶ 10).

[104] *See* Ex. A at DEF000134 (Freeburn Declaration ¶ 16); Ex. C.at DEF000164(Burlison Declaration ¶ 10.

The bottom line is that whatever rationale may have supported excusing CATV attachments from sharing in the cost of safety space is either no longer valid or cannot apply to AT&T's use of DEF's poles. No sound ratemaking rationale would support allocating such a cost to DEF and its electric ratepayers.[105] For ratemaking purposes, this space should be assigned to AT&T (and, conversely, to DEF with respect to joint use poles owned by AT&T).

26. DEF denies that its relative pole ownership was either an "advantage" or that it "continuously impacted AT&T's ability to negotiate a just and reasonable rate over time." First, owning 90%+ of the joint use network is a burden, not an advantage. To put this in financial perspective, DEF's annual pole cost based on year ending 2018 data was $67.12. This means, according to the Commission's formula, it costs DEF $67.12/year to own a single pole. On the other hand, the per pole rate paid by DEF to AT&T under the joint use agreement for this same period was $. In other words, it is more than $ /year cheaper for DEF to rent, rather than own, joint use poles. The same is true for AT&T. AT&T's annual pole cost based on year ending 2018 data was $. Yet AT&T's contract rate under the joint use agreement was only $ /pole. There is no mystery as to why AT&T has allowed the disparity in ownership to grow. AT&T knows, as DEF knows, that it is cheaper to rent than own.

Second, the notion that relative pole ownership affects the ability to negotiate is not merely incorrect—it is a foundational error. For this to be true, DEF would need the ability to kick AT&T off its poles. Otherwise, what leverage is there to exercise? As set forth above, DEF lacks the contractual ability to kick AT&T off its poles.[106] For AT&T's allegation of "bargaining leverage"

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[105] *See* Ex. D at DEF000175 (Olivier Declaration ¶ 14); *see also* Ex. E at 217-18 (Metcalfe Declaration ¶ 32) ("From an economic cost-causation perspective, and under the current circumstances, it would be more equitable to allocate 100% of the safety space to the licensee.").

[106] Given that neither party can kick the other off its poles, and given that DEF has already communicated its willingness to enter into a "CLEC" agreement with AT&T for use of poles not

to have any merit, one of two additional conditions would also need to exist, either: (1) the joint use agreement was unjust and unreasonable at the time it was first executed; or (2) DEF subsequently wielded a growing pole ownership imbalance to its financial benefit. Neither condition has been alleged; and neither condition exists.

AT&T cannot credibly contend that the joint use agreement executed in 1969 was unjust or unreasonable. To its credit, AT&T does not make such a spurious allegation. And for good reason. AT&T's own internal standards from the 1970s identify a %/ % split as the "most equitable" division of costs.[107] The same standards identify a %/ % division of costs as "almost as good" as the "most equitable" method.[108] The "objective percentage" of pole ownership (in other words, the foundation of the cost sharing arrangement in the original joint use agreement and all subsequent amendments) was %/ %. In other words, the "objective percentage" in the joint use agreement is nearly identical to AT&T's self-stated "most equitable" or "almost as good" targets. And, perhaps more importantly, until May 22, 2019, AT&T never once complained to DEF that the cost-sharing arrangement in the joint use agreement was unfair, unreasonable, unjust, inaccurate, outdated, or otherwise in need of revision. To the contrary, in each year placed at issue in AT&T's complaint (and for many years prior), AT&T certified the correctness of both the number of poles invoiced and the applicable rates.[109] This "certification"

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already in joint use, it cannot be credibly alleged that DEF has superior bargaining leverage. With respect to existing joint use poles, DEF has exactly the same bargaining leverage as AT&T—zero. Much as AT&T has no unilateral leverage to reduce it cost sharing obligations, DEF has no unilateral leverage to increase AT&T's cost sharing obligations. The "bargaining leverage" myth might exist in a hypothetical economic vacuum. Or it might even exist where one party can force the other off its poles. **But it does not exist here**. This is not merely a matter of advocacy or opinion. It is a matter of undisputed contractual fact.

[107] *See* Ex. 6 at DEF000294 (AT&T's Internal Division of Cost Circular at p. 17).

[108] *See id*. at DEF000294 (AT&T's Internal Division of Cost Circular at p. 17).

[109] *See* Ex. A at DEF000136-37, DEF000144-48 (Freeburn Declaration ¶ 21, Ex. A-2).

process isn't something DEF forced on AT&T, either—it is AT&T's prompting, and AT&T's form (Form 6407), that leads to this yearly certification. The notion that the contract rates are, or have ever been, unjust and unreasonable is not just wrong under the specific facts of this case—it is a disingenuous misrepresentation.

Though it is true, as AT&T alleges in the final sentence of paragraph 26, that the cost sharing methodology in the joint use agreement "cannot be changed without Duke Energy Florida's agreement," the same is true for AT&T. Neither party can change the cost sharing methodology without the other party's agreement, and neither party can kick the other off its poles. As set forth in the affidavit of Ken Metcalfe, the inability of DEF to force AT&T to remove its attachments "effectively obviates any real or perceived bargaining power that might otherwise come with increased pole ownership."[110] DEF denies any remaining allegations in paragraph 26.

27. DEF denies that either party to the joint use agreement is indefinitely "stuck" paying rentals to the other party in accordance with the joint use agreement. Neither party is required to keep its facilities attached to the other party's poles. Both parties retain the right at any time to remove some or all of their facilities from the other's poles.[111] If AT&T were to remove its facilities from some or all of DEF's poles, it would no longer be bound to share in the cost of those poles. DEF admits that the joint use agreement contains an "evergreen" provision (at least with respect to poles not already in joint use) but denies that AT&T has correctly identified it. An "evergreen" provision is a provision that indefinitely extends the expiration date of a contract.[112] The first part of Section 16.1 of the joint use agreement includes such a provision:

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[110] Ex. E at DEF000222-23 (Metcalfe Declaration ¶ 43).

[111] *See* Ex. 1 at DEF000254 (Joint Use Agreement, Article IX, Section 9.2).

[112] *See supra* note 21.

> Subject to the provisions of Articles XI and XII herein, the provisions of this Agreement, insofar as the same may relate to the further granting of joint use of poles hereunder, may be terminated by either party, after the first day of January, 1979, upon six (6) months' notice in writing to the other party….[113]

The provision that AT&T mistakenly claims to be an "evergreen" clause is actually a perpetual license, exercisable at the licensee's option. The final part of Section 16.1 states:

> …and provided, further, that notwithstanding any such termination, other applicable provisions of this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination.[114]

Similarly, Section 11.2 states with respect to termination:

> All other terms and provisions of this Agreement shall remain in full force and effect solely and only for the purpose of governing and controlling the rights and obligations of the parties herein with respect to existing joint use poles; except that all pole replacements shall be the obligation of the party owning less than its objective percentage.[115]

As set forth above, where DEF lacks the ability to terminate AT&T's license with respect to any existing joint use poles, there can be no "renewal" of the joint use agreement with respect to existing joint use poles. Similarly, the agreement cannot be in "evergreen" status with respect to existing joint use poles given that "evergreen" status is nothing more than an indefinite renewal, pending termination by either party. In this situation (as it relates to AT&T's facilities on DEF's

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[113] Ex 1 at DEF000258-59 (Joint Use Agreement, Article XVI, Section 16.1). So long as the basis of the bargain is not fundamentally altered, DEF is content to abide by the intent of this provision. If the basis of the bargain is fundamentally altered, though, DEF reserves the right to challenge this perpetual license provision as unenforceable under Florida law. *See, e.g.*, *Chessmasters, Inc. v. Chamoun*, 948 So. 2d 985, 987 (Fla. Dist. Ct. App. 2007) ("Leases in perpetuity are universally disfavored, thus courts are loath to construe a right to renewal as perpetual, and will not do so unless the language of the agreement clearly and unambiguously compels them to do so."); *Nat'l Home Cmtys., LLC v. Friends of Sunshine Key, Inc.*, 874 So. 2d 631, 634 (Fla. Dist. Ct. App. 2004) (holding that agreement did not provide for perpetual renewals because there was no provision in the agreement evidencing a "clear and explicit right to perpetual renewals").

[114] Ex. 1 at DEF000258-59 (Joint Use Agreement, Article XVI, Section 16.1).

[115] *Id.* at DEF000255 (Joint Use Agreement, Article XI, Section 11.2).

poles), it is DEF—not AT&T—that is "forced" to continue the relationship; AT&T is the only party with a choice in the matter.

With respect to the fourth, fifth and sixth sentences of paragraph 27, DEF admits that AT&T sent a one-page letter to DEF and its affiliate, Duke Energy Progress, LLC, dated May 22, 2019, which requested a meeting "to determine the appropriate rental rates for our companies." DEF further admits the parties met face-to-face on July 26, 2019 and October 24, 2019, but DEF denies that it "has not made AT&T a single offer." By letter dated September 10, 2020, DEF transmitted an adjusted cost sharing proposal to AT&T that, if accepted, would result in over the life of the proposed deal.[116] As of the date of this answer, AT&T has not responded to the proposal.[117] DEF denies the allegation in the seventh sentence of paragraph 27 that AT&T "genuinely lacks the ability to obtain a new [cost sharing] arrangement." As set forth above, AT&T obviously has this ability given that DEF has offered a new arrangement (and one that would, if accepted, result in).

28. For all of the reasons set forth above, DEF denies that AT&T has been entitled to the new telecom rate since the effective date of the 2011 Order. If this were true, AT&T would have raised this at some point prior to May 22, 2019. DEF also denies, for all the reasons set forth above, that AT&T is entitled to the new telecom rate under the Commission's new ILEC complaint rule. To the extent AT&T did not believe DEF had adequately explained the immense net benefits inuring to AT&T under the joint use agreement prior to now, the evidence described herein and as

[116] *See* Ex. B at DEF000158 (Hatcher Declaration ¶ 18).

[117] *See id.*

attached hereto conclusively establishes these net benefits.[118] DEF denies any remaining allegations in paragraph 28.

29. DEF admits that the 2011 Order stands for the proposition that similarly situated attaching entities should pay similar rates, but DEF denies any implication that AT&T is similarly situated to DEF's CATV and CLEC licensees. AT&T has never been similarly situated to DEF's CATV and CLEC licensees, and given the irreversible benefits of incumbency achieved through the joint use agreement, it never will be (at least with respect to existing facilities). Aside from the fact that AT&T is not, and has never been, similarly situated to DEF's CATV and CLEC licensees, it simply defies common sense to suggest that AT&T has been entitled to a different cost-sharing arrangement since July 12, 2011, given that AT&T never took exception to the existing cost-sharing arrangement (and in fact "certified" its correctness annually) until May 22, 2019. DEF also denies, for the reasons set forth herein, that the advantage AT&T enjoys over DEF's CATV and CLEC licensees is "generalized"—it is specific in concept, application, and now economic terms. DEF denies any remaining allegations in paragraph 29.

30. DEF admits that any analysis of competitive neutrality should account for the different rights and responsibilities in joint use agreements and license agreements, but denies that anything in the joint use agreement is a "disadvantage" to AT&T as compared to the rights and responsibilities within the agreements governing DEF's CATV and CLEC licensees. The second

[118] DEF should not have to engage in a full-fledged offer of proof and financial valuation in order to get AT&T off square one. When DEF explained the types of net benefits it would quantify if required to do so, AT&T merely dismissed them with unconsidered talking points about the "reciprocal" nature of those sources of net benefits. *See id.* at DEF000154 (Hatcher Declaration ¶ 11). DEF never disputed that those benefits were, indeed, reciprocal—DEF's position was and remains (and has now been demonstrated in economic terms through the testimony of Mr. Kenneth P. Metcalfe, CPA, CVA and others) that those "reciprocal" benefits disproportionately inure to the benefit of AT&T under the particular relationship at issue here.

and third sentences of paragraph 30 allege, astoundingly, that AT&T's burdens as a joint use pole owner are just as heavy as DEF's. Mathematically, this is like saying that it is just as difficult to plant and farm 5,000 acres as it is to plant and farm 62,000 acres. Thus, while it is true as alleged in the fourth sentence of paragraph 30, that CLECs and CATVs are not required to plant and farm at all, it is also true that CATVs and CLECs are relegated to the "leftovers" of the yield, if any. And if there are no "leftovers," the CATVs and CLECs pay to replant and wait for the yield. Perhaps more to the point, AT&T is not required to plant and farm. But when DEF plants and farms specifically for AT&T's benefit, then AT&T is required to pay for it.

Moreover, AT&T's underlying allegation that ownership of poles is a "disadvantage" is ironic given that AT&T claims in the same complaint to be disadvantaged by **not** owning poles.[119] In fact, the alleged disadvantages of not owning enough poles was the entire basis for the Commission's original assertion of jurisdiction over ILEC attachments on electric utility poles in 2011.[120] And it was the reason the Commission went even further in 2018.[121] Which is it? Is pole ownership an advantage or disadvantage in a joint use relationship? AT&T cannot have it both ways. If pole ownership is indeed a disadvantage, then it is one that inures to AT&T's net benefit, given that DEF owns 62,000 poles in the jointly used network and AT&T owns only 5,000. Based on year ending 12/31/2018 data, this means DEF's annual carrying cost for the jointly used network is $4.16 million; AT&T's annual carrying cost for the jointly used network is less than $214,000.[122] If AT&T actually owned % of the jointly used network—which would mean

[119] *See* AT&T's Pole Attachment Complaint at ¶ 26.

[120] *2011 Order*, 26 FCC Rcd at 5327, 5328-29 at ¶¶ 199, 206.

[121] *2018 Order*, 33 FCC Rcd at 7768-69, ¶¶ 125-126.

[122] These figures are based on the Commission's annual pole cost formula and assumes the accuracy of the data provided by AT&T with its complaint. *See* AT&T's Pole Attachment Complaint, Ex. A at ATT00018-19 (Affidavit of Daniel P. Rhinehart, Aug. 24, 2020, Ex. R-3).

neither party paid the other any net rentals—then DEF's carrying cost for the remaining % of the network would be $ million. There is a reason why this $ million difference between $ million and $ million corresponds almost exactly with AT&T's net annual rental obligations: it is designed to stand in place of actual pole ownership (*i.e.*, a proxy for pole ownership).

DEF denies the allegations in the fifth sentence of paragraph 30. As set forth above, AT&T enjoys a massive competitive advantage by virtue of the fact that it is not required to remove its attachments from DEF's poles, even in the event of a termination of the joint use agreement. In contrast, DEF's standard CATV and CLEC license agreement provides:

> Upon termination of this Agreement, Licensee shall, within sixty (60) days: (i) remove all of its Attachments from Licensor's Poles; and (ii) advise Licensor of the date on which such Attachments were removed and affected Poles repaired. If any Attachments are not so removed within sixty (60) days following such termination, Licensor shall have the right to: (a) remove Licensee's Attachments without liability, and Licensee shall reimburse Licensor for the associated costs plus an additional 50% of such costs; and (b) seek the payment of holdover fees, on a monthly basis, at the Pole Attachment License Fee rate.[123]

Further, AT&T's allegation that it "may be denied the right to attach to new pole lines at any time" is inconsistent with the actual provisions of the joint use agreement. Though the agreement reserves to each party "the right to exclude from joint use poles which have been installed for purposes other than or in addition to normal distribution of electric or telephone service,"[124] the agreement also specifically provides a process for obtaining access to such poles.[125] The section of the joint use agreement relied-upon by AT&T to support its allegation actually states, "In the

[123] Ex. 7 at DEF000321 (Exemplar CLEC Pole Attachment License Agreement, Section 17).

[124] Ex. 1 at DEF000248 (Joint Use Agreement, Article II, Section 2.2).

[125] *See id*. at DEF000248 (Joint Use Agreement, Article III, Section 3.1).

event one of the parties deem it desirable to attach to such excluded poles, the party wishing to attach will proceed in the manner provided in Article III."[126] Further, the Section 2.2 right to exclude poles from joint use is limited to "poles which have been installed for purposes other than or in addition to normal distribution of electric or telephone service…."[127] In a nutshell, the letter and purpose of the agreement is pro-access. AT&T has not alleged, nor could it, that the implementation of the joint use agreement has been anything but the fulfillment of its letter and purpose.[128] DEF denies the allegations of the sixth (final) sentence of paragraph 30.

C. AT&T Should Continue to Share in the Cost of the Jointly Used Network as Set Forth in the 1990 Amendment to the Joint Use Agreement.

1. AT&T's calculation of the "one-foot" rate applicable to DEF's CATV and CLEC licensees is incorrect.

31. DEF denies that AT&T is entitled to the new telecom rate with respect to any existing joint use poles at any time in the past or on a going-forward basis. In the July 26, 2019 meeting, DEF proposed that AT&T enter into a new pole license agreement (at the Commission's new telecom rate) that would cover poles that are not already in joint use.[129] AT&T expressed no interest in this proposal.[130] Despite rejecting DEF's proposal, AT&T asserts that it is entitled to

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[126] *Id.* at DEF000248 (Joint Use Agreement, Article II, Section 2.2).

[127] *Id*.

[128] AT&T indirectly alleges that CATV and CLEC licensees have an advantage over AT&T because of "statutorily guaranteed access." This is of no consequence to the analysis under the parties' respective agreement. DEF cannot control what Congress gives or does not give to CATVs and CLECs. DEF can only control what contractual terms it gives to CATVs and CLECs. In any event, if AT&T's contractual rights are compared against something extracontractual, this would be comparing apples and oranges, which would completely distort the analysis of competitive neutrality.

[129] *See* Ex. B at DEF000156 (Hatcher Declaration ¶ 15).

[130] *See id*.

the new telecom rate for **all** DEF joint use poles (existing and future) and provides its calculations of the one-foot new telecom rate for 2015-2019. Nonetheless, AT&T's calculations of DEF's one-foot CATV and CLEC pole attachment rates for the period 2015-2019 are inaccurate. The proper per foot calculations applicable to DEF's CATV and CLEC pole licensees, as set forth in paragraph 12 above, are as follows:[131]

	2015	2016	2017	2018	2019
CATV	$5.14	$5.20	$5.35	$4.99	$4.97
CLEC	$7.74	$7.81	$5.37	$5.00	$4.99

These calculations should not be in dispute because, like the rates paid by each party under the joint use agreement, they are based on the Commission's annual pole cost methodology. Each year, DEF sends AT&T a detailed calculation worksheet in support of the joint use rental rates prior to billing. AT&T reviews the calculations (and underlying data) and then sends its "Form 6407" certifying the accuracy of the calculations. The fact that AT&T, after certifying the accuracy of DEF's calculations each year since 2015, now suddenly takes exception to the calculations is a testament to AT&T's rank opportunism and lack of understanding regarding the facts underlying this particular relationship.

More importantly, though, AT&T does not occupy one foot of space on DEF's poles. As set forth above, AT&T is allocated feet of space in the joint use agreement; AT&T actually occupies at least feet of space, and AT&T is the cost-causer of 3.33 feet of additional space on DEF's poles.[132] If these per foot rates were applied to AT&T based on its occupancy levels (using an even 6 feet), it would yield rates for the corresponding periods as follows:[133]

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[131] *See* Ex. D at DEF000173 (Olivier Declaration ¶ 10).

[132] *See supra* ¶¶ 12, 25.

[133] Except for the usable space occupied by AT&T, these calculations use the same presumptions set forth in the final sentence of paragraph 31 of the complaint.

	2015	2016	2017	2018	2019
CLEC Rate	$	$	$	$	$

DEF denies any remaining allegations in paragraph 31.

32. DEF denies the allegations in the first sentence of paragraph 32. The Commission should instead find that the cost-sharing provisions of the existing joint use agreement—which AT&T first questioned at the end of May 2019 —are just and reasonable. DEF denies that the Commission should order a refund of any amounts to AT&T. The facts of this case demonstrate that the cost-sharing provisions in the existing joint use agreement are just and reasonable—if not favorable to AT&T. But in any event, as set forth above, AT&T did not even question the parties' cost-sharing arrangement until May 22, 2019 (despite having the right to do so at any prior time and despite having a specific regulatory remedy to pursue since 2011). Given this fact alone, AT&T should be estopped from claiming or obtaining any sort of refund prior to the 2019 billing year. The Commission stated in its 2018 Order:

> Because our intention is to encourage broadband deployment going forward, we decline to adopt USTelecom's proposal that we give incumbent LECs "the right to refunds for overpayment as far back as the statute of limitations allows."[134]

Moreover, the period for which AT&T seeks a refund is almost entirely comprised of billing years governed by the Commission's **old** ILEC complaint rule. Under the old rule, AT&T—not DEF—bears the burden of proof.[135] AT&T has fallen woefully short of its burden.[136]

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[134] *2018 Order*, 33 FCC Rcd at 7770, ¶ 127 n.478.

[135] *See* 47 C.F.R. § 1.1424 (2011) ("In complaint proceedings where an [ILEC] claims that is it similarly situated to an attacher that is a telecommunications carrier…or a cable television system…the [ILEC] shall bear the burden of demonstrating that it is similarly situated by reference to any relevant evidence, including pole attachment agreements."), *redesignated* as 47 C.F.R. § 1.1413 (2019).

[136] AT&T offers absolutely no economic analysis to support its complaint, either with respect to the period preceding the effective date of the Commission's new ILEC complaint rule or thereafter. *See Verizon Florida LLC v. Florida Power & Light Co*., Memorandum Opinion and

2. Florida's 5-Year Statute of Limitations for Contract Actions is Inapplicable to this Case.

With respect to the second, third, fourth, fifth and sixth sentences of paragraph 32, DEF denies that the "applicable statute of limitations" is the five-year statute of limitations period set forth in Florida Statutes § 95.11(2)(b). The Commission has never explained what is meant by the "applicable statute of limitations" for purposes of rule 1.1407(a)(3), and Section 224 does not establish a limitations period for claims challenging the rates, terms or conditions of pole attachments. AT&T correctly notes that under federal law "when there is no statute of limitations expressly applicable to a federal statute, the general rule is that a state limitations period for an **analogous cause of action** is borrowed and applied to the federal claim."[137] Given that AT&T's complaint most certainly is **not** a "legal or equitable action on a contract, obligation, or liability founded on a written instrument," AT&T's claim is not analogous to a state breach of contract action, and it would not make sense to apply Florida's statute of limitations for actions on a contract.[138]

Order, Docket No. 14-216, 30 FCC Rcd 1140, 1140-41 at ¶ 2 (Feb. 11, 2015) (dismissing ILEC complaint under old rule where ILEC made "no attempt to estimate the value of those unique benefits").

[137] AT&T's Pole Attachment Complaint at ¶ 32 (emphasis added) (quoting *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018)).

[138] AT&T cites the *Verizon Virginia v. Dominion Virginia Power* decision as supporting the application of a breach of contract statute of limitations, but this is not what *Verizon Virginia* says. *See* AT&T's Pole Attachment Complaint at ¶ 32 n.93. Importantly, the Commission made no finding regarding the "applicable statute of limitations" in that case. The Commission merely noted that Verizon contended that the applicable statute of limitations was a 5-year breach of contract limitations period and that the defendant in that case did not dispute that contention. *See Verizon Virginia, LLC and Verizon South, Inc., v. Virginia Electric and Power Company d/b/a Dominion Virginia Power*, Order, Proceeding No. 15-190, 32 FCC Rcd 3750, 3764 (2017). Furthermore, in the *AT&T v. FPL Decision* (and despite significant briefing in which AT&T took the same position it takes here), the Commission specifically "ma[de] no findings as to the appropriate statute of limitations." *AT&T v. FPL Decision*, 35 FCC Rcd at 5323, ¶ 6 n.19.

A more analogous state cause of action would be an action to rescind a contract, given that AT&T's claims seek to disavow or rewrite—rather than enforce—the contract at issue. The limitations period for such an action under Florida law is four years and begins to run at the time the cause of action accrued.[139] Here, AT&T bases its claim to "rescind" the contract on the premise that the cost-sharing methodology in the joint use agreement is not "just and reasonable" under Section 224. This right accrued no later than July 12, 2011 (the effective date of the Commission's 2011 order asserting jurisdiction over the rates, terms and conditions for ILEC attachments on electric utility poles).[140] This means that, **if a Florida state law statute of limitations applies, then AT&T's entire claim is this case—both backward looking and forward looking—is time barred**.

Notwithstanding the foregoing, application of Florida's limitations periods for a breach of contract action or an action to rescind a contract would not be consistent with Commission policy or recent Commission precedent. First, the Commission has a "longstanding policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts."[141] Therefore, it would be inconsistent for the Commission to borrow a state limitations period that applies to actions over which the Commission has consistently refused to exercise jurisdiction. Second, the Commission refused to apply the federal "catchall" statute of limitations (28 U.S.C. § 1658(a)) in a recent agency proceeding because the Commission determined that Section 1658(a)

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[139] Fla. Stat. § 95.11(l) (applying a four year limitations period to rescission claims); Fla. Stat. § 95.031(1) (noting that "the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues"); *see also Allie v. Ionata*, 417 So. 2d 1077, 1078-79 (Fla. Dist. Ct. App. 1982) (finding that, where grounds for rescission predated execution of contract, rescission claim accrued on the date the contract was executed).

[140] *See* Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, 76 Fed. Reg. 40,817, 40,817 (Jul. 12, 2011).

[141] *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987).

"governs court actions, not agency proceedings."[142] In making this determination, the Commission focused on the black letter of Section 1658(a) and interpreted its use of the term "action" to mean that it only applied to "judicial proceedings":

> Section 1658(a) provides: "Except as otherwise provided by law, **a civil action arising** under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues." **The text, context, purpose, and history of Section 1658(a) makes clear that it governs court actions, not agency proceedings to recover improperly disbursed government funds**.
>
> **Albeit not universally, the term "action" in legal parlance most commonly means a judicial proceeding. It is particularly reasonable to apply that gloss here because Section 1658(a) includes not only the term "civil action" but also references the underlying "cause of action."** Black's Law Dictionary defines "cause of action" as "[a] group of operative facts giving rise to one or more bases *for suing*; a factual situation that entitles one person to obtain a remedy *in court* from another person." Thus, as the Fourth Circuit recently recognized, the text of Section 1658(a) **suggests that Congress was concerned with adversarial judicial proceedings**.[143]

Based on the Commission's reasoning in *Sandwich Isles*, none of Florida's statutorily prescribed limitations periods are applicable to agency proceedings, including those applicable to breach of contract actions and actions to rescind a contract, because each statute of limitations states that it applies to "civil actions" (*i.e.*, "court actions" or "judicial proceedings" under *Sandwich Isles*).[144]

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[142] *See In the Matter of Sandwich Isles Communications, Inc.*, Order on Reconsideration, WC Docket No. 10-90, 2019 FCC LEXIS 41, at *160-70, ¶¶ 131-37 (Jan. 3, 2019) (emphasis added).

[143] *Id.* at *161-62, ¶¶ 131-32 (italics in original) (bold-underline emphasis added).

[144] *See, e.g.*, Fla. Stat. § 95.11(2)(b) ("**Actions** other than for recovery of real property shall be commenced as follows: …A **legal or equitable action** on a contract, obligation, or liability founded on a written instrument" shall be commenced "within five years.") (emphasis added); Fla. Stat. § 95.11(3)(l) ("**Actions** other than for recover of real property shall be commenced as follows: …An **action** to rescind a contract" shall be commenced "within five years.") (emphasis added). Section 95.011 of the Florida Statutes makes clear that the term "action," as used in its limitations periods, refers to a "civil action." Fla. Stat. § 95.011 ("**A civil action or proceeding, called "action in this chapter**, …shall be barred unless begun within the time prescribed in this chapter…") (emphasis added).

Therefore, *Sandwich Isles* seemingly precludes the Commission from borrowing limitations periods for either breach of contract actions or actions to rescind a contract under Florida law.

While the general rule requires the borrowing of a limitations period for an analogous state cause of action, federal law allows for the borrowing of a federal limitations period (1) "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes" and (2) "when federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."[145] The two-year statute of limitations in 47 U.S.C. § 415(c) clearly fits within this exception to the general rule.[146] Section 415(c) applies to claims against regulated carriers for overcharges.[147] Because AT&T is arguing that DEF is overcharging it for pole attachment rental, the cause of action to which Section 415

[145] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 356 (1991) (internal quotation marks and citation omitted), *superseded by statute*, Judicial Improvements Act of 1990, 101 P.L. 650, § 313, 104 Stat. 5089, 5115 (codified at 28 U.S.C. § 1658); *see also Hoang,* 910 F.3d at 1101 (recognizing exception to the general rule that allows for the borrowing of a federal limitations period).

[146] 47 U.S.C. § 415(c) ("For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues…"); *see e.g.*, *American Cellular Corporation and Dobson Cellular Systems, Inc. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, Release No. DA 07-228, 22 FCC Rcd 1083, 1083 at ¶ 1 (Jan. 31, 2007) (dismissing complaint filed under Section 208 for alleged over-billing as time barred under Section 415's two-year statute of limitations); *Michael J. Valenti and Real Estate Market Place of New Jersey t/a Real Estate Alternative v. American Telephone and Telegraph Company and MCI Telecommunications Corporation*, Memorandum Opinion and Order, Release No. FCC 97-26, 12 FCC Rcd 2611, 2623 at ¶ 28 (Feb. 26, 1997) (denying applications for review and finding the Common Carrier Bureau properly dismissed complaints filed pursuant to Section 208 as time-barred by Section 415's two-year statute of limitations); *Municipality of Anchorage d/b/a Anchorage Telephone Utility v. ALASCOM, Inc.*, Memorandum Opinion and Order, Release No. DA 89-282, 4 FCC Rcd 2472, 2477 at ¶ 34 (Mar. 20, 1989) (dismissing claims filed pursuant to Section 208 as time-barred under Section 415's two-year statute of limitations).

[147] *See* 47 U.S.C. § 415(c); *see also* 47 U.S.C. § 415(g) (defining "overcharges" as "charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commissioner").

applies "clearly provides a closer analogy" to AT&T's claims than a Florida breach of contract action. Moreover, Section 415 is expressly applicable to Section 208 complaints, and Section 208 complaints and Section 224 complaints are now governed by the same procedural rules, which further demonstrates that actions under Section 415(c) provide a closer analogy to AT&T's claims than any state cause of action. Section 415(c) is also a "significantly more appropriate vehicle for interstitial lawmaking" than variable state-level limitations periods. Applying variable state-level limitations periods would lead to highly variable results, depending on the state at issue. For example, AT&T is arguing for the application of Florida's five-year limitations period for breach of action claims in these proceedings. In AT&T's parallel proceedings against DEF's affiliate Duke Energy Progress, LLC, AT&T is arguing for the application of North Carolina's three-year limitations period for breach of contract actions.[148] Despite the fact that AT&T's claims in each proceeding are virtually identical and premised on the same FCC regulation, the application of different state statutes of limitation would create a variance in the scope of relief AT&T could pursue in each proceeding. Further, DEF expects that AT&T would contend in any action against AT&T by a CATV or CLEC arising under Section 224 that the "applicable statute of limitations" would be the two-year limitations period in Section 415(c). If this is the case, then AT&T is essentially saying that it is protected by a two-year limitations period for Section 224 complaints, but that electric utilities are subject to variable (and longer) limitations periods, depending on the state. This cannot be the result under the law. DEF denies any remaining allegations in paragraph 32.

[148] *See Bellsouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a South Carolina v. Duke Energy Progress, LLC*, AT&T's Pole Attachment Complaint at ¶ 32, Proceeding No. 20-293, EB-20-MD-004 (Sep. 1, 2020); *see also* N.C. Gen. Stat. § 1-52(1) (establishing a three-year statute of limitations for actions "[u]pon a contract").

33. DEF denies that AT&T has overpaid at any point in time and denies that the net rentals it collected from AT&T since 2015 were "collected in violation of federal law." If AT&T actually thought these amounts were "in violation of federal law," then (a) AT&T would not have certified in writing each year that the net rentals were correct, and (b) AT&T would have mentioned this before May 22, 2019. DEF further denies that a refund would be "consistent with the Commission's intention." In fact, as set forth above in paragraph 32, a refund would be specifically contrary to the Commission's intention "to encourage broadband deployment **going forward**."[149] It is also bizarre that AT&T would allege, as it does in the fourth sentence of paragraph 33, that a failure to award a refund "discourages pre-complaint negotiations between the parties." Here, it is not as if AT&T raised a dispute about the cost-sharing provisions in the existing joint use agreement in 2011and then waited until 2020 to file its complaint. **AT&T never even mentioned (let alone raised) a dispute until May 22, 2019**. Moreover, in each year prior to 2019, AT&T certified the correctness of the annual billing. So, there were not any "pre-complaint negotiations" to be had between the parties prior to the time AT&T first raised this dispute on May 22, 2019. In any event, if there is anything unjust or unreasonable about the existing cost-sharing arrangement between DEF and AT&T, it is that DEF is currently paying AT&T a per pole rate of more than % of AT&T's entire annual pole cost.[150] DEF denies any remaining allegations in paragraph 33.

IV. COUNT I—THE COMMISSION SHOULD REFRAIN FROM DISTURBING THE COST-SHARING METHODOLOGY IN THE 1990 AMENDMENT.

34. DEF adopts and incorporates paragraphs 1 through 33 above, as if fully set forth herein.

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[149] *2018 Order*, 33 FCC Rcd at 7770, ¶ 127 n.478.

[150] *See supra* ¶ 22.

35. DEF denies that the Commission is "statutorily required to ensure that the pole attachment rates that Duke Energy Florida charges AT&T are just and reasonable." In fact, until 2011, the Commission interpreted the Act as **prohibiting** the regulation of the rates, terms and conditions of AT&T's attachments on DEF's poles.[151] In other words, even if the Commission's current interpretation of the statute is permissible, the Commission most certainly is not "statutorily required" to regulate this relationship. Further, to the extent there is a statutory "requirement" to regulate the joint use network cost-sharing relationship between DEF and AT&T, the Commission should forbear from exercising such authority under 47 U.S.C. § 160(a).[152] Even if the Commission is reluctant to forbear in this case, it should still suspend or waive the applicability of Rule 1.1413 (and its predecessor rule), given the facts of this particular case, pursuant to Rule 1.3.[153]

36. DEF denies that the cost-sharing provisions of the joint use agreement are unjust, unreasonable, or otherwise in violation of the Pole Attachments Act. To the contrary, the cost-

[151] In an early rulemaking implementing the 1996 Act, the Commission noted that an "ILEC has no rights under Section 224 with respect to the poles of other utilities." *1998 Report and Order*,13 FCC Rcd at 6781,¶ 5; *see also 2011 Order*, 26 FCC Rcd 5240, 5328 at ¶ 205.

[152] *See* 47 U.S.C. § 160(a) (The Commission "shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services . . . if the Commission determines that - - (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.").

[153] 47 C.F.R. § 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.").

sharing provisions are just, reasonable and consistent with what AT&T's internal strategy documents indicate is the "most equitable" and "almost as good" methods of sharing costs in a joint use network.[154] Moreover, as set forth above, even if AT&T were afforded a "per foot" rate consistent with DEF's CATV and CLEC licensees, it would yield a rate about the same as the rates yielded by the joint use agreement.

37. The just and reasonable rate for AT&T's attachments to DEF's poles is the rate calculated in accordance with the 1990 amendment to the joint use agreement. But in the event the Commission applies the new telecom rate to AT&T's attachments to DEF's poles, it should be applied on a per foot basis to avoid discriminating against DEF's CATV pole licensees as explained above in paragraph 12. Based on the data set forth above regarding AT&T's actual occupancy levels and the new telecom rates charged to DEF's CLEC licensees for one foot of pole space, the following per pole rates would apply to AT&T for years 2015 through 2019:

	2015	**2016**	**2017**	**2018**	**2019**
CLEC Rate	$	$	$	$	$
Contract Rate Paid by AT&T	$	$	$	$	$

As illustrated in the chart above, under this approach, AT&T's rates for the use of DEF poles would have been about the same as under the joint use agreement during the same period. DEF denies that AT&T is entitled to any sort of refund, denies that it charged AT&T unjust or unreasonable rates at any time during the 2015-19 time period, and denies any remaining allegations in paragraph 37.

38. As explained above, the pre-existing telecom rate formula cannot serve as a "cap" on the rate for existing joint use poles owned by DEF because this "cap" (if it applies at all) applies only to agreements "entered into or renewed" after March 11, 2019. Because DEF lacks the ability

[154] *See supra* ¶¶ 26, 36, 39.

to terminate the agreement with respect to existing joint use poles, the agreement cannot "renew" with respect to those poles. AT&T, in essence, has a unilateral perpetual license option on 62,000 joint use poles owned by DEF. But even if the pre-existing telecom rate formula is a "cap," it would yield the following rates based on the same assumptions used in paragraph 37 above (along with the actual average of entities per pole):

	2015	2016	2017	2018	2019
Pre-Existing Telecom Rate	$	$	$	$	$
Contract Rate Paid by AT&T	$	$	$	$	$

Even though the pre-existing telecom rate formula yields a slightly lower rate for AT&T's use of DEF's poles than the joint use agreement cost sharing methodology, this is offset, at least in part, by the more dramatic reductions to the rate DEF would pay for use of AT&T's poles under this methodology. The following chart compares the contract rate paid by DEF to the pre-existing telecom rate AT&T calculates for DEF's use of AT&T's poles:

	2015	2016	2017	2018	2019
Contract Rate Paid by DEF	$	$	$	$	$
Pre-Existing Telecom Rate[155]	$	$	$	$	$

DEF denies that AT&T is entitled to any sort of refund and denies any remaining allegations in paragraph 38.

V. AT&T'S COMPLAINT SHOULD BE DENIED.

39. The Commission should deny AT&T's request "that the Commission find that Duke Energy Florida charged and continues to charge AT&T unjust and unreasonable rates in

[155] The figures in this row presume the accuracy of AT&T's calculation of the "proportional" pre-existing telecom rate that DEF would have paid on AT&T poles (which is based on 10.5 feet of space and includes the safety space in DEF's space allocation, given that DEF is the licensee of AT&T's poles). *See* AT&T's Pole Attachment Complaint, Ex. A at ATT00010 (Affidavit of Daniel P. Rhinehart, Aug. 24, 2020, ¶ 19); *see also id*. at ATT00018-19 (Affidavit of David P. Rhinehart, Aug. 24, 2020, Ex. R-3).

violation of federal law." As set forth above, the cost-sharing provision in the existing joint use agreement not only is just and reasonable, but also is consistent with AT&T's own internal strategy documents identifying the "most equitable" means of allocating the costs of a joint use network. Furthermore, the per pole rate that AT&T pays today is less, in today's dollars, that the rate it paid in the first year of the 1990 amendment to the joint use agreement.[156]

40-42. The Commission should deny AT&T's request that the Commission establish different rates for the 2015-present time period, especially given that AT&T never even voiced an objection to the cost-sharing methodology in the joint use agreement until May 22, 2019. But in the event the Commission unwinds the cost-sharing provisions of the joint use agreement, any alternative rates that it sets should be consistent with the rates set forth in paragraphs 37 or 38 above.

In addition to denying the relief sought by AT&T, the Commission should also award to DEF such relief as the Commission deems necessary, just and reasonable.

[156] *See* Ex. E at DEF000220-21 (Metcalfe Declaration ¶ 39).

AFFIRMATIVE DEFENSES

DEF, in accordance with Rule 1.726(e), adopts and incorporates the facts set forth above and separately pleads the following affirmative defenses:

1. AT&T is estopped from seeking a refund for periods that precede May 22, 2019, which is the date AT&T first provided notice to DEF that it disputed the cost-sharing methodology provisions of the joint use agreement.

2. AT&T waived its right to seek a refund for periods that precede May 22, 2019, because AT&T failed to provide any notice to DEF prior to that date that it disputed the cost-sharing methodology provisions of the joint use agreement.

3. AT&T's claim is barred by the four-year statute of limitations applicable to actions to rescind a contract under Florida law.

4. AT&T's claim is barred by the two-year statute of limitations applicable to actions to recover overcharges under 47 U.S.C. § 415(c).

5. AT&T's claims for all years prior to 2019 are barred by accord and satisfaction, based on the pre-billing exchange of information, AT&T's attestation to the accuracy of the rates to be billed, and AT&T's payment of those bills.

6. AT&T's claims for all years prior to 2019 are barred because AT&T acquiesced, consented to, and ratified the rates billed for those years based on the pre-billing exchange of information, AT&T's attestation to the accuracy of the rates to be billed, and AT&T's payment of those bills.

7. AT&T's claims for all years prior to 2019 are barred because AT&T waived any right to contest the rates billed for those years based on the pre-billing exchange of information, AT&T's attestation to the accuracy of the rates to be billed, and AT&T's payment of those bills.

8. AT&T has received and continues to enjoy numerous valuable benefits and competitive advantages under the joint use agreement due to DEF's complete performance thereunder. Therefore, it would be inequitable for the Commission to grant any of the relief sought in AT&T's complaint because it would unjustly enrich AT&T at the expense of DEF.

9. In the event the Commission grants any of the relief sought in AT&T's complaint, it will render the joint use agreement unconscionable and therefore unenforceable.

10. AT&T's claim for relief under the Commission's new ILEC complaint rule fails to state a claim upon which relief can be granted because the joint use agreement at issue was not "entered into or renewed" after the effective date of the rule.

11. The Commission should forbear from exercising jurisdiction in this case because the

facts and circumstances that gave rise to the Commission's assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles are not present in this case.

12. Pursuant to Rule 1.3, the Commission should waive the applicability of Rule 1.1413 and its predecessor rule to this case.

13. The rule upon which AT&T's complaint is premised is unlawful, *ultra vires*, arbitrary, capricious, and unreasonable.

14. The doctrine of laches bars some or all of AT&T's claims.

15. The applicable statute of limitations bars some or all of AT&T's claims.

16. DEF reserves the right to assert other affirmative defenses as pleadings and discovery in this case progress.

Dated: October 30, 2020

Respectfully submitted,

/s/ Eric B. Langley

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Duke Energy Florida, LLC

PUBLIC VERSION

INFORMATION DESIGNATION

1. The Duke Energy Florida, LLC employees and outside experts with relevant information about this proceeding and rental rate dispute are identified in this answer and its supporting declarations, affidavits, and exhibits.

2. The joint use agreement, exemplar pole license agreements, and correspondence between the parties are attached as exhibits to this answer. Also attached are declarations and affidavits of Duke Energy Florida, LLC employees and third-party experts. Additionally, Duke Energy Florida is seeking information from AT&T via interrogatories that are being served concurrently with this answer. Duke Energy Florida reserves the right to rely on information that is not included or attached to this answer if it is provided by AT&T or becomes relevant.

RULE 1.721(m) VERIFICATION

I, Eric B. Langley, as signatory to this submission, hereby verify that I have read the Answer to Pole Attachment Complaint and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded and in fact is warranted by existing law, and is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

/s/ Eric B. Langley
Eric B. Langley

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on this day, October 30, 2020, a true and correct copy of Duke Energy Florida, LLC's Answer to AT&T's Complaint was filed with the Commission via ECFS and was served on the following (service method indicated):

Robert Vitanza Gary Phillips David Lawson AT&T SERVICES, INC. 1120 20th Street NW, Suite 1000 Washington, DC 20036 (by FedEx Overnight)	Marlene H. Dortch, Secretary Federal Communications Commission 445 12th Street, SW Washington, DC 20554 (by FedEx Overnight and ECFS)
Christopher S. Huther Claire J. Evans Frank Scaduto WILEY REIN LLP 1776 K Street NW Washington, DC 20006 chuther@wileyrein.com cevans@wileyrein.com fscaduto@wileyrein.com (by FedEx Overnight)	Mike Engel Federal Communications Commission Market Disputes Resolution Division Enforcement Bureau Michael.Engel@fcc.gov (by FedEx Overnight)
Rosemary H. McEnery Federal Communications Commission Market Disputes Resolution Division Enforcement Bureau 445 12th Street, SW Washington, DC 20554 Rosemary.mcenery@fcc.gov (by FedEx Overnight)	Kimberly D. Bose, Secretary Federal Energy Regulatory Commission 888 First Street, NE Washington, DC 20426 (PUBLIC VERSION only by FedEx Overnight)
Gary F. Clark, Chairman Florida Public Service Commission 2540 Shumard Oak Blvd. Tallahassee, FL 32399-0850 (PUBLIC VERSION only by FedEx Overnight)	

/s/ Eric B. Langley
OF COUNSEL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

DECLARATIONS

Exhibit A. Declaration of Gilbert Scott Freeburn (October 29, 2020).

Exhibit B. Declaration of David Hatcher (October 29, 2020).

Exhibit C. Declaration of Steven D. Burlison, P.E. (Oct. 28, 2020).

Exhibit D. Declaration of Marcia Olivier (Oct. 29, 2020).

Exhibit E. Declaration of Kenneth P. Metcalfe, CPA, CVA (Oct. 29, 2020).

EXHIBITS

Exhibit 1. Joint Use Agreement Between Florida Power Corporation ("DEF") and Southern Bell Telephone and Telegraph Company ("AT&T"), dated June 1, 1969 ("Joint Use Agreement").

Exhibit 2. Amendment to Joint Use Agreement Between Florida Power Corporation ("DEF") and Southern Bell Telephone and Telegraph Company ("AT&T"), dated October 16, 1980 ("1980 Amendment").

Exhibit 3. Amendment to Joint Use Agreement Between Florida Power Corporation ("DEF") and Southern Bell Telephone and Telegraph Company ("AT&T"), dated January 2, 1990 ("1990 Amendment").

Exhibit 4. Letter from Dianne Miller, AT&T, to Scott Freeburn, DEF (Sep. 5, 2019).

Exhibit 5. Letter from Scott Freeburn, DEF, to Dianne Miller, AT&T (Sep. 10, 2020).

Exhibit 6. AT&T's Internal Division of Cost Circular (Sep. 1972).

Exhibit 7. Exemplar CLEC Pole Attachment License Agreement.