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.	)	

To: The Enforcement Bureau

DUKE ENERGY FLORIDA, LLC'S REPLY TO AT&T FLORIDA'S OPPOSITION TO PETITION FOR RECONSIDERATION

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REPLY

Duke Energy Florida, LLC ("DEF") submits this reply to AT&T Florida's opposition to DEF's September 27, 2021 petition for reconsideration in the above-captioned proceeding.

ARGUMENT

I. AT&T Has Failed to Establish that It Is Entitled to Relief Under the 2011 Order.

In analyzing AT&T's claim under the 2011 Order, the Bureau found that: (1) the parties' joint use agreement ("JUA") constitutes an "existing" or "historical" agreement;[1] and (2) the JUA provides AT&T with benefits that give AT&T a competitive advantage over CLEC and CATV attachers on the same poles.[2] Based on these findings, the Bureau should have applied the legal

[1] *See* Order at ¶¶ 9, 34 n.114; *see also 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, 5344-37 at ¶¶ 216-17 (Apr. 7, 2011) (the "2011 Order").

[2] *See* Order at ¶¶ 22-33, 39.

standard articulated in the 2011 Order and the *Verizon Florida Decision* to determine whether AT&T was entitled to relief for the period governed by the 2011 Order.[3] Under the *Verizon Florida Decision*, AT&T is required to demonstrate that the "monetary value" of the benefits it enjoys under the JUA does not justify the difference between the "rate" it paid under the JUA and the rate it would have paid under the Old Telecom Rate formula.[4] AT&T failed to produce any evidence showing that the "monetary value" of the benefits did not justify the "rate" under the JUA.[5] Accordingly, the Bureau erred in finding that AT&T was entitled to relief for the period governed by the 2011 Order.

The foregoing argument is the centerpiece of DEF's Petition.[6] Yet, AT&T devotes little more than a page in its opposition to this threshold issue. Instead of confronting its burden of proof under the *Verizon Florida Decision*, AT&T offers-up three arguments that are incorrect, irrelevant or both. First, AT&T claims:

> 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 the alleged (but disputed) competitive advantages. The Commission did not adopt this standard of review…. 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….[7]

AT&T is just flat wrong. The *Verizon Florida Decision*, which addressed an ILEC complaint involving an "existing" joint use agreement, clearly states that the burden of proof under the 2011

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[3] *See Verizon Fla. LLC v. Fla. Power and Light Co.*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1149 ¶ 24 (Feb. 11, 2015) (the "*Verizon Florida Decision*"); *see also* 2011 Order, 26 FCC Rcd at 5333-37, ¶¶ 214-19 (explaining that ILECs bear the burden of demonstrating that the "rates" they pay under joint use agreements are not "just and reasonable").

[4] *See Verizon Florida Decision*, 30 FCC Rcd at 1149-50 at ¶ 24.

[5] *See* Order at ¶ 45 (finding that AT&T did not provide "a credible valuation of the advantages that AT&T received under the JUA.").

[6] *See* DEF's Petition at 1-4.

[7] AT&T's Opposition at 8 (italics in original).

Order lies with the ILEC to demonstrate that the "rate" under the joint use agreement is not just and reasonable:

> Verizon concedes that it received and continues to receive benefits under the Agreement that are not provided to other attachers, **but it has not produced any evidence showing that the monetary value of those advantages is less than the difference between the Agreement Rates and the New or Old Telecom Rates over time…. Absent such evidence, we are unable to determine whether the Agreement Rates are just and reasonable**.[8]

AT&T attempts to distinguish the *Verizon Florida Decision* by arguing that it was an "interim decision where quantification was requested based on a finding that the ILEC 'conceded that it received and continues to receive benefits under the Agreement that are not provided to other attachers.'"[9] This is an utterly meaningless distinction.[10] Whether it be a concession or a legal finding that an ILEC receives material benefits under an "existing" joint use agreement, the legal standard under the *Verizon Florida Decision* remains the same: the ILEC is required to demonstrate that the "monetary value" of those benefits do not justify the "rate" under the joint use agreement. Under AT&T's postulation, the burden of proof would shift to DEF merely by

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[8] *Verizon Florida Decision*, 30 FCC Rcd at 1149-50 at ¶ 24; *see also id.* at 1140, ¶¶ 1 ("[W]e dismiss Verizon's complaint because Verizon has proven neither that the rates established by the governing agreement between Florida Power and Verizon's predecessor are unjust and unreasonable…."); *id. at* 1140, ¶ 2 ("[W]e find that Verizon has not met its burden of proving that the rates established in a 1975 Joint Use Agreement…are unjust and unreasonable in violation of Section 224(b)(1) of the Communications act of 1934…."), *id.* at 1140, ¶ 3 ("[W]e conclude that Verizon has provided insufficient evidence: (a) to support a finding that the Agreement Rates are unreasonable, and (b) for the Commission to set a just and reasonable rate."); 47 C.F.R. § 1.1424 (2011) ("In complaint proceedings where an incumbent local exchange carrier…claims that it is similarly situated to an attacher that is a telecommunications carrier…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).

[9] AT&T's Opposition at 8 n.36 (internal brackets omitted).

[10] AT&T offers no explanation for why it characterizes the *Verizon Florida Decision* as merely an "interim decision." The *Verizon Florida Decision* was the first decision released by the Commission under the 2011 Order, and it was the only authority governing disputes over "existing" joint use agreements until January 2020.

virtue of AT&T's self-serving "dispute" of the material advantages of the JUA.

Second, AT&T argues:

> 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. 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. 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.[11]

AT&T's argument completely misses the point. As explained in the Petition, the 2011 Order recognized two types of joint use agreements: "existing" (a/k/a "historical") and "new" agreements.[12] Each is governed by a different standard. For "new" agreements, the Commission explained that it would look to the Old Telecom Rate "as a reference point in complaint proceedings."[13] But the Old Telecom Rate is only a "reference point" for "**new**" agreements. The *Verizon Florida Decision* makes clear that a different standard applies to "existing" joint use agreements:

> In support of applying the Old Telecom Rate, Verizon cites the *Order*'s statement that the Commission would consider the Old Telecom Rate "as a reference point" when determining a just and reasonable attachment rate for a "*new agreement*" between an incumbent LEC and a utility. The agreement at issue here is not a new agreement. It is "an historical joint use agreement," which the Commission repeatedly distinguished from "new agreements."[14]

As explained above, the legal standard for disputes involving "existing" agreements requires the ILEC to demonstrate that the "monetary value" of the benefits it receives under its joint use agreement does not justify the "rate" it pays under the joint use agreement. The Bureau failed to apply this legal standard to AT&T's claim and erroneously grafted the Old Telecom Rate as a

[11] AT&T's Opposition at 9 (italics and bold emphasis in original).
[12] *See* DEF's Petition at 4-6; 2011 Order, 26 FCC Rcd at 5334-37, ¶¶ 216-17.
[13] *See* 2011 Order, 26 FCC Rcd at 5336-37, ¶ 218.
[14] *Verizon Florida Decision*, 30 FCC Rcd at 1149, ¶ 23 (italics in original).

"reference point" for reviewing the parties' "existing" JUA.[15] AT&T's opposition fails to address the separate legal standard for "existing" agreements under the *Verizon Florida Decision*. Instead, AT&T merely argues that the Bureau "did treat the JUA as an 'existing' agreement" and "strictly adhered to precedent when it…applied [the Old Telecom Rate as a] 'reference point' here."[16] As demonstrated above, this is patently incorrect.

Third, in response to DEF's argument that AT&T failed to demonstrate a genuine inability to terminate the JUA and obtain a new arrangement, AT&T argues:

> [T]he 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. 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….[17]

AT&T once again misses the mark. The timing of AT&T's attempt to obtain a new arrangement is important because it is intertwined with the substance of its attempt. As the record makes clear, AT&T's first request to renegotiate the JUA came after the effective date of the 2018 Order, and AT&T's position was that the presumptions established in the 2018 Order applied to periods that were actually governed by the 2011 Order. AT&T dogmatically insisted that it was entitled to the New Telecom Rate (for the entire period in dispute) and has maintained throughout this proceeding that it was DEF's burden to demonstrate otherwise.[18] The entire point of DEF's argument is that the conversation would have been entirely different had AT&T sought to "obtain a new arrangement" prior to the 2018 Order and under the guidance of the 2011 Order.[19] For example,

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[15] In fact, the Bureau failed to address the *Verizon Florida Decision* at all in its Order.

[16] AT&T's Opposition at 9. Like the Bureau, AT&T completely ignored the *Verizon Florida Decision*. AT&T's failure to address the *Verizon Florida Decision* speaks volumes, as the *Verizon Florida Decision* lies at the heart of DEF's argument on this issue.

[17] AT&T's Opposition at 10.

[18] *See, e.g.*, AT&T's Complaint at ¶¶ 31-33; AT&T's Reply at ¶ 8, 13, 21, 28, 31.

[19] *See* DEF's Petition at 6-8.

had AT&T sought a new arrangement in 2015, when there was no question regarding who bore the burden of proof, and when the Old Telecom Rate was merely a "reference point" for "new" agreements, AT&T would have had no choice but to actually negotiate under the legal standard of the 2011 Order. Under those circumstances, there would have been a much greater probability of the parties reaching a negotiated resolution.

AT&T's argument also evidences a general misunderstanding of the legal standard under the 2011 Order—i.e., that it was AT&T's burden to demonstrate that it was entitled to relief during period governed by the 2011 Order. Before the Commission will review "existing" joint use agreements, ILECs are required to meet the threshold burden of demonstrating that they "genuinely lack[] the ability to terminate an existing agreement and obtain a new arrangement."[20] AT&T failed to demonstrate that it even attempted to obtain a new arrangement under the 2011 Order. AT&T's failure of proof on this threshold issue should preclude it from obtaining any relief under the 2011 Order.

II. The Record and the Commission's "Cost Causation" Principles Require that AT&T Bear the Cost of the 3.33 Feet of Safety Space on DEF's Poles.

On DEF's poles, the communication workers safety zone (a/k/a/ "safety space") exists, as its name implies, to protect communication workers. Without communications attachments, this 3.33 feet (40") of space is unnecessary on DEF's poles. Similarly, without electric facilities, this space is unnecessary on AT&T's poles. Because of this, the parties have always **shared** the cost of this space on jointly used poles pursuant to the JUA. The Commission's current rate formulas, which were developed entirely during an era where cost-sharing arrangements within joint use agreements were undisturbed, do not account for the safety space. Because of this, DEF argued

[20] 2011 Order, 26 FCC Rcd at 5335-36, ¶ 216.

that the 3.33 feet of safety space on jointly used poles owned by DEF should be allocated to AT&T under the Old Telecom Rate formula.[21] In support of this argument, DEF explained, *inter alia*, that: (1) AT&T is the "cost causer" of the safety on DEF's poles; and (2) DEF does not need and does not use the safety space on its own poles.[22]

Relying solely on prior Commission precedent, the Bureau rejected DEF's argument:

> We reaffirm that safety space is not attributable to communications attachers because AT&T's attachments do not occupy the communications safety space and the Commission has long held that the communications safety space is for the benefit of the electric utility, not attachers. Duke's attempt to charge AT&T for the safety space is inconsistent with the Commission's rules, which permit a utility to charge attachers only for the physical space occupied by their attachments. Because AT&T's attachments do not occupy the safety space, Duke may not charge AT&T for that space.[23]

In its Petition, DEF pointed out several flaws in the Bureau's finding, including the fact that it: (1) fails to address DEF's "cost causation" argument; and (2) relies solely on prior Commission precedent without considering the record evidence that clearly distinguishes that precedent from the facts at issue in this proceeding—i.e., namely that DEF does not need and does not use the safety space on its own poles.[24]

Like the Bureau, AT&T just glosses-over DEF's "cost causation" argument. In an attempt to rebut DEF's evidence that it does not need and does not use the safety space on its own poles, AT&T argues that DEF's "claim is dispelled by the nature of its facilities, which require the space, and Duke Florida's use of the space for streetlights."[25] AT&T cites to the following testimony as establishing that DEF "uses" the safety space:

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[21] *See, e.g.,* DEF's Answer at ¶ 25; DEF's Initial Brief in Response to the Enforcement Bureau's March 8, 2021 Letter at 21 (filed Apr. 8, 2021) ("DEF's Initial Brief"); DEF's Petition at 9-11.
[22] *See* DEF's Answer at ¶ 25; DEF's Initial Brief at 9-11, 21.
[23] Order at ¶ 49 (internal citations omitted).
[24] *See* DEF's Petition at 9-11.
[25] AT&T's Opposition at 11 n.55.

> DEF does not need and does not use the safety space on its own poles. 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. Though streetlights are occasionally mounted within the safety space on DEF's poles, the safety space is not necessary for the proper installation of a streetlight.[26]
>
> Though streetlights are occasionally mounted within the Communication Worker Safety Zone on DEF's poles as permitted by the NESC, the safety zone is not necessary for the proper installation of a streetlight. Streetlights can be, and often are, safely mounted within the electric supply space.[27]

The "occasional" and non-essential installation of streetlights within the safety space hardly establishes that the safety space on DEF's poles "is usable and used by" DEF. Furthermore, to the extent AT&T is arguing that the "nature of DEF's facilities" caused the need for the safety space, this argument only applies to the safety space on AT&T's poles—on DEF's poles, it is the presence of communications attachments (or, more specifically, their workers) that necessitates this space.

AT&T also argues that the safety space on DEF's poles cannot be allocated to AT&T because "Commission rules…permit a utility to charge attachers *only* for the physical space occupied by their attachments."[28] AT&T's argument presumes a definition of the term "occupied" that does not exist. The Commission's regulations already presume, for example, that a CATV or CLEC wireline attachment "occupies" 1-foot of space.[29] This presumption is based in part on the standard 12" clearance requirement between communications attachments.[30] In other words, the clearance requirements necessitated by an attachment are part of the space "occupied." Here, the 40" clearance requirement is part of the space "occupied" by the communications attachments on DEF's poles. If the Bureau dismantles the JUA's cost-sharing methodology, then the cost of the

[26] DEF's Answer at Exh. A, DEF000134 (Decl. of Scott Freeburn, Oct. 29, 2020, ¶ 16).
[27] *Id.* at Exh. C, DEF000163-64 (Decl. of Steven Burlison, P.E., Oct. 28, 2020, ¶ 9).
[28] AT&T's Opposition at 11 (citations omitted).
[29] *See* 47 C.F.R. ¶ 1.1410.
[30] *See, e.g.,* National Electrical Safety Code (NESC), IEEE Standards Association, Rule 235H (2017).

safety space should be allocated (a) equally among all communications attachers, or (b) to AT&T as the original cost-causer.[31] Otherwise, DEF and its electric ratepayers end-up bearing the cost of space they do not use, do not need and would not have built for purposes of electric service.[32]

III. Because It Is the Only Viable Methodology for Valuing AT&T's Right to Remain Attached, the Bureau Erred by Rejecting DEF's "Avoided System Replacement Costs" Valuation.

The JUA provides AT&T with the right to remain attached to DEF's poles following termination.[33] According to DEF's valuation expert, the right to remain attached following termination provided AT&T with an annualized net benefit of $[redacted] per pole.[34] While the Bureau found that this right provided AT&T with a material advantage over DEF's CATV and CLEC licensees, the Bureau rejected Mr. Metcalfe's valuation because: (1) it "assumes that AT&T would incur the costs of a duplicate network, plus other costs, in arriving at this figure,"[35] and (2) "[t]he Commission has never condoned valuing an alleged advantage by assuming that, without the JUA, an incumbent LEC would have built a duplicate pole network."[36]

In its Petition, DEF notes that the Bureau relied upon a Congressional finding that supported the original enactment of Section 224, which only applied to CATVs (who generally lack the ability to construct new pole lines).[37] Unlike CATVs, however, AT&T *does* have the

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[31] If the Bureau allocates this cost to AT&T, as it should, then DEF would expect to bear this cost on jointly used poles owned by AT&T.

[32] *See Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-151, 13 FCC Rcd 6777, 6818 at ¶ 91 (Feb. 6, 1998) ("Where use of the one foot presumption would not encourage just and reasonable rates, any party may rebut the presumption.").

[33] *See* DEF's Answer at Exh. 1, DEF000258-59 (JUA, Article XVI, Section 16.1).

[34] *See id.* at Exh. E, DEF000212-13, DEF000235 (Decl. of Kenneth Metcalfe, CPA, CVA, Oct. 30, 2020, ¶¶ 18-21, Exh. E-2).

[35] Order at ¶ 43 n.157.

[36] *See id.* at ¶ 42.

[37] *See* DEF's Petition at 13 (citing *BellSouth Telecomms., LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, Memorandum Opinion and Order, Proceeding No. 19-187, 35 FCC Rcd 5321, 5330 at

ability to build new pole lines.[38] Thus, if AT&T were not contractually permitted to remain attached to DEF's poles following termination, AT&T's next best alternative is constructing its own pole network.

AT&T argues that "Duke Florida's redundant network theory is contrary to precedent" and that the "Commission has never condoned valuing an alleged advantage by assuming that, without the JUA, an ILEC would have built a duplicative pole network."[39] This is nothing more than a reiteration of the Bureau's finding. AT&T even cites the same authority that the Bureau relies upon in its Order—authority that DEF distinguishes within its Petition.[40] If DEF cannot value AT&T's right to remain attached following termination using an "avoided system replacement costs" methodology, then how should this material benefit be evaluated? This question is particularly important given that the Bureau and AT&T both seem to acknowledge that, in the absence of AT&T's contractual right to remain attached, the next best alternative for AT&T is to deploy its own poles.[41]

CONCLUSION

For the reasons set forth above, as well as the reasons previously stated in DEF's Petition, answer, declarations, documentary evidence and briefing, DEF respectfully urges the Bureau to reconsider the portions of its August 27, 2021 Order described in DEF's Petition.

¶ 15 (May 20, 2020) (the "*FPL I Decision*") (citing S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977 Report), reprinted in 1978 U.S.C.C.A.N. 109)).

[38] *See* DEF's Petition at 13-14.

[39] *See* AT&T's Opposition at 17 (citations omitted).

[40] *See* DEF's Petition at 13-14.

[41] *See* Order at ¶ 37 & n.135 (citing DEF's "avoided system replacement costs" valuation and noting that "AT&T's alternative to the JUA [is] far costlier"); AT&T's Opposition at 18 (arguing that the Bureau did not accept the accuracy of the replacement cost valuation for any purpose on the one hand, while explaining that the Bureau used the valuation to demonstrate that "AT&T's alternative to the JUA is far costlier" on the other hand) (internal brackets omitted).

Dated: October 14, 2021

Respectfully submitted,

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RULE 1.721(m) VERIFICATION

I, Eric B. Langley, as signatory to this submission, hereby verify that I have read this Reply to AT&T's Opposition to DEF's Petition for Reconsideration and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and 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
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CERTIFICATE OF SERVICE

I hereby certify that on this day, October 14, 2021, a true and correct copy of Duke Energy Florida, LLC's Reply to AT&T's Opposition was filed with the Commission via ECFS and was served on the following (service method indicated):

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