Before the
Federal Communications Commission
Washington, DC 20554

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

OPPOSITION OF BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA TO DUKE ENERGY FLORIDA'S PETITION FOR RECONSIDERATION

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Date: October 7, 2021

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* Certain information in this Opposition to Duke Florida's Petition for Reconsideration has been designated confidential pursuant to 47 C.F.R. § 1.731. The designated information is marked with a text box in the confidential version of these pleadings and is redacted in the public version.

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Pursuant to 47 C.F.R. § 1.106(g), BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T") respectfully submits this opposition to Duke Energy Florida's ("Duke Florida") petition for reconsideration of the Enforcement Bureau's August 27, 2021 Memorandum Opinion and Order (the "*Bureau Order*").[1]

I. Introduction and Summary

The Commission should promptly dismiss Duke Florida's petition for reconsideration because the *Bureau Order* plainly does not warrant consideration under Commission rule 1.106(p). First, the petition "rel[ies] on arguments that have been fully considered and rejected … within the same proceeding."[2] "[R]epetition of the same arguments … does not provide grounds for reconsideration."[3] Second, the petition fails to "identify any material error, omission, or reason warranting reconsideration" as required.[4] Instead, Duke Florida attempts to relitigate long-settled rate-setting principles and a decade of pole attachment rate reform requiring a reduction of its unjust and unreasonable rates. These are not proper bases for reconsideration.

If the Commission addresses the petition on the merits, it should deny it for reasons already provided in the *Bureau Order* and many other Commission decisions. A decade ago, the Commission required competitively neutral pole attachment rates to reduce infrastructure costs, promote competition, and foster broadband deployment.[5] Yet Duke Florida ignored this

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[1] Memorandum Opinion and Order, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (EB Aug. 27, 2021) ("*Bureau Order*").

[2] 47 C.F.R. § 1.106(p)(3).

[3] *See AT&T Corp. v. Wide Voice, LLC*, Memorandum Opinion and Order, ¶ 4, Proceeding No. 20-362 (EB Sept. 28, 2021) ("*Wide Voice Order*").

[4] 47 C.F.R. § 1.106(p)(1).

[5] *See, e.g.*, *In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order, 33 FCC Rcd 7705, 7767 (¶ 123) (2018)

directive and continued to charge AT&T $[redacted] per pole rates under the parties' Joint Use Agreement ("JUA") while charging AT&T's competitors an approximately $[redacted] new telecom rate,[6] which fully compensates Duke Florida for "all costs that are caused by [an] attacher."[7] This *$[redacted] per pole premium* overcompensates Duke Florida to the tune of $[redacted] million annually to the detriment of the Commission's competition and deployment goals.[8] The *Bureau Order* correctly finds that Duke Florida charged AT&T unjust and unreasonable pole attachment rates and must refund amounts it unlawfully collected.[9] The Commission should promptly reject Duke Florida's petition and provide AT&T the just and reasonable pole attachment rates that the law and the Commission's competition and deployment goals require.

II. Duke Florida's Petition Is Procedurally Barred Because It Repeats Arguments Already Made and Rejected.

Duke Florida's petition "plainly do[es] not warrant consideration" because it "[r]el[ies] on arguments that have been fully considered and rejected by the Commission within th[is] …

("*Third Report and Order*") ("In the interest of promoting infrastructure deployment, the Commission adopted a policy in 2011 that similarly situated attachers should pay similar pole attachment rates for comparable access.").

[6] *Bureau Order* ¶ 12; Answer, Proceeding No. 20-276 (Oct. 30, 2020) ("Answer"), Ex. D at DEF000173 (Olivier Decl. ¶ 10) (listing rates Duke Florida charged CLEC and cable attachers).

[7] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5299 (¶ 137), 5321 (¶ 182) (2011) ("*Pole Attachment Order*").

[8] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 30 FCC Rcd 13731, 13741 (¶ 20) (2015) ("*Cost Allocator Order*") ("[W]e view pole attachment rate reform as part of the Commission's fundamental mission to advance the availability and adoption of broadband in America."); *see also* Complaint, Proceeding No. 20-276 (Aug. 25, 2020) ("Compl."), Ex. A at ATT00008 (Rhinehart Aff. ¶ 15).

[9] For reasons detailed in AT&T's Application for Review, the just and reasonable rate for AT&T's use of Duke Florida's poles should be the same new telecom rate guaranteed AT&T's competitors, rather than a higher rate (up to the old telecom rate) set by the *Bureau Order*. *See* Application for Review, Proceeding No. 20-276 (Sept. 27, 2021).

proceeding" and many others.[10] Having considered the arguments Duke Florida repeats here, the *Bureau Order* found (1) the JUA rates are subject to review under the 2011 *Pole Attachment Order* and the 2018 *Third Report and Order*,[11] (2) AT&T's rate—like its competitors' rates—must be based on the 1 foot of space its facilities are presumed to occupy on a pole,[12] (3) Duke Florida relied on "speculative" valuations that were "unsupported by reliable evidence" and "at odds with precedent" in its effort to justify charging AT&T a rate higher than the fully compensatory new telecom rate,[13] (4) Duke Florida must refund amounts it unlawfully collected consistent with Florida's contract law statute of limitations,[14] and (5) the Commission has jurisdiction over this dispute to ensure just and reasonable rates.[15] Each of these findings

[10] 47 C.F.R. § 1.106(p)(3); *see also, e.g.*, *Wide Voice Order* ¶ 4 ("Wide Voice's repetition of the same arguments here does not provide grounds for reconsideration"); *In the Matter of Updating the Intercarrier Comp. Regime*, 35 FCC Rcd 6223, 6229 (¶ 18) (2020) ("Our rules and precedent are clear that we need not consider petitions for reconsideration … that 'merely repeat arguments we previously ... rejected' in the underlying order.") (citation omitted); *In the Matter of Ely Radio, LLC*, 27 FCC Rcd 7608, 7610 (¶ 6) (2012) ("A petition for reconsideration that reiterates arguments that were previously considered and rejected will be denied."); *Qwest Commc'ns Co. v. N. Valley Commc'ns, LLC*, 26 FCC Rcd 14520, 14522 (¶ 5) (2011) ("It is 'settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.'") (citation omitted).

[11] *See Bureau Order* ¶¶ 15-20, 34-45; *see also, e.g.*, Petition at 1-8 (Arguments I-II); Answer ¶¶ 11, 21, 32; Duke Florida's Supplemental Brief at 14-16, Proceeding No. 20-276 (Apr. 8, 2021) ("Duke Florida Supp. Br.").

[12] *See Bureau Order* ¶¶ 47-50; *see also, e.g.*, Petition at 9-12 (Arguments III-IV); Answer ¶¶ 12, 25, 31; Duke Florida Supp. Br. at 9-12, 19-21; Duke Florida's Reply Supplemental Brief at 6-13, Proceeding No. 20-276 (Apr. 8, 2021) ("Duke Florida Reply Supp. Br.").

[13] *See Bureau Order* ¶¶ 41-44; *see also, e.g.*, Petition at 12-21 (Arguments V-VI); Answer ¶¶ 8, 10, 15; Duke Florida Supp. Br. at 2-9, 12-14.

[14] *See Bureau Order* ¶¶ 56-64; *see also, e.g.*, Petition at 21-24 (Arguments VII-VIII); Answer ¶ 32 and Affirmative Defenses 1, 2, 3, 4, 5, 6, 7.

[15] *See Bureau Order* ¶¶ 1 n.2, 3 n.7; *see also, e.g.*, Petition at 25 (Arguments IX-X); Answer ¶ 35 and Affirmative Defense 13.

reflected a straightforward application of prior Commission decisions.[16] Duke Florida's request that the Commission consider them *again* on reconsideration is a waste of the Commission's (and AT&T's) time and resources.[17]

And Duke Florida never attempts "to identify any material error, omission, or reason warranting reconsideration."[18] Instead, Duke Florida argues that the *Bureau Order* should have *abandoned* precedent to reach a different decision here.[19] That is not and cannot be a "material

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[16] *See, e.g.*, *Verizon Md. LLC v. The Potomac Edison Co*., 35 FCC Rcd 13607 (2020) ("*Potomac Edison Order*"); *Third Report and Order*, 33 FCC Rcd at 7705-7771 (¶¶ 123-129); *Pole Attachment Order*, 26 FCC Rcd at 5288-5290 (¶¶ 107-112), 5321-5338 (¶¶ 182-220); *see also BellSouth Telecommunications v. Duke Energy Progress, LLC*, Memorandum Opinion and Order, Proceeding No. 20-293 (EB Sept. 21, 2021) ("*Duke Progress Order*"); *BellSouth Telecommunications v. Fla. Power & Light Co*., 36 FCC Rcd 253 (EB 2021) ("*FPL 2021 Order*"); *BellSouth Telecommunications v. Fla. Power & Light Co*., 35 FCC Rcd 5321 (EB 2020) ("*FPL 2020 Order*"); *Verizon Va. v. Va. Elec. and Power Co*., 32 FCC Rcd 3750 (EB 2017) ("*Dominion Order*").

[17] Duke Florida puts a new spin on 3 prior arguments, but they remain redundant. First, having unsuccessfully argued that AT&T does not "genuinely lack the ability" to negotiate new rates despite AT&T's fruitless 15-month effort to do so, Duke Florida now argues AT&T does not "genuinely lack the ability" to negotiate new rates because the negotiations did not begin sooner. *See* Petition at 6-8; Answer ¶ 27; *Bureau Order* ¶ 37. Second, having unsuccessfully argued that the applicable statute of limitations for refunds should be 2 years under 47 U.S.C. § 415(c), Duke Florida now argues the 2-year period could also be found in 47 U.S.C. § 415(b). *See* Petition at 23-24; Answer ¶ 32; *Bureau Order* ¶¶ 60-61. Third, having unsuccessfully challenged the Commission's jurisdiction and threatened to "seek the intervention of the Florida Public Service Commission" if the Commission reduces its rates, Duke Florida now argues the Commission should vacate its order because Duke Florida may have that opportunity sometime in the future if Florida reverse-preempts the Commission's jurisdiction. *See* Petition at 24-25, Answer ¶ 5; *Bureau Order* ¶ 1 & n.2. These expanded arguments remain meritless for reasons detailed below. The third is also not ripe. *See Wide Voice Order* ¶ 5 (finding reconsideration is not warranted based on an argument that is not ripe for review).

[18] 47 C.F.R. § 1.106(p)(1); *see also, e.g.*, *In Re Applications of Bennett Gilbert Gaines*, 8 FCC Rcd 3986, 3986 (¶ 3) (1993) ("To be successful, a petition for reconsideration must rely on new facts, changed circumstances, or material errors or omissions in the underlying opinion.").

[19] *See, e.g.*, Petition at 8 (challenging the *Bureau Order*'s reliance on precedent that Duke Florida considers wrong); *id.* at 13 (faulting the *Bureau Order* for relying "on its own decision in the *AT&T Florida v. FPL* case"); *id.* at 19 (challenging the 2018 *Third Report and Order*'s adoption of the old telecom rate as a "hard cap"); *id.* at 23-24 (seeking reconsideration of the Commission's refund standard, adopted in the 2011 *Pole Attachment Order* and further

error" in the "*application of* … Commission precedent to the facts of this case."[20] Duke Florida's petition is thus procedurally flawed and should be dismissed or denied for these reasons alone.

III. Duke Florida's Petition Fails on the Merits for Reasons the Commission Already Provided in This and Many Other Decisions.

If the Commission reaches the merits, it should still deny Duke Florida's petition. With lengthy and confusing arguments, Duke Florida launches yet another broadscale attack on settled precedent and the Commission's pole attachment rate reforms.[21] The arguments fare no better the third or fourth time around. The *Bureau Order* correctly finds that Duke Florida charged AT&T unjust and unreasonable pole attachment rates and must refund amounts it unlawfully collected. The Commission should deny reconsideration and ensure the competitively neutral rates that are essential to its competition and deployment objectives.

A. The JUA Rates Are Subject to Commission Oversight.

Duke Florida's first two arguments try to insulate its unjust and unreasonable JUA rates from Commission oversight, arguing that they do not qualify for review under the standards the Commission adopted in 2011 and 2018.[22] But by statute, the Commission "shall regulate" the

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described in the 2020 *Potomac Edison Order*); *id.* at 25 (challenging the Commission's jurisdiction over the rates charged ILECs, and issue settled in 2011 and affirmed on appeal).

[20] *See In the Matter of Alpha & Omega Commc'ns, LLC*, 30 FCC Rcd 1931, 1932 (¶ 4) (2015) (emphasis added).

[21] Duke Florida in this proceeding repeats the same flawed and discredited arguments that its parent company used to unsuccessfully challenge the Commission's 2011 and 2018 ILEC rate reforms. *See* Petition for Review of Duke Energy Corporation, et al., 11th Cir. Case No. 18-14408, 9th Cir. Case No. 19-70490 (Oct. 19, 2018); Petition for Review of Duke Energy Corporation, et al., D.C. Cir. Case No. 11-1146 (May 18, 2011).

[22] *See* Petition at 1-8 (Arguments I-II). *But see Bureau Order* ¶¶ 14-20, 34-45.

rates Duke Florida charges AT&T to ensure that they are "just and reasonable."[23] Duke Florida's rates are not the exception.

First, the JUA rates are subject to review under the Commission's 2018 new telecom rate presumption.[24] The presumption applies to "newly-renewed agreements," which include agreements "that are automatically renewed, *extended*, or placed in evergreen status" after the presumption's effective date.[25] The JUA fits this definition. Like the agreement subject to the presumption in the Commission's recent *Potomac Edison Order*, this JUA also states that it "shall *continue* in force" until terminated.[26] Because "'continue' and 'extend' are synonymous in this context," the new telecom rate presumption applies.[27]

Duke Florida disagrees. It takes issue with the *Bureau Order*'s reliance on the *Potomac Edison Order* to reject its argument that the new telecom rate presumption should only apply if the parties take some affirmative action to renew the JUA.[28] Duke Florida's argument lacks merit. As the *Bureau Order* explained, Duke Florida ignores the language of the JUA and "the Commission's express decision to apply [the presumption] to existing agreements that 'are *automatically* renewed, extended, or placed in evergreen status' without requiring further action

[23] 47 U.S.C. § 224(b).

[24] 47 C.F.R. § 1.1413(b); *see also Bureau Order* ¶¶ 15-20.

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

[26] *Bureau Order* ¶ 15 (quoting Compl. Ex. 1 at ATT00102-103 (JUA, Art. XVI)); *Potomac Edison Order*, 35 FCC Rcd at 13613 (¶ 15) (agreement "shall continue in force thereafter…"); *see also Duke Progress Order* ¶ 9 (agreement "shall continue in force until terminated…").

[27] *Bureau Order* ¶ 15 (citing *Potomac Edison Order*, 35 FCC Rcd at 13613 (¶¶ 15-16)); *see also Duke Progress Order* ¶ 9.

[28] *See* Petition at 8.

by the parties."[29] The Commission has now rejected this theory in the 2018 *Third Report and Order*, the *Potomac Edison Order*, and the *Bureau Order*. It should again be summarily dismissed.

Duke Florida also incorrectly claims that the Commission did not consider its argument that a JUA with an "evergreen provision" (like almost every JUA) should never renew for purposes of the new telecom rate presumption.[30] Duke Florida reasons that this protection of the existing pole network after the JUA termination means the JUA never terminates for those existing attachments and argues "there can be no 'renewal' when there is no right of termination."[31] In fact, the *Bureau Order* expressly rejected this argument as well, finding that it has no support in "the text or structure of the rules or the *2018 Order*" and that it "run[s] contrary to the incentives for new broadband deployment that the Commission sought to foster through its adoption of that rule in the *2018 Order*."[32] The *Bureau Order* correctly found that the JUA rates are subject to review under the new telecom rate presumption.

Second, even apart from the new telecom rate presumption, the JUA rates meet the standard for review the Commission adopted in 2011.[33] In its 2011 *Pole Attachment Order*, the

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[29] *Bureau Order* ¶ 19 (quoting *Potomac Edison Order*, 35 FCC Rcd at 13613-14 (¶ 17) (quoting *2018 Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475)); *see also Duke Progress Order* ¶ 13.

[30] *See* Petition at 8.

[31] *Id.*

[32] *Bureau Order* ¶ 18; *see also Duke Progress Order* ¶ 12.

[33] The *Bureau Order* did not need to reach this question because the new telecom rate presumption applies. As explained in AT&T's Application for Review, the Commission did not carve complaint proceedings into different time periods subject to different standards when it adopted the presumption; it adopted the presumption without temporal limitation to simplify disputes and accelerate rate reductions. By regulation, the presumption applies to an entire "complaint proceeding[ ] challenging utility pole attachment rates" under a newly renewed JUA, 47 C.F.R. § 1.1413(b), and it should have applied to all rental periods at issue here.

Commission clarified that it would review rates charged under an existing JUA if an ILEC "genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement."[34] In case after case, the Commission has found this standard met where, as here, the unjust and unreasonable rates are locked in by an evergreen provision, the electric utility has superior bargaining power to perpetuate those rates (here, a 12-to-1 pole ownership advantage), and "protracted negotiations … failed to produce a mutually agreeable, just and reasonable rate."[35]

Duke Florida does not challenge these findings in its petition, instead arguing that the JUA rates should have escaped review based on 3 requirements it tries to graft onto the 2011 *Pole Attachment Order*. Duke Florida first argues that unjust and unreasonable rates escape correction under the 2011 *Order* if an ILEC does not prove the "monetary value" of alleged (but disputed) competitive advantages.[36] The Commission did not adopt this standard of review. This standard would require an ILEC to both dispute the existence of an alleged competitive advantage *and* prove its (non-existent) value. Rather, the Commission has always placed the burden on the pole owner—here, Duke Florida—to justify charging a rate higher than the regulated rate,[37] as just and reasonable rates are cost-based rates designed to compensate—but

[34] *Bureau Order* ¶ 34 n.114 (quoting *Pole Attachment Order*, 26 FCC Rcd at 5335-36 (¶ 216)).

[35] *Bureau Order* ¶¶ 34-38; *see also Duke Progress Order* ¶¶ 36-40; *Potomac Edison Order*, 35 FCC Rcd at 13616-13618 (¶¶ 22-28); *FPL 2020 Order*, 35 FCC Rcd at 5326-5327 (¶¶ 11-12); *Dominion Order*, 32 FCC Rcd at 3756-3757 (¶¶ 13-14).

[36] Petition at 1-4. Duke Florida relies on an interim decision where quantification was requested based on a finding that the ILEC "concede[d] that it received and continues to receive benefits under the Agreement that are not provided to other attachers." *Id.* at 3 (quoting *Verizon Fla. v. FPL*, 30 FCC Rcd 1140, 1149 (¶ 24) (EB 2015)). That is not the case here.

[37] *Bureau Order* ¶ 41 n.148; *see also Marcus Cable Assocs. v. Tex. Utils. Elec. Co*., 18 FCC Rcd 15932, 15938-39 (¶ 13) (2003) ("Once a complainant in a pole attachment matter meets its burden of establishing a *prima facie* case, the [utility] bears a burden to explain or defend its actions."). Duke Florida did not challenge the *Bureau Order*'s finding that AT&T made a *prima facie* case of unreasonableness. *See id.* ¶ 40.

not over-compensate—the pole owner.[38] The *Bureau Order*, therefore, correctly held Duke Florida to its burden to "justify 'the rate … alleged in the complaint not to be just and reasonable.'"[39] And it rightly rejected Duke Florida's effort as "speculative," "unsupported by reliable evidence," and "at odds with precedent."[40]

Duke Florida then argues that the JUA rates escape review and are shielded from correction because the 1969 JUA is a "historic" (or "existing") agreement whose rates are entitled to deference.[41] But the *Bureau Order* **did** treat the JUA as an "existing" agreement and found that it satisfies the "threshold" requirements for review of such agreements.[42] It also strictly adhered to precedent when it described the 2011 *Order*'s adoption of the old telecom rate as a "reference point" and applied that "reference point" here.[43]

Lastly, Duke Florida argues that the JUA rates escape review under the 2011 *Pole Attachment Order* in the absence of evidence of rate negotiations *before* the 2018 *Third Report and Order* took effect.[44] There is no such requirement in the Commission's orders or rules.

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[38] *See, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 182) ("The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers, as it ensures that utilities will recover more than the incremental cost of making attachments."); *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18) (a pole owner may not recover "costs that [it] does not incur"); *Heritage Cablevision Assocs. v. Tex. Utils. Elec. Co*., 6 FCC Rcd 7099, 7105 (¶ 29) (1991) (a pole owner may not charge a higher rate when it does not "incur[ ] any additional costs in preparing or maintaining its poles as a result of [the] installation of fiber optic cables" as compared to "coaxial cable").

[39] *Bureau Order* ¶ 41 n.148 (quoting *Dominion Order*, 32 FCC Rcd at 3759 (¶ 19 n.70) (quoting then-current 47 C.F.R. § 1.1407(a) (2018))).

[40] *Bureau Order* ¶¶ 41-44; *see also* Section III.C, below.

[41] Petition at 4-6.

[42] *Bureau Order* ¶¶ 34-38.

[43] *See Bureau Order* ¶ 39; *see also, e.g.*, *Duke Progress Order* ¶¶ 41, 47; *Potomac Edison Order*, 35 FCC Rcd at 13607 (¶¶ 29-30); *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 17).

[44] Petition at 6-8.

Instead, the Commission has "declin[ed] the invitation … to modify [its] rules to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge"[45] and, in 2018, retained its authority to require refunds of amounts unlawfully collected as far back as the statute of limitations allows.[46]

Moreover, the record reveals the fallacy of Duke Florida's claim that "the result might have been very different" had "AT&T requested renegotiation in 2015, for example," instead of early 2019.[47] The parties' "protracted negotiations" failed to resolve this case—not because of when they began—but because Duke Florida rejected the Commission's jurisdiction, precedent, and rate reforms during the parties' negotiations and, for that matter, throughout this dispute.[48]

B. Commission Regulations and Precedent Require that Rates Be Set Based on the Space Occupied on the Pole.

Duke Florida seeks to increase the rates that result from the Commission's new and old telecom rate formulas by charging AT&T for 3.33 feet of safety space on its poles that is "usable and used by the electric utility"[49] and for 3 feet of space allocated by the JUA to, but not used by,

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

[46] 47 C.F.R. § 1.1407(a).

[47] Petition at 8.

[48] During negotiations, Duke Florida "insisted on using inflated inputs that contradict FCC precedent," "refused to consider refunds for any prior period," and postured that "AT&T can simply remove its attachments from Duke's poles to avoid the JUA's rates." *Bureau Order* ¶ 37 & n.130 (citation omitted). The *Bureau Order* correctly rejected each of Duke Florida's flawed and tired arguments, *see id.* ¶¶ 37, 47-50, 56-64, yet Duke Florida is undeterred and continues to challenge the Commission's jurisdiction and precedent in its petition, *see, e.g.*, Petition at 9-12, 21-24, 25.

[49] *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("*Consolidated Partial Order*").

AT&T.[50] The *Bureau Order* correctly rejected these arguments because "Commission rules … permit a utility to charge attachers *only* for the physical space occupied by their attachments."[51]

First, the Commission has "long held that the … safety space is for the benefit of the electric utility, not communications attachers."[52] Duke Florida concedes it cannot charge AT&T's competitors for the safety space[53] and admits the *Bureau Order* reached the same conclusion based on "the Commission's previous finding that the 'safety space is usable and used by the electric utility.'"[54] Yet, in the face of this established precedent, Duke Florida continues to argue that AT&T is the cause of and should be allocated that space.[55] The

[50] Petition at 9-12 (Arguments III-IV).

[51] *Bureau Order* ¶ 49 (emphasis added); *see also FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) ("[U]nder the Commission's rate formula, 'space occupied' means space that is 'actually occupied'"); *Consolidated Partial Order*, 16 FCC Rcd at 12143 (¶ 78) ("determination of the amount of space occupied" is based on "the amount of space actually occupied").

[52] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); *see also Bureau Order* ¶ 49 ("We reaffirm that safety space is not attributable to communications attachers," as it "is for the benefit of the electric utility, not attachers."); *Duke Progress Order* ¶ 51 n.171 ("[T]he communications safety space is for the benefit of the electric utility, not communications attachers"); *Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51) ("[T]he 40-inch safety space … is usable and used by the electric utility"); *Television Cable Serv. v. Monongahela Power Co*., 88 FCC.2d 63, 68 (¶¶ 10-11) (1981) (rejecting argument that "the 40-inch safety space" should be added "to the 12 inches regularly allotted to [a cable attacher] to compute the space occupied").

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

[54] Petition at 10 (citations omitted).

[55] Duke Florida also argues that it does not use the safety space, yet that claim is dispelled by the nature of its facilities, which require the space, and Duke Florida's use of the space for streetlights. *See* Answer Ex. A at DEF000134 (Freeburn Decl. ¶ 16); Answer Ex. C at DEF000163-64 (Burlison Decl. ¶ 9). Duke Florida is also wrong in claiming that the Enforcement Bureau does not "understand" that the safety space is in the usable space on a pole. *See* Petition at 9 & n.35. Duke Florida mischaracterizes a footnote, which states that the FCC rate formulas do not allocate the cost of the safety space to communications attachers because they do not occupy the safety space. *See Bureau Order* ¶ 49 n.174. The same footnote clarifies that "the safety space is 'usable'" space and is "used by the electric utility." *See id.* (citation omitted).

Commission should reject Duke Florida's plea to ignore the Commission's prior rulings. "Because AT&T's attachments do not occupy the safety space, Duke may not charge AT&T for that space."[56]

Second, the Commission's rate formulas are based on "space *occupied*," not space allocated by a JUA.[57] This makes sense, as allocated space typically diverges substantially from used space,[58] and electric utilities cannot lawfully reserve extra space for ILECs.[59] Calculating rates based on physically occupied space thus ensures that attachers are charged for their actual use and avoids the potential for overcharging, undercharging, and double recovery.

Even though "the JUA *allocates* three feet of space to AT&T," AT&T's pole attachment rate must be based on the space *occupied* by AT&T.[60] Absent statistically valid survey data about the actual average space occupied, the presumption is that communications attachers occupy 1 foot of space.[61] This 1 foot presumption applies because "Duke has not rebutted th[at]

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[56] *Bureau Order* ¶ 49; *id.* ¶ 49 n.176 ("Duke's attempt to force AT&T to bear the cost of the safety space is, in essence, an attempt to revisit settled rulings").

[57] *See Bureau Order* ¶¶ 47, 49 & n.175; *see also* 47 C.F.R. § 1.1406(d)(2) (calculating new telecom rates based on "Space Occupied"); 47 C.F.R. § 1.1409(e)(2) (2010) (calculating preexisting telecom rates based on "Space Occupied").

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

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

[60] *Bureau Order* ¶ 26 n.84 (emphasis added). This discussion in the *Bureau Order* disproves Duke Florida's unfounded claim that its "space occupied analysis completely ignores" the JUA's space allocation. *See* Petition at 11-12.

[61] 47 C.F.R. § 1.1410; *see also Bureau Order* ¶ 47; *Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19866 (¶ 18) (2002).

presumption."[62] Duke Florida nonetheless claims it has data "showing that AT&T actually occupies at least [redacted] feet of space" on Duke Florida's poles.[63] It does not. The *Bureau Order* rejected Duke Florida's data,[64] which was fundamentally flawed, statistically invalid, and inherently unreliable.[65] The *Bureau Order* correctly applied the 1-foot space occupied presumptive input required by the Commission's rules.[66]

C. Duke Florida's Valuation Arguments Were "Speculative," "Unsupported by Reliable Evidence" and "at Odds with Precedent."

Duke Florida next asks the Commission to let Duke Florida charge *more* than the "hard cap" set by the Commission's 2018 *Third Report and Order* based on valuations of alleged competitive advantages that are "speculative," "unsupported by reliable evidence," and "at odds

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[62] *Bureau Order* ¶ 26 n.84; *see also id.* ¶¶ 47-50.

[63] Petition at 11.

[64] *Bureau Order* ¶ 50.

[65] Duke Florida relied on measurements its contractor collected during the third-party attachment application process before make-ready potentially changed the location of attachments. It considered only [redacted] poles, which were not randomly selected, were clustered in [redacted] of [redacted] counties covered by the JUA, and included multiple poles down the same pole lead. *See Bureau Order* ¶ 50. The data was rife with error, containing multiple entries the same pole with vastly different measurements. And the measurements did not capture the space *occupied* by AT&T. Rather, Duke Florida paired a measurement of how far above-ground AT&T's facilities were placed with a presumption that the average (although highly fact-specific) minimum ground clearance for a utility pole is 18 feet. The resulting [redacted]-foot value is hypothetical and does not establish the space actually occupied by AT&T. *See* Reply Legal Analysis at 8-11, Proceeding No. 20-276 (Nov. 24, 2020) ("Reply Legal Analysis"); AT&T Supp. Br. at 12-15 and Exs. 5-11, Proceeding No. 20-276 (Apr. 8, 2021); AT&T Reply Supp. Br. at 12-13 and Ex. 1, Proceeding No. 20-276 (Apr. 19, 2021).

[66] The 1-foot space occupied presumption is consistent with all recent data the Commission has relied upon about the space occupied by ILEC facilities. *See Potomac Edison Order*, 35 FCC Rcd at 13624 (¶ 37); *FPL 2021 Order*, 36 FCC Rcd at 259 (¶ 18). Indeed, AT&T's facilities are comparable in size to its competitors' facilities, which are also presumed to occupy 1 foot of space. *See, e.g.*, Reply Legal Analysis Ex. C at ATT00288 (Peters Reply Aff. ¶ 26); Reply Legal Analysis Ex. D at ATT00301-302 (Davis Reply Aff. ¶ 10).

with precedent."[67] The *Bureau Order* rightly rejected Duke Florida's arguments the first time around and should do so again.

First, the Commission cannot depart upward from the old telecom rate in this proceeding, because the Commission set the old telecom rate as an "upper bound" where an electric utility rebuts the new telecom rate presumption.[68] Even though the old telecom rate is "sufficiently high that it hinders important statutory objectives," the Commission found its use would create a range of rates (from new to old telecom) that is broad enough to "account for" all possible "arrangements that provide net advantages to [I]LECs relative to cable operators or telecommunications carriers."[69] And the range is certainly broad enough here, where Duke Florida could not accurately quantify the value of a single net material competitive advantage in response to AT&T's complaint.[70]

Second, the Commission correctly rejected Duke Florida's speculative valuations, which it relied on to try to embed in its pole attachment rate purely hypothetical costs it claims AT&T was able to forego because of the JUA, namely "(a) … make-ready cost[s] to replace nearly every [Duke] pole to which [AT&T] is attached, or (b) [costs to] construct an entirely redundant network of poles."[71] Duke Florida's make-ready theory is based on an unfounded assumption that it installed joint use poles when it would have installed shorter non-joint use poles to meet its own electric service needs—such that, without the JUA, AT&T would have had to pay to

[67] *Bureau Order* ¶¶ 41-44. *See* Petition at 12-21 (Arguments V-VI).

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

[69] *Pole Attachment Order*, 26 FCC Rcd at 5303 (¶ 147), 5337 (¶ 218).

[70] *See Bureau Order* ¶ 41 (rejecting Duke Florida's valuation attempts as "speculative and unsupported by reliable evidence").

[71] *Id.*

replace each of Duke Florida's poles with a taller pole in order to attach.[72] The Commission has repeatedly rejected this argument.[73] The height of Duke Florida's poles is not a *competitive* advantage for AT&T, as AT&T *and its competitors* require Duke Florida's joint use poles and have for many decades.[74] Duke Florida "did not build its poles just to accommodate AT&T."[75]

Duke Florida misses the mark when it argues that the *Bureau Order* misreads a document Duke Florida produced, claiming it speaks only to "the replacement of poles already in joint use" so should not have been used to rebut its claim that Duke Florida would have installed shorter poles in the absence of joint use.[76] The *Bureau Order*, however, is correct about the document: it "shows that, by 1972 (*i.e.*, 3 years after the JUA), it was electric utilities—and *not* telephone companies—that more commonly required taller poles" even in the absence of joint use.[77] When converting poles to joint use, the document states that it was [redacted] while a typical nonjoint electric pole line was already "of sufficient 'strength and clearances' to

[72] *Id.*; *see also* Petition at 14-17. The *Bureau Order* did not "completely ignore[ ]" the testimony of Duke Florida's witnesses that the 1969 JUA "caused [Duke Florida] to build a network of poles taller and stronger than necessary for its own use." Petition at 15. Instead, the Commission correctly rejected the testimony as "controverted by evidence" and because "Duke's witnesses … provide no explanation as to the basis for those statements and offer no information regarding the height and strength of poles in Duke's pole network prior to the JUA or in the period immediately after its execution." *Bureau Order* ¶ 43 & n.155.

[73] *See Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128) (alleged competitive advantages must be "beyond basic pole attachment … rights"); *Duke Progress Order* ¶¶ 44-45; *Potomac Edison Order*, 35 FCC Rcd at 13619-20 (¶ 32); *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15).

[74] *See Bureau Order* ¶ 43.

[75] *Potomac Edison Order*, 35 FCC Rcd at 13619-20 (¶ 32); *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15).

[76] *See* Petition at 16.

[77] *Bureau Order* ¶ 43 n.156 (citing Answer Ex. 6 at 1 (DEF000278) and 15 (DEF000292)).

allow telephone company attachments 'with little or no rearrangements or pole replacements.'"[78] And when replacing poles, the document recognizes "one of the more common reasons for premature pole replacement" was the *electric utility*'s need for additional pole space.[79] In other words, and as the Commission has repeatedly held, Duke Florida cannot rely on the height of its poles to increase the rate it charges AT&T or any other communications attacher.[80] Regardless of why it installed its poles, the Commission has already ensured that Duke Florida is fully compensated for them at a new telecom rate.[81]

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[78] *Id.* (citing Answer Ex. 6 at 1 (DEF000278)). This remains true. In a September 2020 filing, Duke Florida's parent company, joined by other electric utilities, stated that only about 0.024% of an electric utility's poles require replacement each year to accommodate an additional communications facility. *See* Initial Comments of Duke Energy Corp., et al. at 16-17, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17- 84 (Sept. 2, 2020). In a January 2021 filing, Duke Florida's parent company again emphasized that its utility poles are "almost always capable of hosting an additional attachment." Ex Parte of Duke Energy Corp., et al. at 2, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17-84 (Jan. 29, 2021). And in this record, Duke Florida depicts a 55-foot pole as its "typical" joint use pole and a 45-foot pole as its "typical" pole without AT&T attached. Answer Ex. C at DEF000168 (Burlison Decl., Ex. C-1). There is ample room on poles of these heights for AT&T and its competitors to attach without replacing them. Indeed, the Commission's regulations presume there is space for Duke Florida and 4 communications attachers on a 37.5-foot pole. 47 C.F.R. §§ 1.1409(c), 1.1410; *see also* Compl. Ex. C at ATT00037 (Peters Aff. ¶ 12); Reply Legal Analysis Ex. C at ATT00279 (Peters Reply Aff. ¶ 9); Reply Legal Analysis Ex. E at ATT00335 (Dippon Reply Aff. ¶ 51).

[79] *Id.* (citing Answer Ex. 6 at 15 (DEF000292)).

[80] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *see also Bureau Order* ¶ 43; *Duke Progress Order* ¶ 45; *Potomac Edison Order*, 35 FCC Rcd at 13619 (¶ 32).

[81] 47 C.F.R. § 1.1406(d)(2) (calculating new telecom rates based on "Pole Height"); *see also Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137) ("The [new telecom] rate is just, reasonable, and fully compensatory"); *id*. at 5321 (¶ 182) ("The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers…. The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate."); *see also FCC v. Fla. Power Corp*., 480 U.S. 245, 254 (1987); *City of Portland v. United States*, 969 F.3d 1020, 1053 (9th Cir. 2020); *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002).

Duke Florida's redundant network theory is contrary to precedent as well. "The Commission has never condoned valuing an alleged advantage by assuming that, without the JUA, an [I]LEC would have built a duplicative pole network."[82] The Commission seeks to reduce rates and infrastructure costs—not overcompensate electric utilities by letting them embed in their pole attachment rates the prohibitive cost of a duplicative pole network that does not, and will never, exist.[83]

Duke Florida criticizes the Enforcement Bureau for not explaining the correct way to assign value to an evergreen provision if quantification cannot be based on the hypothetical cost of a needlessly redundant replacement network,[84] but that was not the Bureau's job. Duke Florida, not the Enforcement Bureau, has the burden to "justify" a rate higher than the new telecom rate with cost valuations.[85] Duke Florida did not do so.[86]

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[82] *Bureau Order* ¶ 42; *see also Duke Progress Order* ¶ 44; *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15) (rejecting valuation that "assum[ed] that, without the JUA, AT&T would have built a duplicate pole network").

[83] Duke Florida wants to embed in AT&T's rate an extra $[redacted] per pole every year based on this hypothetical duplicative pole network that does not exist. *See* Petition at 12. *But see Bureau Order* ¶ 37 n.136 (finding that "replicating Duke's 62,000 pole network [is] unrealistic from AT&T's perspective given the difficulty of obtaining the necessary zoning and other approvals."); *id*. ¶ 42 n.152 ("[A]s Congress has found, owing to a variety of factors, including environmental and zoning restrictions, there is "often no practical alternative except to utilize available space on existing poles.") (citation omitted).

[84] Petition at 14.

[85] *Bureau Order* ¶ 41 n.148 (quoting *Dominion Order*, 32 FCC Rcd at 3759 (¶ 19 n.70) (quoting then-current 47 C.F.R. § 1.1407(a) (2018))).

[86] In its Petition, Duke Florida repeatedly mischaracterizes its record evidence as "uncontroverted" and AT&T's evidence as nonexistent. *See, e.g.*, Petition at iii, 3, 7, 9, 10, 15, 19, 20. Neither is true. AT&T submitted nearly 350 pages of testimony and documentary evidence, which substantiated its claims, explained how some of Duke Florida's evidence actually supported AT&T's claims, and refuted the rest of Duke Florida's evidence and arguments. *See* Compl., Exs. A-D, 1-19 at ATT00001-236; Reply Legal Analysis, Exs. A-E at ATT00237-348.

Duke Florida also incorrectly faults the *Bureau Order* for using its expert's hypothetical valuation of an unnecessary replacement network to illustrate the bargaining leverage inherent in Duke Florida's 12-to-1 pole ownership advantage.[87] Duke Florida claims it was "arbitrary and capricious" to accept the valuation for one purpose, but not another. But the *Bureau Order* did not *accept* the accuracy of the replacement cost valuation for any purpose; it simply noted that the analysis confirmed the far greater cost for AT&T to replace "62,363 Duke poles to which AT&T is attached" as compared to the cost to Duke Florida to replace "5,233 AT&T poles to which Duke is attached."[88] In other words, "AT&T's alternative to the JUA [is] far costlier," which "reinforces Duke's ability 'to perpetuate the status quo and refuse reductions to its unjust and unreasonable rates."[89]

Finally, Duke Florida improperly criticizes the *Bureau Order* for reaching different decisions about "permitting fees" and "inspection and engineering costs."[90] But the *Bureau Order* was correct to distinguish the two, as they are not the same. A permitting fee may "cover the administrative cost of processing [permit] applications," provided it is not already included in the administrative component of the rate formula.[91] Inspection and engineering costs, on the other hand, involve the costs required to prepare a pole for a new attachment. And, as the

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[87] Petition at 14.

[88] *Bureau Order* ¶ 37 & n.135.

[89] *Id.*

[90] *See* Petition at 17-18.

[91] *Bureau Order* ¶ 29; *see also Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387, 4393 (¶ 44) (1987) ("A separate charge or fee for items such as application processing … is not justified if the costs associated with these items are already included in the rate…."); *Cavalier Tel., LLC v. Va. Elec. and Power Co.*, 15 FCC Rcd 9563, 9574 (¶ 22) (2000), *vacated by settlement*, 17 FCC Rcd 24414 (2002) ("Because Respondent provided no explanation that the administrative costs associated with permit application processing are not otherwise included in the carrying charges, we find that the fees are an unjust and unreasonable rate, term, or condition.").

Bureau Order correctly found, "AT&T completes its own make-ready, engineering, and survey work, or pays [Duke] at cost for the work it asks [Duke] to perform."[92] There are no "inspection and engineering costs" incurred by Duke Florida requiring further compensation.[93] Duke Florida may not lawfully "charge a higher rate" where an ILEC "performs a particular service itself and incurs costs comparable to its competitors in performing that service."[94]

The *Bureau Order* thus correctly rejected Duke Florida's valuations as "speculative," "unsupported by reliable evidence," and "at odds with precedent."[95] They do not justify charging AT&T an anti-competitive rate that is higher than the fully compensatory new telecom rate guaranteed AT&T's competitors.[96]

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[92] *Bureau Order* ¶ 32.

[93] It is also not clear what uncompensated work Duke Florida claims to perform for AT&T, particularly when it admits that it does not perform "pre-construction and post-construction inspections" out of "deference" to ILECs. *See* Answer ¶ 14; *see also* Reply Legal Analysis Ex. D at ATT00298 (Davis Reply Aff. ¶ 4) ("I am … not aware of any cost related to permitting, engineering, or inspections that AT&T does not already incur.").

[94] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18 & n.67). Duke Florida inflated its valuation of "inspection and engineering costs" in at least 4 ways. First, Duke ignored internal costs incurred by AT&T. Second, Duke Florida guessed what AT&T would have paid when it deployed its facilities years or decades ago instead of estimating going-forward costs. Third, Duke Florida used current-day costs for all 62,000+ poles with AT&T attachments, including costs that do not apply to every attachment and are not clearly authorized by its license agreements. Fourth, Duke Florida ignored the exceptionally high JUA rates, which imposed a $[redacted] per pole premium on AT&T for decades—far higher than Duke Florida's claimed $[redacted] per pole valuation for AT&T's use of existing poles. *See* Answer ¶¶ 14, 17; Answer Ex. A at DEF000153 (Freeburn Decl. ¶ 18); Answer Ex. E at DEF000240 (Metcalfe Aff., Ex. E-3.2); Answer Ex. 7 at DEF000296-341 (License Agreement); *see also* Compl. Ex. A at ATT00007 (Rhinehart Aff. ¶ 12); Reply Legal Analysis Ex. C at ATT00291-293 (Peters Reply Aff. ¶¶ 32-34); Reply Legal Analysis Ex. E at ATT00341 (Dippon Reply Aff. ¶ 63).

[95] *Bureau Order* ¶¶ 41-44. *See* Petition at 12-21 (Arguments V-VI).

[96] *See* Application for Review at 3-16.

D. Refunds Were Correctly Awarded Consistent with Regulation, Precedent, and Florida's Statute of Limitations for Contract Actions.

Duke Florida challenges settled precedent when it asks the Commission to reduce the refunds awarded by the *Bureau Order*.[97] The Commission's rules authorize refunds "as far back in time as the applicable statute of limitations allows."[98] The Commission has since confirmed that the "applicable statute of limitations" is the state limitations periods for contract actions,[99] which is 5 years in Florida.[100] "This precedent resolves the applicable statute of limitations for AT&T's complaint here: it is Florida's five year statute of limitations for a 'legal or equitable action on a contract.'"[101]

Duke Florida seeks a different result, but precedent forecloses its arguments. *First*, Duke Florida argues that refunds should never be considered "appropriate" for periods prior to good faith notice of a dispute.[102] The Commission, however, "decline[d] the invitation … to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge."[103] Doing so "runs counter to the very idea of a statute of limitations."[104] And regardless, Duke Florida was on notice beginning in 2011 that it was obligated to conform the contract rates to the just and reasonable level as required by law. It should not be rewarded for its failure and refusal to do so.

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[97] Petition at 21-24 (Arguments VII-VIII).

[98] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112); *see also* 47 C.F.R. § 1.1407(a)(3).

[99] *Potomac Edison Order*, 35 FCC Rcd at 13626-28 (¶¶ 40-46); *see also Duke Progress Order* ¶¶ 58-63; *FPL 2021 Order*, 36 FCC Rcd at 255-57 (¶¶ 9-11).

[100] *FPL 2021 Order*, 36 FCC Rcd at 256 (¶ 10).

[101] *Bureau Order* ¶ 57 (citing Fla. Stat. § 95.11(2)(b)).

[102] Petition at 21-23.

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

[104] *See id.*

Second, Duke Florida asks the Commission to ignore the 5-year statute of limitations that applies to actions involving a Florida contract and instead apply the 2-year statute of limitations under 47 U.S.C. § 415(b), which bears no relation to this dispute. "Section 415(b) is a statute of limitations covering complaints against a 'carrier' for the recovery of damages" and Duke Florida "is not a carrier under the Act."[105] Duke Florida does not explain how Section 415(b) could be "applicable" to this dispute, especially when the Commission has already found it is not. Instead, Duke Florida finds the Commission's approach to refunds unfair for 3 reasons the Commission has rightly rejected.[106] Under Commission rules and precedent, "AT&T is entitled to a refund of overpayments consistent with the applicable statute of limitations, which in Florida is five years."[107]

E. The Commission's Jurisdiction Over the Rates Duke Florida Charges AT&T Is Long Settled and Should Be Promptly Exercised.

Finally, Duke Florida argues both sides of the coin: that the Commission lacks jurisdiction and that Florida may reverse-preempt the Commission's jurisdiction.[108] Neither argument has merit. The Commission's jurisdiction over the pole attachment rates Duke Florida charges AT&T was settled a decade ago and affirmed by the U.S. Courts of Appeals for the D.C.

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[105] *See Potomac Edison Order*, 35 FCC Rcd at 13627 (¶ 45).

[106] *See* Petition at 23-24. *But see Bureau Order* ¶ 56 n.204 (holding that "variability is inherent in the Commission's decision to adopt a state law borrowing rule in pole attachment complaint cases similar to that used in federal court"); *id.* ¶ 59 (rejecting argument that the Commission's *Sandwich Isles* decision requires a different result); *id.* ¶ 61 n.222 (noting that Duke Florida's argument that a 2-year statute of limitations would apply to pole attachment complaints against ILECs is not ripe as "AT&T has not taken that position here, and we need not address [it]").

[107] *Bureau Order* § F.

[108] Petition at 24-25 (Arguments IX-X).

Circuit and Ninth Circuit.[109] And the possibility that Florida may reverse-preempt the Commission's jurisdiction at some future date does nothing to undermine the validity or finality of the *Bureau Order* issued squarely within the Commission's jurisdiction.

There may be issues requiring resolution if the State of Florida tries to reverse-preempt at some future date, but this is not the case for those questions. Not only is it not clear when or whether Florida will adopt the necessary regulations or seek to reverse-preempt, but the Commission has already issued a final order in this case. The Commission has full authority to enforce the *Bureau Order*, deny Duke Florida's petition for reconsideration, and make the corrections requested in AT&T's Application for Review. It should do so promptly to ensure the just, reasonable, and competitively neutral rates needed to further the Commission's important competition and deployment goals.

IV. Conclusion

For the foregoing reasons, and those detailed in AT&T's other filings in this docket, AT&T respectfully requests that the Commission promptly deny Duke Florida's petition for reconsideration.

[109] *See Potomac Edison Order*, 35 FCC Rcd at 13612 (¶ 14 n.43); *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 19); *see also City of Portland*, 969 F.3d at 1052-53; *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 18 (2013).

Respectfully submitted,

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Dated: October 7, 2021

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2021, I caused a copy of the foregoing Opposition of BellSouth Telecommunications, LLC d/b/a AT&T Florida to Duke Florida's Petition for Reconsideration to be served on the following (service method indicated):

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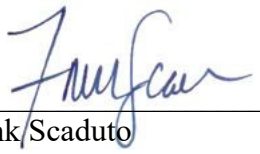

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