PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 19-187 Bureau ID No. EB-19-MD-006 **REDACTED**

AT&T'S REPLY TO FPL'S ANSWER

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Date: November 6, 2019

TABLE OF CONTENTS

* Certain information in this Reply 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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Set forth below are the specific replies of BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T") to the numbered paragraphs set forth in the Answer of Florida Power and Light Company ("FPL"). Any claims not specifically addressed are denied for reasons detailed in AT&T's Amended Pole Attachment Complaint ("Complaint"), Reply Legal Analysis, and supporting affidavits and exhibits.[1]

I. PARTIES AND JURISDICTION

1. FPL admits the allegations of Paragraph 1, so no response is required.

2. FPL admits the allegations of Paragraph 2, so no response is required.

3. AT&T admits that FPL and AT&T are parties to a Joint Use Agreement ("JUA") dated January 1, 1975, that an amendment to the JUA is dated June 1, 2007, and that the JUA was terminated by FPL pursuant to Article XVI as to the further granting of joint use, effective

[1] Unless otherwise indicated, references to AT&T's Complaint and Reply Legal Analysis also refer to those documents' supporting affidavits and exhibits.

September 26, 2019. AT&T further admits that the June 1, 2007 amendment to the JUA includes certain storm related protocols and a dispute resolution process. AT&T denies that FPL terminated the JUA "after receiving no payment under the agreement from AT&T for the calendar years 2017 & 2018" because the JUA terminated on September 26, 2019 and FPL received payment in full of the 2017 and 2018 disputed invoices almost 3 months earlier on July 1, 2019.[2] AT&T denies that FPL was due the invoiced amounts "under the agreement" because the JUA requires compliance with federal law[3] and FPL invoiced rent that is not "just and reasonable" as required by federal law for reasons detailed in AT&T's Complaint and Reply Legal Analysis. AT&T also denies that the timing of AT&T's payment of the disputed rates has any relevance to whether the invoiced rates comply with federal law, which is the sole issue in dispute.[4]

AT&T denies the pole ownership numbers and percentages FPL alleges in the second sentence of paragraph 3 and states that, according to FPL's invoice for 2018 rent, the parties share an estimated 638,914 poles in the overlapping areas served by FPL and AT&T, with FPL owning about 425,704 of the joint use poles (67%) and AT&T owning approximately 213,210 of the joint use poles (33%).[5] AT&T further states that the same pole ownership percentages (67%

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[2] *See, e.g.*, FPL's Br. in Support of Its Answer ("FPL Br.") at 13 ("On July 1, 2019, AT&T delivered payment to FPL in the form of two checks totaling [redacted], which represented the outstanding principal balance.").

[3] AT&T's Am. Pole Attachment Compl. ("Compl.") Ex. 1 at ATT00119 (JUA, Art. VI).

[4] *See, e.g.*, *Qwest Commc'ns Co. v. Sancom, Inc.*, 28 FCC Rcd 1982, 1993-94 (¶ 27) (2013) (finding no "equitable principle" violated "by failing to pay … charges before disputing them").

[5] Compl. Ex. 2 at ATT00147-48 (Invoice dated Feb. 1, 2019) ("2018 Invoice"); Compl. Ex. B at ATT00051 (¶ 7) (Aff. of D. Miller, June 27, 2019 ("Miller Aff.")).

to 33%) were alleged in paragraph 23 of AT&T's Complaint and that "FPL admits that the relative pole ownership percentages supplied by AT&T in paragraph 23 are accurate."[6]

4. AT&T denies that the Commission lacks jurisdiction over this dispute for any of the 4 reasons FPL alleges. *First*, the FCC's statutory authority to regulate the rates, terms, and conditions of incumbent local exchange carrier ("ILEC") pole attachments was settled in the 2011 *Pole Attachment Order*, which was affirmed on appeal.[7] *Second*, FPL's argument that the Commission's "assertion of authority" to set just and reasonable rates for a 1975 JUA is "*ultra vires* [and] impermissibly retroactive" was rejected in FPL's last pole attachment complaint proceeding[8] and remains meritless for reasons stated in Section II.B of AT&T's Reply Legal Analysis. *Third*, the Florida Public Service Commission does not have authority to set the rates, terms, and conditions for AT&T's use of FPL's poles because Florida has not reverse-preempted the Commission's regulation of pole attachments pursuant to 47 U.S.C. § 224(c).[9] *Fourth*, AT&T fully complied with Commission rules when AT&T, in good faith, notified FPL in writing of the allegations that form the basis of this dispute and sought to settle this dispute through a face-to-face executive-level meeting and a non-binding mediation as detailed in Section III.B of AT&T's Complaint and Section II.F.1 of AT&T's Reply Legal Analysis.

5. AT&T denies that Florida has jurisdiction to regulate the rates for AT&T's use of FPL's poles because Florida has not reverse-preempted the Commission's authority pursuant to

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[6] Answer ¶ 23.

[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 (2011) ("*Pole Attachment Order*"), *aff'd, Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013).

[8] *Verizon Fla. v. FPL*, Memorandum Opinion and Order, 30 FCC Rcd 1140, 1145-47 (¶¶ 17-19) (EB 2015) ("*FPL Order*").

[9] *See, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5371 (App. C).

47 U.S.C. § 224(c). AT&T states that FPL's claim that it may "seek the intervention of the Florida Public Service Commission, if necessary" is speculative and requires no response, but if a response is required, it is denied. AT&T denies that the FCC's enforcement of AT&T's federal statutory right to "just and reasonable" rates could result in "a massive shift of the cost of the jointly used network to FPL's electric customers." Rather, a new telecom rate is "fully compensatory" to the pole owner.[10] AT&T denies FPL's categorization of this proceeding as involving "at least four 'buckets' of substantive issues: (1) the rates AT&T pays for access to FPL's poles; (2) the rates FPL pays for access to AT&T's poles; (3) AT&T's access rights to FPL's poles; and (4) FPL's access rights to AT&T's poles." The parties have access to each other's poles under the JUA and, with the exception of [redacted] the 2016 rental year, FPL agreed with AT&T's calculation of the proportional rates that would apply to FPL's use of AT&T's poles if AT&T is provided a refund of its overpayments at the just and reasonable rates it requests.[11] This proceeding, therefore, only involves a dispute over the "just and reasonable" rate for AT&T's use of FPL's poles, an issue squarely within the Commission's jurisdiction.[12]

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[10] *Id.* at 5321 (¶ 183 n.569) (quoting Omnibus Broadband Initiative, FCC, Connecting America: The National Broadband Plan at 110 (2010) ("*National Broadband Plan*")) (emphasis added); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987).

[11] *See, e.g.*, Answer Ex. A at FPL00019-20 (Kennedy Decl. ¶ 35) (admitting the parties currently have attachments on each other's poles); Answer Ex. D at FPL00157 (Deaton Decl. ¶ 11); Reply Ex. A at ATT00925, ATT00952-53 (Rhinehart Reply Aff. ¶ 27 & Ex. R-7). The parties calculate different proportional rates for FPL's use of AT&T's poles for the 2019 and 2020 years because FPL did not use AT&T's updated cost data when calculating the 2019 rate and omitted the Implementation Rate Difference required by 47 C.F.R. § 1.1406(e) when calculating the 2020 rate. *See* Reply Ex. A at ATT00926-27 (Rhinehart Reply Aff. ¶ 29).

[12] 47 U.S.C. § 224(b).

AT&T denies FPL's allegation that the 2011 *Pole Attachment Order* "expressed" an intention to leave the JUA "intact," and that the Commission "should leave the parties' long-standing contract intact" here. The Commission "adopted a policy in 2011 that similarly situated attachers should pay similar pole attachment rates for comparable access"[13] and stated that it would review "an existing agreement … in a complaint proceeding."[14] AT&T also denies that the 2011 *Order* provides the relevant standard. Instead, the new telecom rate presumption adopted in the 2018 *Third Report and Order* applies to the terminated JUA because it is a "newly-renewed" agreement for reasons detailed in Section III.A of AT&T's Complaint and Section II.B of AT&T's Reply Legal Analysis.

6. AT&T admits that FPL filed a complaint against AT&T in Florida state court at 12:30 am on July 1, 2019, alleging non-payment of FPL's disputed invoices for 2017 and 2018 rent,[15] and states that FPL served the Complaint on AT&T on July 2, 2019, a day after FPL received payment in full of the disputed 2017 and 2018 rent that it seeks in its complaint.[16] AT&T admits that it removed the action to U.S. District Court for the Southern District of Florida on July 22, 2019, admits that the case is pending, and states that AT&T filed a motion to dismiss the complaint on mootness and other grounds on July 29, 2019.[17] AT&T denies that FPL's complaint has merit and denies that AT&T "fail[ed] to continue its contractually-obligated

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[13] *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7767 (¶ 123) (2018) ("*Third Report and Order*").

[14] *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216).

[15] *See* Compilation of Court Pleadings Filed Sept. 25, 2019 ("Pleadings Compilation"), Ex. 2 at ATT00279 (Civil Cover Sheet).

[16] *See* Pleadings Compilation Ex. 11 at ATT00716 (Aff. of D. Miller, July 29, 2019, ¶ 7).

[17] *See id.* at ATT00690-788 (AT&T's Mot. to Dismiss, or in the Alternative, Stay (July 29, 2019)).

payments" under the JUA. FPL's rental invoices were not "contractually-obligated payments" because the JUA requires compliance with federal law[18] and the rental rates FPL invoiced were not just and reasonable as required by federal law for reasons detailed in AT&T's Complaint and AT&T's Reply Legal Analysis. In addition, AT&T paid in full all disputed rental amounts,[19] although neither the fact of AT&T's payment nor the timing of AT&T's payment impacts whether the invoiced rates comply with federal law, which is the sole issue in dispute.

AT&T denies that FPL is entitled to any of the relief it seeks in the federal court action, including its request for "an injunction requiring AT&T to immediately remove its attachments from FPL's poles" and further states that the rental rates FPL has been charging and FPL's effort to force the removal of AT&T's attachments from its poles are squarely at odds with the FCC's goals of reducing the costs and accelerating the deployment of broadband and other advanced services. AT&T denies all other allegations in the first paragraph of FPL's Answer to paragraph 6 and states that the court pleadings speak for themselves.[20]

With respect to the second paragraph of paragraph 6, AT&T admits that electric utilities have sought review of the Commission's *Third Report and Order* adopting the new telecom rate presumption in a petition for reconsideration at the FCC and a petition for review at the U.S. Court of Appeals for the Ninth Circuit, and notes that AT&T disclosed that fact in its Complaint.[21] AT&T denies that the relevant question under Rule 1.722(h) is whether there is

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[18] Compl. Ex. 1 at ATT00119 (JUA, Art. VI).

[19] *See, e.g.*, FPL Br. at 13 ("On July 1, 2019, AT&T delivered payment to FPL in the form of two checks totaling [redacted], which represented the outstanding principal balance.").

[20] *See generally* Pleadings Compilation at ATT00277-910.

[21] Compl. ¶ 6 n.9.

any "overlap with any issue" in those proceedings[22] and states that the pending petitions do not impact the effectiveness of the new telecom rate presumption and cannot impact AT&T's statutory right to "just and reasonable" pole attachment rates for use of FPL's poles.

7. AT&T admits "that the parties engaged in written communications" and "held face-to-face meetings" about the basis for AT&T's Complaint, but denies that AT&T only raised "certain matters" about its Complaint in those negotiations. AT&T denies the remaining allegations in FPL's Answer to paragraph 7 for reasons detailed in Section III.A.2 of AT&T's Complaint and Section II.F.1 of AT&T's Reply Legal Analysis and because AT&T "notified [FPL] in writing of the allegations that form the basis of the complaint," "invited a response within a reasonable period of time," and "in good faith, discussed or attempted to discuss the possibility of settlement with [FPL]."[23] AT&T denies FPL's allegation that AT&T did not fully inform FPL about the nature of its complaint, and notes that FPL confirmed its understanding of AT&T's position by, for example, stating a "belie[f] that AT&T is misinterpreting the FCC Pole Attachment orders and their application to our Agreement"[24] and noting its "disagree[ment] with AT&T's assessment of the application of federal law to our longstanding written agreement."[25] AT&T also denies FPL's allegation that AT&T did not inform FPL "as to what it believed was

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[22] 47 C.F.R. § 1.722(h) ("A formal complaint shall contain … [a] statement explaining whether a separate action has been filed with the Commission, any court, or other government agency that is based on the same claim or same set of facts, in whole or in part, or whether the complaint seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment rulemaking proceeding that is concurrently before the Commission.").

[23] 47 C.F.R. § 1.722(g); *see also* Compl. Ex. B at ATT00054-57 (Miller Aff. ¶¶ 12-21); Reply Ex. A at ATT00927-31 (Rhinehart Reply Aff. ¶¶ 30-38); Reply Ex. B at ATT00956 (Miller Reply Aff. ¶ 2); Reply Ex. C at ATT00963 (Peters Reply Aff. ¶ 4).

[24] Compl. Ex. 6 at ATT00173 (Notice of Default (Aug. 31, 2018)).

[25] Compl. Ex. 20 at ATT00222 (Notice to Initiate Mediation (Jan. 31, 2019)).

the just and reasonable rate" because the record shows that AT&T repeatedly asked for new telecom rates, but FPL refused to even disclose the new telecom rates that FPL charges AT&T's competitors.[26]

II. FPL HAS LONG CHARGED AT&T UNJUST AND UNREASONABLE POLE ATTACHMENT RENTAL RATES.

8. AT&T denies FPL's allegation that AT&T "attaches to FPL's poles on terms and conditions that materially advantage AT&T over its CATV and CLEC competitors" for reasons detailed in Section III.B of AT&T's Complaint and Section II.C of AT&T's Reply Legal Analysis. AT&T denies that the two alleged "advantages" that FPL describes as "chief" are net material competitive advantages. *First*, AT&T denies that FPL has "built and maintained, and continues to build and maintain, poles of sufficient height and strength to accommodate AT&T without any upfront capital cost to AT&T." AT&T has incurred significant capital costs to deploy the joint use poles that it shares with FPL.[27] In addition, FPL's allegation is based entirely on FPL's claim that it installed joint use poles "taller than [FPL] needs to serve its electric customers,"[28] which is not true[29] and, regardless, is not a relevant comparison under the Commission's principle of competitive neutrality because AT&T *and* its competitors require FPL's joint use poles.[30] FPL also represents that its joint use poles average 40.4 feet,[31] which

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[26] *See, e.g.*, Compl. Ex. 10 at ATT00188 (Email from M. Jarro, FPL, to D. Miller, AT&T (Dec. 4, 2018)); Compl. Ex. 22 at ATT00233 (Email from D. Bromley, FPL, to D. Miller, AT&T (Mar. 20, 2019)).

[27] *See, e.g.*, Reply Ex. A at ATT00931 (Rhinehart Reply Aff. ¶ 39).

[28] *See, e.g.*, FPL Br. at 50.

[29] *See, e.g.*, Reply Ex. D at ATT01001-02 (Dippon Reply Aff. ¶ 42).

[30] *See, e.g.*, Reply Ex. C at ATT00971-72 (Peters Reply Aff. ¶ 19).

[31] Answer Ex. A at FPL00015 (Kennedy Decl. ¶ 28).

means that its poles can accommodate AT&T *and* AT&T's competitors with little, if any, make-ready required.[32] AT&T also notes that FPL rests its valuation of this alleged benefit on a claim that it installed 45-foot poles because of the JUA,[33] but the JUA defines a normal joint use pole as a 35- or 40-foot pole.[34] AT&T also denies this allegation for reasons detailed in Section II.C of AT&T's Reply Legal Analysis.

Second, AT&T denies that it is advantaged because FPL "contractually agreed that, even in the event of a termination [of the JUA], AT&T can remain attached to FPL's poles" because AT&T's competitors have a statutory right of access to FPL's poles, which means that they can remain attached to FPL's poles even if their license agreements are terminated.[35] AT&T also denies this allegation for reasons detailed in Section II.C of AT&T's Reply Legal Analysis.

AT&T denies FPL's allegation that it has not continued to charge AT&T pole attachment rates significantly higher than the new telecom rates that apply to AT&T's similarly situated competitors, as the following table shows the extent of FPL's overcharges:

Comparison of per-pole rates[36]	2014	2015	2016	2017	2018
Properly calculated new telecom rate	$10.46	$11.12	$12.12	$13.32	$15.80
Rate FPL charged AT&T (wood)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Rate FPL charged AT&T (concrete)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Rate FPL charged AT&T (transmission)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[32] *See, e.g.*, 47 C.F.R. §§ 1.1409(c), 1.1410; Reply Ex. C at ATT00971-72 (Peters Reply Aff. ¶ 19).

[33] Answer Ex. A at FPL00005, FPL00030, FPL00032 (Kennedy Decl. ¶ 9 & Ex. C).

[34] Compl. Ex. 1 at ATT00111 (JUA § 1.1.5).

[35] 47 U.S.C. § 224(f); *see also* FPL Br. at 70 n.278 (admitting AT&T's competitors have "mandatory access rights to poles").

[36] *See* Compl. Ex. A at ATT00008, ATT00015-25 (Rhinehart Aff. ¶ 14 & Ex. R-1); Reply Ex. A at ATT00923, ATT00927-48 (Rhinehart Reply Aff. ¶ 20 & Ex. R-5); FPL's Resp. to AT&T's

AT&T denies FPL's allegation that it "does not charge AT&T 'pole attachment rates' at all" because, in FPL's view, it instead charges AT&T rates that reflect "how the costs of the joint use network are shared." This argument merely repeats an argument that FPL has consistently and unsuccessfully made in its longstanding effort to avoid the Commission's statutory obligation to ensure just and reasonable rates for ILECs.[37] Regardless of how FPL describes the rates it charges AT&T, the JUA states that they are annual "rental" rates for AT&T's attachments to FPL's poles,[38] which fall squarely within the Commission's statutory responsibility to ensure "just and reasonable rates.

AT&T denies the last sentence of FPL's Answer to paragraph 8 because the new telecom rate applies to AT&T's use of FPL's poles for reasons detailed in AT&T's Complaint and Reply Legal Analysis. AT&T denies FPL's allegation that the Commission should charge a new telecom rate on a "per foot" basis "to avoid discriminatory effect on CATV licensees" because doing so would be contrary to Commission precedent. The Commission's new telecom rate formula (which applies to cable providers providing telecommunications services) and its cable rate formula (which applies to cable providers providing cable services) produce "per pole" rates,

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Interrog. No. 5. This table includes the properly calculated new telecom rates, which differ from the inflated new telecom rates FPL charged AT&T's competitors that are included in AT&T's Reply to FPL's Answer to paragraph 9. *See also* Reply Ex. A at ATT00915-16 (Rhinehart Reply Aff. ¶ 7).

[37] *See, e.g.*, Reply Comments of FPL et al. at 28, *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future* (Oct. 10, 2010) (arguing that ILECs are not entitled to just and reasonable rates because joint use agreements are "infrastructure cost sharing agreements"); Reply Brief of FPL et al. at 16, *Am. Elec. Power Serv. Corp. v. FCC*, 2012 WL 1187988 (D.C. Cir. Apr. 9, 2012) (arguing that "joint use agreements ... are infrastructure cost sharing agreements").

[38] Compl. Ex. 1 at ATT00121 (JUA, Art. X).

and not "per foot" rates.[39] In addition, the Commission rejected use of the cable rate formula as the comparable rate for competitive neutrality purposes when it incorporated the new telecom rate formula into its ILEC rate rule.[40] This is not the appropriate place to reconsider that decision.

9. AT&T admits that the presumptions that ILECs are similarly situated to their competitors, and should receive the same new telecom rate, apply to agreements that are "new or newly renewed" after the March 11, 2019 effective date of the 2018 *Third Report and Order*. AT&T denies FPL's conclusory statement in footnote 6 that "the new ILEC complaint rule is arbitrary, capricious and inconsistent with the law" for reasons detailed in Section II.F.3 of AT&T's Reply Legal Analysis.

AT&T denies the third sentence of FPL's Answer to paragraph 9 because the JUA is a pole attachment contract that governs each party's attachments to the other party's poles.[41] AT&T denies FPL's allegation that the JUA was not "new or newly renewed" after the March 11, 2019 effective date of the *Third Report and Order* because the JUA automatically renewed and was placed by FPL into evergreen status following that date and for reasons detailed in Section III.A.1 of AT&T's Complaint and Section II.B.2 of AT&T's Reply Legal Analysis. AT&T admits that the JUA is dated January 1, 1975, that an amendment to the JUA is dated June

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[39] *See In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12122 (¶ 31) (2001) ("*Consolidated Partial Order*"); *see also id.* at 12173-74 (App'x D-1, D-2) (showing calculation of "maximum rate per pole" under cable formula).

[40] *See* 47 C.F.R. § 1.1413(b).

[41] *See* Compl. Ex. 1 at ATT00108-39 (JUA).

1, 2007, and that the JUA was terminated by FPL pursuant to Article XVI as to the further granting of joint use.

AT&T denies the last sentence of FPL's Answer to paragraph 9 because the JUA was not "terminated effective August 26, 2019," but was terminated effective September 26, 2019, the date 6 months after FPL provided notice of termination pursuant to Article XVI.[42] AT&T denies FPL's claim that termination of the JUA was required due to an alleged "failure to make ... required payments under the agreement" for 2017 and 2018 rent. AT&T did not fail to make any "required payments" under the JUA because the JUA requires compliance with federal law[43] and FPL's rental invoices did not comply with federal law for reasons detailed in AT&T's Complaint and AT&T's Reply Legal Analysis. In addition, AT&T paid FPL's disputed invoices in full on July 1, 2019,[44] nearly 3 months *before* the JUA terminated, and so the disputed invoices could not have required that the JUA terminate. In any event, regardless of the reason, the JUA terminated as to the further granting of joint use under Article XVI, which is all that is required to place the JUA in evergreen status for purposes of the new telecom rate presumption.[45] AT&T admits that FPL is pressing forward with a federal court complaint "seek[ing] an injunction to remove AT&T's facilities from its poles," but denies that FPL's claim has merit. AT&T denies all other allegations in the first paragraph of FPL's Answer to paragraph 9 and states that the court pleadings speak for themselves.[46]

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[42] *See* Compl. Ex. 23 at ATT00250 (Notice of Termination (Mar. 25, 2019)); *see also* Compl. Ex. 1 at ATT00128 (JUA, Art. XVI).

[43] Compl. Ex. 1 at ATT00119 (JUA, Art. VI).

[44] *See, e.g.*, FPL Br. at 13 ("On July 1, 2019, AT&T delivered payment to FPL in the form of two checks totaling [redacted], which represented the outstanding principal balance.").

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

[46] *See generally* Pleadings Compilation at ATT00277-910.

AT&T denies the first sentence of the second paragraph of FPL's Answer to paragraph 9, which contains allegations that are substantially similar or identical to allegations in the first paragraph of FPL's Answer to paragraph 9, and AT&T hereby incorporates its response to those allegations. AT&T denies the second sentence of the second paragraph of FPL's Answer to paragraph 9 because FPL must do more than "*allege*[ ]" a "competitive benefit that could rebut the presumption." The Commission instead held that an electric utility must "rebut the presumption with clear and convincing evidence that the [I]LEC receives net benefits under its pole attachment agreement with the utility that materially advantage the [I]LEC over other telecommunications attachers."[47] AT&T also denies that FPL has alleged any net competitive benefit—let alone proven any with clear and convincing evidence—that rebuts the new telecom rate presumption for reasons detailed in Section II.C of AT&T's Reply Legal Analysis. AT&T denies FPL's allegations that AT&T is not competitively disadvantaged by the JUA rates, and that AT&T is competitively advantaged by them, because the allegations are patently false when JUA rates are compared to the rates FPL charged AT&T's competitors to use comparable space on FPL's poles:

[47] *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123).

Comparison of per-pole rates[48]	2014	2015	2016	2017	2018
Wood Distribution Poles					
New telecom rate FPL charged	$10.44	$11.54	$12.94	$14.84	$16.85
Cable rate FPL charged	$10.46	$11.57	$12.97	$14.88	$16.89
Rate FPL charged AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Concrete Distribution Poles					
New telecom rate FPL charged	$10.44	$11.54	$12.94	$14.84	$16.85
Cable rate FPL charged	$10.46	$11.57	$12.97	$14.88	$16.89
Effective rate FPL charged AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Transmission Poles					
New telecom rate FPL charged	$68.06	$76.34	$84.22	$104.60	$103.43
Cable rate FPL charged	$39.70	$33.32	$36.75	$45.65	$45.14
Effective rate FPL charged AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

A. AT&T Is Entitled To The New Telecom Rental Rate Under The Commission's 2018 *Third Report And Order*.

10. AT&T admits "that, under the Commission's rules, similarly situated attachers should pay similar pole attachment rates for comparable access." AT&T denies the remainder of FPL's Answer to paragraph 10, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 8, 9, 11, 12, 14, 15, 16, 18, 19, 20, 28, 29, and 38, and AT&T hereby incorporates its response to those allegations.

1. The New Telecom Rate Presumption Applies, But FPL Charges Rates Far Higher.

11. AT&T denies the first sentence of FPL's Answer to paragraph 11, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer,

[48] *See* Reply Ex. A at ATT00915-16 (Rhinehart Reply Aff. ¶ 7); Reply Ex. 5 (FPL's new telecom rate worksheets); FPL's Resp. to AT&T's Interrog. No. 5. This table includes the inflated new telecom rates FPL charged, which differ from the properly calculated new telecom rates included in AT&T's Reply to FPL's Answer to paragraphs 8 and 21. *See also* Reply Ex. A at ATT00915-16 (Rhinehart Reply Aff. ¶ 7).

including those made in response to paragraphs 9, 10, 12, 14, 15, 18, 19, 20, 28, and 38, and AT&T hereby incorporates its response to those allegations. AT&T admits that the JUA's initial term expired on January 1, 1980, and that the JUA continued "in force thereafter" until the JUA was terminated by FPL pursuant to Article XVI and placed in evergreen status. FPL's allegation that the JUA terminated "due to AT&T['s] failure to meet its payment obligations under the agreement" is substantially similar or identical to other allegations in FPL's Answer that AT&T has denied, including those made in response to paragraphs 9, 17, 24, and 27, and AT&T hereby incorporates its denial and response to those allegations. AT&T admits that the new telecom rate presumption does not apply "because of an event that occurred in 1980," and states that it instead applies because the JUA "newly renewed" after the effective date of the *Third Report and Order* for reasons detailed in Section III.A.1 of AT&T's Complaint and Section II.B.2 of AT&T's Reply Legal Analysis.

12. AT&T denies FPL's Answer to paragraph 12 for reasons detailed in Section II.B.2 of AT&T's Reply Legal Analysis and because FPL's termination of the JUA placed the agreement into "evergreen status" for purposes of the new telecom rate presumption. Notwithstanding its termination, the JUA "shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."[49] AT&T admits that "FPL lacks the contractual ability to terminate AT&T's license [to attach to FPL's poles] with respect to any existing joint use poles (even for AT&T's failure to provide any payments under the agreement for two years)," but denies that AT&T failed to provide any payments—let alone any

[49] Compl. Ex. 1 at ATT00128 (JUA, Art. XVI); *see also Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475) (citing *FPL Order*, 30 FCC Rcd 1140).

rental payments—under the JUA for two years.[50] AT&T also denies that the timing of AT&T's payment of the disputed rates has any relevance to whether the invoiced rates comply with federal law, which is the sole issue in dispute.[51]

AT&T denies FPL's allegation that the JUA's evergreen provision means "there can be no 'renewal' of the 1975 JUA with respect to existing joint use poles." FPL admits that the JUA was "valid and enforceable" when the *Third Report and Order* took effect in March 2019[52]—and thus the JUA must have "renewed" when its initial term expired on January 1, 1980 and automatically extended each day thereafter. AT&T also denies the allegations in FPL's Answer to paragraph 12 for reasons detailed in Section III.A.1 of AT&T's Complaint and Section II.B.2 of AT&T's Reply Legal Analysis.

13. AT&T denies the first sentence of FPL's Answer to paragraph 13 because AT&T is entitled to a "rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2)" for reasons detailed in AT&T's Complaint and AT&T's Reply Legal Analysis. AT&T denies that FPL did not receive any payment—let alone any rental payment—from AT&T for the 2017 and 2018 rental years.[53] AT&T denies the third sentence of FPL's Answer to paragraph 13 because the JUA rates are "excessively and unreasonably high" for reasons detailed in AT&T's Complaint

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[50] AT&T's payments under the JUA are not limited to rental payments. *See, e.g.*, Answer Ex. A at FPL00013 (Kennedy Decl. ¶ 19) (admitting that AT&T pays make-ready costs). In addition, there was also no failure to pay rent for "two years." According to FPL, its 2017 invoice was dated March 5, 2018, and was promptly disputed by April 3, 2018. *See* FPL Br. at 9. The 2018 invoice was dated February 1, 2019 and it was paid in full, along with the 2017 invoice, on July 1, 2019. *See id.* at 12, 13.

[51] *See, e.g.*, *Qwest Commc'ns Co.*, 28 FCC Rcd at 1993-94 (¶ 27) (finding no "equitable principle" violated "by failing to pay … charges before disputing them").

[52] FPL Br. at 22-23.

[53] *See id.* at 9 (admitting AT&T paid FPL's 2016 rental invoice "in early 2017"); *id.* at 9, 13 (admitting AT&T paid FPL's 2017 and 2018 rental invoices).

and AT&T's Reply Legal Analysis. AT&T denies footnote 7 because the rates FPL charges AT&T for use of transmission poles are relevant to this proceeding, as the Commission has the statutory obligation to ensure just and reasonable rates for AT&T's use of FPL's "poles."[54]

AT&T denies the last two sentences of FPL's Answer to paragraph 13 because AT&T properly calculated the applicable new telecom rates, and FPL improperly calculated the new telecom rates, for reasons detailed in Section III.C of AT&T's Complaint, Section II.E.1 of AT&T's Reply Legal Analysis, and in the supporting Affidavits of Daniel P. Rhinehart. AT&T denies that the rates FPL cites are the new telecom rates FPL in fact charged AT&T's competitors, which are the lower rates that appear in paragraph 9 above.[55] AT&T states that the properly calculated new telecom rates for AT&T's use of FPL's poles for the 2014 through 2018 rental years are $10.46, $11.12, $12.12, $13.32, and $15.80 per pole, respectively.[56]

2. FPL Did Not And Cannot Rebut The Presumption, So AT&T Is Entitled To The New Telecom Rate.

14. AT&T denies FPL's allegation that "in the course of the parties' negotiations, FPL was never afforded the opportunity nor did FPL have the occasion to 'rebut the presumption' or identify the 'advantage that AT&T enjoys over its competitors'" for reasons detailed in Section III.B of AT&T's Complaint and Section II.F.1 of AT&T's Reply Legal Analysis. AT&T denies that its description of FPL's decision not to discuss the new telecom rate presumption is a "gross distortion" and notes that FPL has not provided any correspondence or other evidence showing that FPL ever discussed, asked to discuss, or tried to rebut the new

[54] 47 U.S.C. § 224(a)(1), (a)(4), (b).

[55] *See* FPL's Resp. to AT&T's Interrog. No. 5; *see also* Reply Ex. 5 (FPL's new telecom worksheets).

[56] *See* Reply Ex. A at ATT00923, ATT00937-48 (Rhinehart Reply Aff. ¶ 20 & Ex. R-5).

telecom rate presumption during the parties' negotiations. AT&T admits that, instead of trying to rebut the presumption, "FPL repeatedly explained to AT&T" that FPL was taking the position that, because "the 1975 JUA pre-dates both the *2011 Pole Attachment Order* and the *2018 Third Report and Order*, … neither order is applicable to such agreements." AT&T denies that AT&T never "c[a]me close to making a compelling argument that either order applied to the parties' relationship" and never asked "that FPL 'rebut the presumption'" for reasons detailed in AT&T's Complaint and AT&T's Reply Legal Analysis and confirmed by the correspondence attached to AT&T's Complaint.

15. AT&T admits that Verizon Florida, LLC ("Verizon") filed a pole attachment complaint against FPL that was dismissed without prejudice, but notes that FPL's description omits the phase of the proceeding in which Verizon challenged FPL's claim that its rates were justified by alleged advantages, which resulted in a settlement [redacted]. AT&T denies FPL's claim that its litigation with Verizon lacks "relevance to the instant matter," as the litigation instead confirms FPL's understanding of the applicable standards, puts FPL's refusal to negotiate with AT&T into context, and resolved legal issues against FPL that it has attempted to relitigate in this proceeding.

AT&T denies that FPL has "supplied 'clear and convincing' evidence" that "AT&T is materially advantaged over other attaching entities" for reasons detailed in Section II.C of AT&T's Reply Legal Analysis. AT&T denies that FPL has rebutted, or can rebut, the new telecom rate presumption with "the plain language of the 1975 JUA" since the relevant standard requires a comparison of the JUA with the terms and conditions of FPL's license agreements

with AT&T's competitors.[57] AT&T denies the last sentence of FPL's Answer to paragraph 15. FPL's witnesses have not provided testimony, analysis, or actual, current data that rebuts the presumption, for reasons detailed in Section II.C of AT&T's Reply Legal Analysis.

16. AT&T denies the first paragraph of FPL's Answer to paragraph 16 because it conflicts with Commission precedent as detailed in AT&T's Reply Legal Analysis. For example, FPL states that "[a] comparison between the parties' 1975 JUA and a license agreement is neither required nor appropriate in this proceeding," whereas the Commission's principle of competitive neutrality requires that comparison.[58] FPL also argues that the Commission should *not* "weigh and account for all of the different rights and responsibilities (of which there are many) placed on AT&T as compared to its competitors," but the Commission held that "[a] failure to weigh, and account for, the different rights and responsibilities in joint use agreement could lead to marketplace distortions."[59] FPL states that the Commission found "that giving ILECs the telecom rate would give ILECs an unfair advantage over other attaching entities," but the Commission found the opposite in 2011 and 2018 because "competitive neutrality counsels in favor of affording [I]LECs *the same rate* as the comparable provider (whether the telecommunications carrier or the cable operator)."[60] FPL asserts that the Commission "acknowledge[d] ... many benefits to ILECs under 1975 JUAs" in the 2011 *Order*, but the Commission simply listed what "some commenters contend" are competitive benefits and

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[57] *See, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7770-71 (¶ 128); *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶¶ 217-18).

[58] *See, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7770-71 (¶ 128); *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶¶ 217-18).

[59] *See Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654).

[60] *Id.* at 5336 (¶ 217) (emphasis added); *see also Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126).

made no finding about JUAs, let alone 1975 JUAs.[61] FPL also argues that the Commission "reject[ed] arguments that rates for pole attachments by [I]LECs should *always* be identical to those of telecommunications carriers or cable operators,"[62] which is one reason why the Commission adopted a *rebuttable* presumption.[63] AT&T denies the remaining allegations in the first paragraph of FPL's Answer to paragraph 16 for reasons detailed in AT&T's Complaint and AT&T's Reply Legal Analysis.

With respect to the second paragraph of FPL's Answer to paragraph 16, AT&T admits that alleged benefits that "relate to deployment" on future new FPL pole lines can no longer occur because FPL terminated the JUA as concerns the further granting of joint use pursuant to Article XVI. AT&T denies the remaining allegations of the second paragraph of paragraph 16 for reasons detailed in Section II.C.1 of AT&T's Reply Legal Analysis and because FPL has not, and cannot, show that a one-time service provided years or decades ago *continues* to provide AT&T competitive value that should be embedded into an annually recurring per-pole rental rate.

17. AT&T admits that Section XIII.A.4 of the JUA requires each party to "continue to perform its obligations under the JUA pending final resolution of any Dispute, unless to do so would be impossible or impracticable under the circumstances," but denies that AT&T failed to perform any "obligation under the JUA" when it instead insisted that FPL comply with the JUA and federal law.[64] AT&T admits that FPL terminated the JUA as far as concerns the further granting of joint use pursuant to Article XVI and filed a court action that requests an injunction

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[61] *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654).

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

[63] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128).

[64] Compl. Ex. 1 at ATT00119 (JUA, Art. VI).

"to remove AT&T's equipment from FPL's infrastructure." AT&T denies that FPL's request for an injunction has merit and denies that either of "these steps" was required "due to lack of payment by AT&T" or was permitted under the JUA, and notes that AT&T paid all disputed invoices in full *before* FPL served its complaint and *before* the JUA terminated.[65]

AT&T denies that it "completely fail[ed] to disclose," or "specifically drafted its Complaint to conceal ... facts" about, the parties' rental rate dispute and its impact on the timing of AT&T's payment of the disputed invoices. AT&T's Complaint includes a complete set of the parties' correspondence about the dispute and expressly states that AT&T "processed payment" so that the disputed invoices would be paid in full before the Complaint was filed.[66] AT&T denies that it "refused to provide FPL with any compensation whatsoever under the 1975 JUA for two full calendar years' worth of rental payments," because AT&T paid all the disputed rentals in full.[67] AT&T also denies that the timing of AT&T's payment of the disputed rates has any relevance to whether the invoiced rates comply with federal law, which is the sole issue in dispute.[68]

AT&T also denies FPL's allegations that nonpayment of any invoices "had a substantial effect" on FPL or required FPL's customers to bear unnecessary costs because FPL's consumer rates are set based on a rate settlement agreement approved by the Florida Public Service

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[65] *See, e.g.*, Pleadings Compilation Ex. 11 at ATT00716 (Aff. of D. Miller, July 29, 2019, ¶ 7).

[66] *See, e.g.*, Compl. Ex. B at ATT00051-52 (Miller Aff. ¶ 8).

[67] *See, e.g.*, FPL Br. at 13 ("On July 1, 2019, AT&T delivered payment to FPL in the form of two checks totaling [redacted], which represented the outstanding principal balance.").

[68] *See, e.g.*, *Qwest Commc'ns Co.*, 28 FCC Rcd at 1993-94 (¶ 27) (finding no "equitable principle" violated "by failing to pay ... charges before disputing them").

Commission,[69] AT&T paid the disputed invoices in full, and AT&T has been overcompensating FPL for years, paying FPL at JUA rates that are many multiples of the rates that were "fully compensatory" for its use of FPL's poles. AT&T denies that the JUA rates properly reflect AT&T's "share" of the pole costs, as AT&T and FPL pay relatively comparable rates ([redacted] per pole in 2018) for use of vastly different amounts of space (about 1 foot vs. at least 10.5 feet).[70]

AT&T denies that FPL's response to AT&T's request for just and reasonable rates was "justified," let alone "fully justified," and denies that FPL requires any "collection efforts" when all disputed rentals have been paid in full.[71] AT&T denies FPL's allegations regarding bargaining power because FPL's heavy handed response to AT&T's request for just and reasonable rates—including its demand that AT&T remove its facilities from over 425,000 FPL poles despite AT&T's payment in full of all disputed rentals—evidences FPL's use of its pole ownership advantage to try to gain an advantage with respect to rental rates.[72]

AT&T denies that it engaged in any unlawful "self-help" or refused to meet any "obligations under the 1975 JUA," when it sought to determine the rent actually due under the JUA, which requires compliance with federal law, through the pre-complaint dispute resolution process, as detailed in Section III.A.2 of AT&T's Complaint and Section II.F.2 of AT&T's Reply Legal Analysis. AT&T also denies that it somehow refused to negotiate a new rate when

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[69] *See, e.g.*, FPL's Resp. to AT&T's Interrog. No. 9.

[70] *See, e.g.*, 47 C.F.R. § 1.1410; Compl. Ex. B at ATT00052, ATT00061 (Miller Aff. ¶¶ 28, 29 n.24); 47 C.F.R. § 1.1410); *see also* Reply Ex. 3 at FPL-002803 (License § [redacted]) ([redacted]).

[71] *See, e.g.*, FPL Br. at 13 ("On July 1, 2019, AT&T delivered payment to FPL in the form of two checks totaling [redacted], which represented the outstanding principal balance.").

[72] *See, e.g.*, Compl. Ex. D at ATT00079 (Dippon Aff. ¶ 14).

it repeatedly asked FPL to negotiate the just and reasonable rate required by the JUA and federal law, as detailed in Section III.A.2 of AT&T's Complaint and Section II.F.1 of AT&T's Reply Legal Analysis.[73] AT&T denies the remainder of FPL's Answer to paragraph 17; FPL's allegations that "AT&T never provided FPL with any of the allegations or arguments that form the basis of its Complaint" are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 7 and 33, and AT&T hereby incorporates its response to those allegations.

18. AT&T denies FPL's Answer to paragraph 18, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 9, 10, 11, 12, 14, 15, 19, 20, 28, and 38, and AT&T hereby incorporates its response to those allegations. AT&T also denies the first paragraph of FPL's Answer to paragraph 18 because the new telecom rate is the "just and reasonable rate" even if the standard adopted in the 2011 *Pole Attachment Order* applies.[74] AT&T denies the second paragraph of FPL's Answer to paragraph 18 because the Commission did not "preclude review" of any agreements in its 2011 *Order*,[75] let alone the 1975 JUA which was entered into "decades" before the 2011 *Order*, just like the JUA reviewed in FPL's prior pole attachment complaint proceeding, which was also entered into in 1975.[76] Indeed, the Commission instead expressly stated that it *would* review "existing joint use agreements … in a complaint proceeding."[77]

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[73] *See also* Reply Ex. A at ATT00927-31 (Rhinehart Reply Aff. ¶¶ 30-38); Reply Ex. B at ATT00956-57 (Miller Reply Aff. ¶¶ 2-3); Reply Ex. C at ATT00964-65 (Peters Reply Aff. ¶¶ 5-7).

[74] *See* Compl. ¶¶ 20-30; Reply Legal Analysis, Section II.D.

[75] *See Pole Attachment Order*, 26 FCC Rcd at 5335-36 (¶ 216).

[76] *See FPL Order*, 30 FCC Rcd at 1143, 1150 (¶¶ 10, 25).

[77] *See Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216).

AT&T denies the last sentence of FPL's Answer to paragraph 18, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 20, 22, 23, 24, and 38, and AT&T hereby incorporates its response to those allegations.

19. AT&T denies FPL's Answer to paragraph 19, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 18, 20, 28, 29, and 38, and AT&T hereby incorporates its response to those allegations. AT&T denies the last three sentences of FPL's Answer to paragraph 19, including the table, which contain allegations that are substantially similar or identical to the allegations in FPL's Answer to paragraph 13, and AT&T hereby incorporates its response to those allegations. AT&T states that the properly calculated new telecom rates for AT&T's use of FPL's poles for the 2014 through 2018 rental years are $10.46, $11.12, $12.12, $13.32, and $15.80 per pole, respectively.[78]

B. Even Apart from the 2018 *Third Report and Order*, AT&T Was Entitled To Just And Reasonable Rates Back to 2011.

20. AT&T admits that ILECs, including "AT&T have been entitled to a just and reasonable rate since July 12, 2011," but denies that this is simply "the Commission's position" because it is instead a requirement of federal law.[79] AT&T denies that the JUA rates are "just and reasonable" and denies that AT&T "considered the 1975 JUA to be 'just and reasonable' until very recently" because the timing of AT&T's request for "just and reasonable" rates does not reflect AT&T's longstanding opinion that the JUA rates are "unjust and unreasonable." In addition, because the only relevant question is whether the rates comply with federal law—which

[78] *See* Reply Ex. A at ATT00923, ATT00937-48 (Rhinehart Reply Aff. ¶ 20 & Ex. R-5).

[79] *See* 47 U.S.C. § 224(b).

does not change based on when they were disputed—the Commission "decline[d] the invitation ... to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge."[80] AT&T denies that it did not "take exception" to the JUA rates until August 21, 2018, but admits that it asked FPL on August 21, 2018 to justify its rates under the new telecom rate presumption that had just been adopted in the FCC's August 3, 2018 *Third Report and Order*.[81] AT&T denies the last sentence of FPL's Answer to paragraph 20, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 9, 10, 11, 12, 14, 15, 18, 19, 23, 24, 28, and 38, and AT&T hereby incorporates its response to those allegations.

21. AT&T denies the first two sentences of FPL's Answer to paragraph 21 because the JUA rates are *not* "just and reasonable" and because the Commission's pre-existing and new telecom rates *are* relevant to this proceeding for reasons detailed in AT&T's Complaint and AT&T's Reply Legal Analysis. AT&T admits that AT&T paid the "base contract rates" FPL lists in paragraph 21, but notes that FPL omitted the premiums it also charged AT&T for use of concrete distribution poles and transmission poles, which result in the far higher effective rates shown in the table below.[82] AT&T denies that FPL properly calculated the pre-existing telecom rates it lists in paragraph 21 for reasons detailed in Section III.B of AT&T's Complaint, Section II.E.1 of AT&T's Reply Legal Analysis, and in the supporting Affidavits of Daniel P. Rhinehart, and states that the properly-calculated pre-existing telecom rates are shown in the table below.

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

[81] Compl. Ex. 5 at ATT00164 (Email from K. Hitchcock, AT&T, to T. Kennedy, FPL (Aug. 21, 2018)).

[82] *See, e.g.*, Compl. Ex. B at ATT00052-53 (Miller Aff. ¶¶ 10-11).

AT&T denies that it failed to properly "characteriz[e] the extent to which the rates contained in the parties' 1975 JUA differ from the Commission's regulated rates" because the following table shows that the JUA rates far exceed the rates that result from a proper application of the Commission's new and pre-existing telecom formulas to AT&T's use of FPL's poles:

Comparison of per-pole rates[83]	2014	2015	2016	2017	2018
Properly calculated new telecom rate	$10.46	$11.12	$12.12	$13.32	$15.80
Properly calculated pre-existing telecom rate	$15.84	$16.85	$18.37	$20.18	$23.94
Rate FPL charged AT&T for wood distribution poles (base rate)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Effective rate FPL charged AT&T for concrete distribution poles (base rate + premium)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Effective rate FPL charged AT&T for transmission poles (base rate + premium)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

22. AT&T admits that AT&T and FPL do not use comparable space on a utility pole because FPL uses far more space than AT&T wants, uses, or requires.[84] AT&T admits that it calculated rental rates for AT&T and FPL based "on the FCC's assumptions" for space occupied, but denies that doing so was inappropriate.[85] In addition, AT&T denies that there is any valid or reliable evidence that could rebut the presumptive inputs for space occupied[86] and notes that FPL

[83] *See* Reply Ex. A at ATT00923 (Rhinehart Reply Aff. ¶ 20); Compl. Ex. B at ATT00052-53 (Miller Aff. ¶¶ 10-11). This table includes the properly calculated new telecom rates, which differ from the inflated new telecom rates FPL charged that are included in AT&T's Reply to FPL's Answer to paragraph 9. *See also* Reply Ex. A at ATT00915-16 (Rhinehart Reply Aff. ¶ 7).

[84] *See, e.g.*, Reply Ex. C at ATT00973, ATT00975 (Peters Reply Aff. ¶¶ 21, 26).

[85] *See* 47 C.F.R. § 1.1410.

[86] *See, e.g.*, Reply Ex. A at ATT00920-23 (Rhinehart Reply Aff. ¶¶ 16-19); Reply Ex. C at ATT00975 (Peters Reply Aff. ¶ 27); Reply Ex. D at ATT00993-96 (Dippon Reply Aff. ¶¶ 27-32).

used the FCC's presumptions [redacted] in the rates FPL calculated for its own use of AT&T's poles.[87]

AT&T denies the third sentence of FPL's Answer to paragraph 22 because it does not respond to the simple point made in paragraph 22 that the unreasonableness of the JUA rates is also evident when they are viewed in comparison to the rates FPL pays for use of far more space on AT&T's poles. AT&T admits that the amount of space AT&T and FPL use "does not need to be comparable because AT&T's and FPL's use of pole infrastructure is not comparable" and admits that AT&T and FPL "are not offering the same type of service; they are not attaching the same type of equipment to poles; [and] they do not have the same space requirements." But the Commission expected that ILECs and electric utilities would each pay "roughly the same proportionate rate given the parties' relative usage of the pole."[88] FPL has admitted that the JUA rates do not reflect this standard; under its best case scenario, AT&T uses 1.18 feet of space and FPL requires 10.5 feet,[89] but FPL pays only slightly more than AT&T ([redacted] per pole in 2018).[90] AT&T denies the last sentence of the first paragraph of FPL's Answer to paragraph 22 because this inequitable allocation of pole costs is evidence that FPL leveraged its pole ownership advantage to achieve unjust and unreasonable rates for reasons detailed in Section III.A of AT&T's Complaint and Section II.D.2 of AT&T's Reply Legal Analysis.

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[87] Answer Ex. D at FPL00157 (Deaton Decl. ¶ 11); Reply Ex. 5 (FPL's new telecom rate worksheets); Reply Ex. A at ATT00920 (Rhinehart Reply Aff. ¶ 15).

[88] *See Verizon Va., LLC v. Va. Elec. & Power Co.*, 32 FCC Rcd 3750, 3760 (¶ 21 n.78) (EB 2017) ("*Dominion Order*") (quoting *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662)).

[89] *See* Answer Ex. D at FPL00164 (Deaton Decl., Ex. RBD-1) (10.5 feet for FPL); Answer Ex. E at FPL00166 (Murphy Decl. ¶ 3) (1.18 feet for AT&T); *see also* Reply Ex. 3 at FPL-002803 (License 3 §[redacted]) ([redacted]).

[90] Compl. Ex. B at ATT00052 (Miller Aff. ¶ 28).

AT&T admits that AT&T does not have a statutory right of access to FPL's poles, and that its cable and CLEC competitors do. AT&T admits that FPL may deny access to AT&T's cable and CLEC competitors "on a non-discriminatory basis where there is insufficient capacity" under 47 U.S.C. § 224(f), but denies that FPL has shown that it, in fact, denies access to AT&T's cable and CLEC competitors in these circumstances, as FPL stated only that there are "times" when it *may* choose not to expand capacity for AT&T's competitors.[91] AT&T denies that it "negotiated the contractual right to attach to FPL's infrastructure regardless of whether there is capacity or not" because FPL admitted it is only "in certain circumstances" that FPL *must* "expand capacity to accommodate AT&T" and, when it does, FPL charges AT&T for all "direct construction costs plus overheads that are required for the work."[92] AT&T denies that "[w]ithout this contractual obligation, FPL would have constructed a pole network with no more capacity than it needs to provide electrical service" because data show that FPL installs poles of comparable height regardless of whether or not AT&T is attached.[93] AT&T denies the next-to-last sentence in FPL's Answer to paragraph 22 because FPL *has* constructed poles tall enough to include the safety space for third parties even if FPL is the only entity on its pole and represented that "[t]hird party attachment standards … are part in parcel of an electric utility's overhead distribution construction standards."[94]

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[91] Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 10).

[92] FPL Br. at 51, 57-58; *see also* Answer Ex. A at FPL00013, FPL00117 (Kennedy Decl. ¶ 19 & Ex. J).

[93] Reply Ex. D at ATT01001-02 (Dippon Reply Aff. ¶ 42).

[94] *See id.*; *see also* Initial Comments of FPL et al. Regarding Safety and Reliability at 6, *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules* (Mar. 7, 2008).

AT&T denies the last sentence of FPL's Answer to paragraph 22 because AT&T did not "cause" the safety space on FPL's poles. In response to electric utilities' requests to remove the safety space from usable space based on this same argument that the safety space exists "to protect attaching entities' workers," the Commission definitively concluded: "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. The space is usable and is used by the electric utilities."[95] AT&T also denies the allegations of paragraph 22 for reasons detailed in Section III.B of AT&T's Complaint and Section II.C.2 of AT&T's Reply Legal Analysis.

23. AT&T admits that FPL has a two-to-one pole ownership advantage. AT&T denies the third and fourth sentences of FPL's Answer to paragraph 23 because the Commission has held that a two-to-one pole ownership advantage is indicative of "market power" or "bargaining leverage"[96] and FPL has used its advantage to try to preserve its unlawful pole attachment rates by refusing to discuss rates while increasing operational threats and pressure.[97] AT&T denies FPL's argument in footnote 30 that the parties cannot rely on the public version of the *Dominion Order* because it includes redactions, since the Commission has routinely relied on decisions that contain redactions.[98] AT&T denies the last sentence of the first paragraph of

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[95] *Amendment of the Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, 6467 (¶¶ 21-22) (2000).

[96] *Dominion Order*, 32 FCC Rcd at 3757 (¶ 13); *see also Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206) (estimating that electric utilities "own approximately 65-70 percent of poles").

[97] *See* Compl. Ex. B at ATT00055-57 (Miller Aff. ¶¶ 15, 18, 19, 21); Compl. Ex. D at ATT00079 (Dippon Aff. ¶ 14).

[98] *See, e.g., In the Matter of Applications of Xo Holdings & Verizon Commc'ns Inc. for Consent to Transfer Control of Licenses & Authorizations*, 31 FCC Rcd 12501, 12537 (2016) (citing *In the Matter of Applications of AT&T Inc. & Deutsche Telekom AG*, 26 FCC Rcd 16184 (2011)

paragraph 23, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 17, 24, 27, and 33, and AT&T hereby incorporates its response to those allegations.

AT&T denies the second paragraph of FPL's Answer to paragraph 23 because FPL never made an offer "to purchase AT&T's poles and negotiate attachment rates and arrangements that would be comparable to what FPL provides to non-ILECs" as detailed in Section III.B of AT&T's Reply Legal Analysis. FPL's Principal Regulatory Analyst, Thomas Kennedy, admits that he merely raised the "idea" of purchasing AT&T's poles and that he would not commit to provide AT&T new telecom rates or any guarantee of access to FPL's poles.[99] AT&T denies that AT&T "was largely unresponsive to this offer" because FPL did not make an offer and, in any event, Mr. Kennedy admits that AT&T was open to receiving an offer if it would "place[ ] [AT&T] on a level playing field with other telecom providers."[100] AT&T denies that any conclusions about AT&T can be drawn from FPL's non-offer and denies that AT&T needs to sell poles in order to obtain its statutory right to "just and reasonable" rates. AT&T also denies that FPL's argument has any relevance to whether the invoiced rates for AT&T's use of FPL's poles comply with federal law, which is the sole issue in dispute.

AT&T denies the last paragraph of FPL's Answer to paragraph 23 because it is foreclosed by the *Pole Attachment Order*, which held that a pole ownership advantage *is* indicative of bargaining leverage and rejected the arguments FPL made based on "[s]tandard

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(redacted FCC order)); *In the Matter of Application for Review of A Decision of the Wireline Competition Bureau by Net56, Inc. Palatine, Illinois*, 32 FCC Rcd 963 (2017) (citing *In the Matter of Sandwich Isles Commc'ns, Inc.*, 31 FCC Rcd 12999 (2016) (redacted FCC order)).

[99] Answer Ex. A at FPL00020 (Kennedy Decl. ¶ 36).

[100] *Id.*

economic theories."[101] AT&T denies the pole ownership percentages included in the last paragraph of FPL's Answer to paragraph 23 because they do not match FPL's invoices or evidence.[102] AT&T further denies the last paragraph of FPL's Answer to paragraph 23 for reasons detailed in Section III.A of AT&T's Complaint and Section III.A of AT&T's Reply Legal Analysis.

24. AT&T denies the first sentence of FPL's Answer to paragraph 24, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 17, 23, 27, and 33, and AT&T hereby incorporates its response to those allegations. AT&T denies the second sentence of FPL's Answer to paragraph 24 because AT&T genuinely lacks the ability to terminate the JUA rates for reasons detailed in Section II.D.3 of AT&T's Reply Legal Analysis and because FPL has taken the position that nothing "requires [FPL] to modify an existing agreed upon contract rate.[103] In addition, the Enforcement Bureau previously pointed to an evergreen clause that, like the clause in the JUA, requires payment of the JUA rates after termination as evidence that rate relief was justified because the ILEC "genuinely lacks the ability to terminate an existing agreement.'"[104]

AT&T denies the third sentence of FPL's Answer to paragraph 24 because AT&T did not "simply refuse[ ] to make any payment whatsoever for two calendar years," but instead sought to

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[101] *See Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206 n.618) (explaining why a pole ownership disparity provides leverage under "[s]tandard economic theories").

[102] *See, e.g.*, Compl. Ex. 2 at ATT00147 (2018 Invoice).

[103] Compl. Ex. 12 at ATT00197 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 20, 2018)) ("Also, as we have previously communicated, there is nothing in the 2011 FCC Order that affirmatively requires the parties to modify an existing agreed upon contract rate.").

[104] *FPL Order*, 30 FCC Rcd at 1150 (¶ 25) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216)).

determine the just and reasonable amount that was lawfully due through a pre-complaint dispute resolution process that lasted fewer than two calendar years as detailed above in paragraph 12. AT&T also denies that the timing of AT&T's payment of the disputed rates has any relevance to whether the invoiced rates comply with federal law, which is the sole issue in dispute.[105]

AT&T denies the fourth sentence of FPL's Answer to paragraph 24, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 23, 30, and 31, and AT&T hereby incorporates its response to those allegations. AT&T denies the last sentence of FPL's Answer to paragraph 24 for reasons detailed in Section II.F.3 of AT&T's Reply Legal Analysis and because AT&T's request for just and reasonable rates cannot be moot when AT&T still has attachments on more than 425,000 of FPL's poles.[106] AT&T also denies that the JUA "terminated as a direct result of AT&T's gamesmanship" because AT&T did not engage in any gamesmanship, but instead transparently engaged in the pre-complaint dispute resolution process and paid all disputed rent on July 1, 2019—nearly 3 months before the JUA terminated, as detailed in Section II.F.1 of AT&T's Reply Legal Analysis.

25. AT&T denies FPL's allegation that AT&T's citation to and quotation of FCC precedent in paragraph 25 of its complaint amounts to "vague, unsupported legal conclusions." AT&T also denies FPL's Answer to paragraph 25 for reasons detailed in AT&T's Complaint and AT&T's Reply Legal Analysis.

26. AT&T denies the first sentence of FPL's Answer to paragraph 26 for reasons detailed in Section III.A.2 of AT&T's Complaint and Section II.F.1 of AT&T's Reply Legal

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[105] *See, e.g.*, *Qwest Commc'ns Co.*, 28 FCC Rcd at 1993-94 (¶ 27) (finding no "equitable principle" violated "by failing to pay … charges before disputing them").

[106] *See, e.g.*, Compl. Ex. 2 at ATT00147 (2018 Invoice).

Analysis and because FPL necessarily "refused to engage in negotiations regarding the terms of the parties' 1975 JUA" when it informed AT&T that, despite the *Pole Attachment Order* and the unambiguous language in the *Third Report and Order*, it was "not aware of any federal law that requires FPL to take affirmative action to change an agreed upon contract rate."[107] AT&T denies the rest of the first sentence of FPL's Answer to paragraph 26, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 8, 20-21, 36-37, 39, and 42, and AT&T hereby incorporates its response to those allegations. AT&T admits that the JUA requires compliance with "federal law," but denies that compliance is limited to "compliance of the poles ... with the National Electric Safety Code." The JUA states that the "[j]oint use of poles covered by this Agreement shall at all times be in conformity with all applicable provisions of law *and* the terms and provision of the Code...,"[108] not just with the National Electric Safety Code as FPL alleges.

27. AT&T denies the first sentence of FPL's Answer to paragraph 27, which contains allegations that are substantially similar or identical to the allegations in FPL's Answer to paragraph 26, including those made in response to paragraphs and AT&T hereby incorporates its response to those allegations. AT&T denies the second and third sentences of FPL's Answer to paragraph 27, which contain allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 17, 23, 24, and 33, and AT&T hereby incorporates its response to those allegations. AT&T denies the fourth

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[107] *See* Compl. Ex. 10 at ATT00188 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 4, 2018)); *see also* Compl. Ex. 12 at ATT00197 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 20, 2018)) ("Also, as we have previously communicated, there is nothing in the 2011 FCC Order that affirmatively requires the parties to modify an existing agreed upon contract rate."); *see also* FPL Br. at 19 ("FPL also emphasized to AT&T several times that FPL was unwilling to negotiate a new rate going forward.").

[108] Compl. Ex. 1 at ATT00119 (JUA, Art. VI) (emphasis added).

sentence of FPL's Answer to paragraph 27, which contains allegations that are substantially similar or identical to the allegations in FPL's Answer to paragraph 17, and AT&T hereby incorporates its response to those allegations. With respect to the fifth sentence of FPL's Answer to paragraph 27, AT&T denies that FPL had the right to terminate AT&T's right to attach to existing poles under the JUA and states that FPL's effort to force the removal of AT&T's attachments from its poles is squarely at odds with the FCC's goals of reducing the costs and accelerating the deployment of broadband and other advanced services. AT&T denies the last sentence of FPL's Answer to paragraph 27, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 9, 11, 17, and 24, and AT&T hereby incorporates its response to those allegations.

28. AT&T denies the first sentence of FPL's Answer to paragraph 28 because AT&T is entitled to the new telecom rate for the reasons detailed in AT&T's Complaint and Reply Legal Analysis. AT&T denies the second sentence of FPL's Answer to paragraph 28, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 9, 11, and 18, and AT&T hereby incorporates its response to those allegations. AT&T denies the last sentence of FPL's Answer to paragraph 28, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 18, 29 and 35, and AT&T hereby incorporates its response to those allegations.

29. AT&T denies the first sentence of FPL's Answer to paragraph 29 which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 28 and 31, and AT&T hereby incorporates its response to those allegations. AT&T admits that "similarly situated attachers should receive

similar rates" under the *Pole Attachment Order*, but denies that the Commission limited this principle "to 'new' agreements." The *Pole Attachment Order* expressly provides for review of existing joint use agreements and the *Third Report and Order* described the policy as applicable to all ILECs, regardless of the vintage of their agreements.[109] AT&T denies the third sentence of FPL's Answer to paragraph 29, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 18, 28, and 35, and AT&T hereby incorporates its response to those allegations. AT&T denies the fourth sentence of FPL's Answer to paragraph 29, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 9, 10, 15, 16, and 19, and AT&T hereby incorporates its response to those allegations.

30. AT&T denies FPL's Answer to paragraph 30, which misstates AT&T's argument in an effort to avoid the Commission's requirement that any analysis of "competitive neutrality" must "account for ... different rights *and responsibilities*."[110] AT&T denies that it has just two competitive disadvantages, but admits that the two FPL lists are, in fact, competitive disadvantages that increase AT&T's costs as compared to its competitors. AT&T denies that its general location as the "lowest attaching entity on a pole" is guaranteed. AT&T also denies that its location on the pole and its ownership of poles "stem from voluntary choices that AT&T made (presumably motivated by self-interest)," and denies that any voluntary choices can eliminate the fact of the competitive disadvantage. AT&T also notes that FPL admitted that

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[109] *See Third Report and Order*, 33 FCC Rcd at 7767 (¶ 123) ("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.").

[110] *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654) (emphasis added).

"standard practice and code compliance"—and not AT&T's choice—requires AT&T's location on the pole.[111]

AT&T denies that its location on FPL's poles, about 1 foot below the location of AT&T's competitors, provides AT&T any "easier" or less "encumbered" access to its facilities than its competitors, denies that its location on the pole allows for faster "construction methods" than its competitors may use, and denies that the time required for AT&T and its competitors to attach is not comparable. As FPL admitted, the Commission has worked to eliminate delays from make-ready with its one-touch make-ready rules,[112] and AT&T *can* experience make-ready delays similar to its competitors when make-ready is required for its own attachments.[113] AT&T denies that it is relevant whether or not AT&T has "asked FPL to attach anywhere else on the pole" because FPL admits that AT&T's location is the result of the origin of joint use, and must generally continue so that various communications facilities do not crisscross midspan.[114]

AT&T denies that the only damage from AT&T's location on the pole that imposes additional costs on AT&T is from "accidents necessitating AT&T's *replacement* of a joint use pole" and notes that FPL's license agreements [redacted].[115] AT&T also denies FPL's allegations about AT&T's location on the pole for reasons detailed in Section III.B of AT&T's Complaint and Section II.C.2 of AT&T's Reply Legal Analysis.

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[111] *See* FPL Br. at 54.

[112] *Id.* at 55 n.208.

[113] Reply Ex. C at ATT00977-78 (Peters Reply Aff. ¶ 30).

[114] *See* FPL Br. at 54 ("standard practice and code compliance" requires AT&T's location).

[115] *See* Reply Ex. 1 at FPL-000214 (License 1 [redacted]); Reply Ex. 2 at FPL-000794 (License 2 [redacted]); Reply Ex. 3 at FPL-002804 (License 3 [redacted]); Reply Ex. 4 at FPL-002072 (License 4 [redacted]).

AT&T denies that its ownership of poles "has nothing to do with the 1975 JUA," as AT&T is required to own poles under the JUA in order to use FPL's poles. Indeed, FPL's incorrect assertion that AT&T must sell its poles in order to stop paying the JUA rates confirms that FPL views the JUA as requiring AT&T to own poles. AT&T admits that Southern Bell Telephone and Telegraph Company, which entered into the JUA with FPL, owned poles before 1975. AT&T notes that FPL's admission that the parties owned poles *before* 1975 undercuts FPL's valuations, which claim that AT&T should pay JUA rates that cover the replacement cost [redacted].[116]

AT&T denies that the JUA "allowed AT&T to reduce or avoid the cost of pole ownership" to any greater extent than its competitors, which are not required to own any poles but have a statutory right of access to FPL's.[117] AT&T denies that FPL has allowed "AT&T to own as many or as few poles as it wishes" and denies that AT&T "has allowed the percentage of poles that it owns to decrease vis-à-vis FPL since the inception of the 1975 JUA" because FPL admitted that AT&T's ownership ratio has "declined ... primarily due to FPL's FPSC-ordered storm hardening initiatives."[118] AT&T denies that AT&T requested "pole ownership percentage goals" in 1975, states that it has overcompensated FPL for use of its poles at JUA rates that far exceed the fully compensatory new telecom rate, and denies that it "finds paying FPL pursuant to the 1975 JUA preferable to installing and maintaining its own poles." This allegation is based on FPL's factually false claim that it offered to purchase AT&T's poles, which is substantially

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[116] *See, e.g.*, Answer Ex. A at FPL00006 (Kennedy Aff. ¶ 9); *see also Ala. Cable Telecomm. Ass'n v. Ala. Power Co.*, 16 FCC Rcd 12209, 12234 (¶ 57) (2001) ("Respondent's final attempt at appraisal, using replacement costs ... also fails.").

[117] 47 U.S.C. § 224(f).

[118] Answer Ex. A at FPL00004 (Kennedy Decl. ¶ 8).

similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 23, 24, and 31, and AT&T hereby incorporates its response to those allegations.

AT&T admits that its pole ownership imposes "a set of costs" on AT&T under the JUA that are not imposed on AT&T's competitors under FPL's license agreements, but denies that these costs "are completely independent of AT&T's relationship with FPL" as they are instead required by FPL under the JUA. AT&T admits that "AT&T has no statutory right to attach to utilities' pole infrastructure," but denies that this is a "key" competitive "benefit" from the JUA because AT&T's competitors have a superior statutory right of access to FPL's poles, which means that they can remain attached to FPL's poles even if their license agreements are terminated.[119]

AT&T denies the last paragraph of FPL's Answer to paragraph 30 because AT&T has not "argue[d] out of both sides of its mouth," but has instead properly relied on the fact that AT&T both owns far fewer poles than FPL and far more poles than its competitors. Both facts are relevant under Commission precedent. Where, as here, the ILEC is at a pole ownership disadvantage relative to an electric utility, "market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates."[120] At the same time, because AT&T must own more poles relative to its competitors, the rate that is just and reasonable must "weigh, and account for" this difference that imposes additional costs on AT&T as compared to its competitors.[121] AT&T also denies FPL's allegations about AT&T's pole ownership costs for

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[119] 47 U.S.C. § 224(f); *see also* FPL Br. at 70 n.278 (admitting AT&T's competitors have "mandatory access rights to poles").

[120] *Pole Attachment Order*, 26 FCC Rcd at 5327 (¶ 199).

[121] *Id.* at 5335 (¶ 216 n.654).

reasons detailed in Section III.B of AT&T's Complaint and Section II.C.2 of AT&T's Reply Legal Analysis.

AT&T denies the remaining allegations in FPL's response to paragraph 30, which are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 8, 9, 10, 15, 16, 19, 20, 23, 24, 29, and 31, and AT&T hereby incorporates its response to those allegations.

C. AT&T Should Pay A Properly Calculated New Telecom Rate And Be Refunded Its Overpayments.

31. AT&T denies the first sentence of FPL's Answer to paragraph 31, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 28 and 29, and AT&T hereby incorporates its response to those allegations. AT&T denies the second through fourth sentences of FPL's Answer to paragraph 31, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 23, 24, and 30, and AT&T hereby incorporates its response to those allegations. AT&T denies the fourth sentence of FPL's Answer to paragraph 31, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 13, 19, and 37, and AT&T hereby incorporates its response to those allegations.

32. AT&T denies the first paragraph of FPL's Answer to paragraph 32 because AT&T should be refunded the [redacted] of dollars that FPL has collected in violation of federal law for reasons detailed in Section III.C of AT&T's Complaint and Section II.E.2 of AT&T's Reply Legal Analysis. AT&T also denies the first paragraph of FPL's Answer to paragraph 32 because the Commission did not "expressly foreclose[ ]" refunds in the *Third Report and Order*. The Commission declined to create a "*right* to refunds," but affirmed its

authority to award refunds when appropriate.[122] And, as FPL learned two decades ago, refunds are appropriate when a pole owner charges "unjust and unreasonable" rates in violation of federal law.[123]

AT&T denies the second paragraph of FPL's Answer to paragraph 32 because the "applicable statute of limitations" is the 5-year statute of limitations that applies to actions involving a Florida contract[124] for reasons detailed in Section III.C of AT&T's Complaint and Section II.E.2 of AT&T's Reply Legal Analysis. AT&T also denies the second paragraph of FPL's Answer to paragraph 32 because the 2-year statute of limitations of 47 U.S.C. § 415 is not "more appropriate" because it is not applicable to the Pole Attachment Act or to this case, which does not seek to recover "lawful" charges or to obtain damages from a "carrier"[125] as further detailed in Section II.E.2 of AT&T's Reply Legal Analysis.

33. AT&T denies the first sentence of FPL's Answer to paragraph 33 because FPL has collected [redacted] of dollars from AT&T in violation of federal law for reasons detailed in AT&T's Complaint and Reply Legal Analysis. AT&T denies the second sentence of FPL's Answer to paragraph 33, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 20, 40-41, and 42, and AT&T hereby incorporates its response to those allegations. AT&T denies the third and fourth sentences of FPL's Answer to paragraph 33, which contain

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[122] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.478); 47 C.F.R. § 1.1407(a)(3).

[123] *See Time Warner Entm't v. Fla. Power & Light Co.*, 14 FCC Rcd 9149, 9154 (¶ 11) (Chief, Cable Service Bur. 1999) ("Therefore, we will order FPL to reimburse the Complainants for any charges over the amount of the maximum permitted annual pole attachment rate of $5.79 per pole, beginning April 13, 1998 through the present, plus interest.").

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

[125] *See* 47 U.S.C. § 415.

allegations that are substantially similar or identical to the allegations in FPL's Answer to paragraph 32, and AT&T hereby incorporates its response to those allegations. AT&T denies the remainder of FPL's Answer to paragraph 33, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 7, 14, 17, 23, 24, and 27, and AT&T hereby incorporates its response to those allegations.

III. COUNT I – UNJUST AND UNREASONBLE RATES

34. AT&T adopts and incorporates its replies to FPL's Answers to paragraphs 1 through 33 as though fully set forth herein.

35. AT&T denies FPL's Answer to paragraph 35 because it conflicts with Commission precedent and the plain language of 47 U.S.C. § 224. FPL argues that, even if the Commission has authority to regulate the rates charged ILECs, the Commission "is not 'statutorily *required*' to regulate the parties' relationship." However, the statute states that "the Commission *shall regulate* the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[126] The Commission therefore held that where an ILEC, like AT&T, has access to utility poles, "they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)."[127] AT&T disagrees with FPL's interpretation of the law before 2011, but states that it is irrelevant to any issue presented in this complaint proceeding. AT&T denies the remainder of FPL's Answer to paragraph 35, which contains allegations that are substantially similar or identical to other

[126] 47 U.S.C. § 224(b)(1) (emphasis added).

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

allegations in FPL's Answer, including those made in response to paragraphs 18, 28, and 29, and AT&T hereby incorporates its response to those allegations.

36. AT&T denies the first and second sentences of FPL's Answer to paragraph 36, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 20, 21, 22, 26, 33, 36, 37, 39, and 42, and AT&T hereby incorporates its response to those allegations. AT&T denies that the rental rate provision in the JUA (what FPL refers to as a "cost-sharing provision") was "originally proposed by AT&T," because AT&T lacks current knowledge about the 1975 negotiations between FPL and Southern Bell Telephone and Telegraph Company.[128] AT&T denies that a "per foot" rate is consistent with the Commission's pre-existing telecom rate formula because the pre-existing telecom rate formula produces "per pole" rates,[129] as the calculations of FPL's witness confirm.[130] AT&T denies that a properly-calculated pre-existing telecom rate is higher than the JUA rates because a properly-calculated pre-existing telecom rate is far lower than the JUA rates:

Comparison of per-pole rates	2014	2015	2016	2017	2018
Properly calculated pre-existing telecom rate	$15.84	$16.85	$18.37	$20.18	$23.94
Rate FPL charged AT&T (wood)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Rate FPL charged AT&T (concrete)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Rate FPL charged AT&T (transmission)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[128] *See* Compl. Ex. 1 at ATT00110 (JUA, § 0.1).

[129] *See Consolidated Partial Order*, 16 FCC Rcd at 12122 (¶ 31) (emphasis added).

[130] *See* Answer Ex. D at FPL00161-64 (Deaton Decl., Ex. RBD-1).

37. AT&T denies the first sentence of the first paragraph of FPL's Answer to paragraph 37, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 20, 21, 26, 36, 39, and 42, and AT&T hereby incorporates its response to those allegations. AT&T denies the second sentence of the first paragraph of FPL's Answer to paragraph 37, which contains allegations that are substantially similar or identical to the allegations made in response to paragraph 8, and AT&T hereby incorporates its response to those allegations. AT&T denies the last sentence of the first paragraph of FPL's Answer to paragraph 37, which contains allegations that are substantially similar or identical to the allegations made in response to paragraphs 13, 19, and 31, and AT&T hereby incorporates its response to those allegations. The properly calculated new telecom rates for AT&T's use of FPL's poles for the 2014 through 2018 rental years are $10.46, $11.12, $12.12, $13.32, and $15.80 per pole, respectively.[131]

AT&T states that the proportional new telecom rates for FPL's use of AT&T's poles for the 2014 through 2018 rental years if the new telecom rates listed in the prior sentence apply are $15.62, $12.58, $11.66, $9.44, and $12.60 per pole, respectively,[132] but denies that these rates are proportional to the inflated and improperly calculated rates that FPL proposes to apply to AT&T's use of FPL's poles. AT&T notes that the parties differ only with respect to the 2016 proportional rate, which AT&T calculates as $11.66 per pole and FPL calculates as [redacted] per pole.[133]

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[131] Reply Ex. A at ATT00923, ATT00937-48 (Rhinehart Reply Aff. ¶ 20 & Ex. R-5).

[132] *Id.*

[133] *See* Answer Ex. D at FPL00157 (Deaton Decl. ¶ 11); Reply Ex. A at ATT00925-26 (Rhinehart Reply Aff. ¶ 27).

AT&T denies the last paragraph of FPL's Answer to paragraph 37 because AT&T properly calculated the amount that it has overpaid to date during the applicable statute of limitations for reasons detailed in Section III.C of AT&T's Complaint, Section II.E of AT&T's Reply Legal Analysis, and in the supporting Affidavits of Daniel P. Rhinehart. AT&T further denies FPL's allegation that the JUA should be upheld if FPL were to "owe AT&T ... less than what [AT&T] has contended in its Complaint." In all events, FPL should be ordered to refund the amounts it collected from AT&T in violation of federal law.

38. AT&T denies the first sentence of the first paragraph of FPL's Answer to paragraph 38, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 9, 10, 11, 12, 14, 15, 18, 19, 20, and 28, and AT&T hereby incorporates its response to those allegations. AT&T denies the second and third sentences of FPL's Answer to paragraph 38, which contain allegations that are substantially similar or identical to the allegations made in response to paragraphs 21, 36, and 40-41, and AT&T hereby incorporates its response to those allegations. The properly calculated pre-existing telecom rates for AT&T's use of FPL's poles for the 2014 through 2018 rental years are $15.84, $16.85, $18.37, $20.18, and $23.94 per pole, respectively,[134] which are far lower than the JUA rates as shown in paragraph 36 above.

AT&T denies the last paragraph of FPL's Answer to paragraph 38 because AT&T properly calculated the amount that it has overpaid to date as compared to proportional pre-existing telecom rates, and FPL improperly calculated that amount, for reasons detailed in Section III.C of AT&T's Complaint, Section II.E of AT&T's Reply Legal Analysis, and in the supporting Affidavits of Daniel P. Rhinehart. Paragraph 38 also contains allegations that are

[134] Reply Ex. A at ATT00923, ATT00937-48 (Rhinehart Reply Aff. ¶ 20 & Ex. R-5).

substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 32 and 33, and AT&T hereby incorporates its response to those allegations.

IV. REQUEST FOR RELIEF

39. AT&T denies FPL's Answer to paragraph 39, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 20, 21, 26, 36, 37, and 42, and AT&T hereby incorporates its response to those allegations.

40-41. AT&T denies FPL's Answer to paragraphs 40-41, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 13, 19, 20, 21, 31, 33, 36, 37, and 42, and AT&T hereby incorporates its response to those allegations.

42. AT&T denies FPL's Answer to paragraph 42, which contains allegations that are substantially similar or identical to other allegations in FPL's Answer, including those made in response to paragraphs 13, 19, 20, 21, 26, 31, 33, 36, 37, 39, and 42, and AT&T hereby incorporates its response to those allegations.

AT&T'S RESPONSE TO FPL'S AFFIRMATIVE DEFENSES

A. Estoppel and Unclean Hands

AT&T denies this affirmative defense for reasons detailed in Section II.F.3 of AT&T's Reply Legal Analysis. FPL argues that AT&T should be estopped from receiving a refund due to "unclean hands" because the 1975 JUA was "in place for several decades" without complaint and was then challenged during "months of discussion" that FPL found unsatisfactory. Whether an estoppel or unclean hands defense is available in a pole attachment complaint proceeding is

doubtful.[135] But if it were available, it fails. AT&T is statutorily entitled to "just and reasonable" rates for use of FPL's poles; that AT&T paid and challenged rates charged by FPL that were in violation of federal law and that FPL found AT&T's efforts to obtain lawful rates to be "unsatisfactory" "is of no consequence."[136]

B. Good-Faith Negotiation Requirement Set Forth in Rule 1.722(g).

AT&T denies this affirmative defense for reasons detailed in Section II.F.1 of AT&T's Reply Legal Analysis. FPL argues that the Commission should dismiss the complaint for failure to satisfy the pre-complaint negotiation requirement of 47 C.F.R. § 1.722(g), but the record shows that AT&T repeatedly and exhaustively explained its argument that FPL's rates are unjust and unreasonable, in good faith tried to negotiate with FPL for a just and reasonable rate, traveled to FPL's headquarters for an executive-level meeting, and participated in a private mediation in its effort to reach a settlement.[137] AT&T thus "notified [FPL] in writing of the allegations that form the basis of the complaint," "invited a response within a reasonable period of time," and "in good faith, discussed or attempted to discuss the possibility of settlement with

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

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

[137] *See, e.g.*, Compl. Ex. A at ATT00003-04 (Rhinehart Aff. ¶¶ 4-5); Compl. Ex. B at ATT00054-57 (Miller Aff. ¶¶ 12-22); Compl. Exs. 4-29.

[FPL]."[138] FPL has provided no valid basis for dismissing or staying this complaint for further negotiations—particularly when FPL has taken the position that further negotiations "would be an exercise in [f]utility."[139]

C. Failure to State a Claim

AT&T denies this affirmative defense for reasons detailed in Sections II.A through II.D of AT&T's Reply Legal Analysis. FPL argues that AT&T cannot state a claim for relief because the JUA predates the 2011 *Pole Attachment Order* and the 2018 *Third Report and Order*. But both *Orders* expressly anticipate review of agreements that, like the JUA, were entered into before the *Orders* were released. The Commission "adopted a policy in 2011 that similarly situated attachers should pay similar pole attachment rates for comparable access"[140] and stated that it would review rates under an "existing agreement … in a complaint proceeding."[141] In 2015, the Enforcement Bureau emphasized that FPL could *not* "force Verizon to pay the relatively high Agreement Rates for as long as its attachments remain on [FPL]'s poles" under a JUA that, like the JUA at issue, was also entered into in 1975.[142] And in the 2018 *Third Report and Order*, the Commission found that the new telecom rate presumption *should* "impact privately-negotiated agreements" entered or renewed after the *Order*'s effective date.[143]

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[138] 47 C.F.R. § 1.722(g).

[139] *See* Pleadings Compilation Ex. 17 at ATT00843 (Opp'n to Mot. to Dismiss, or in the Alternative, Stay (Aug. 20, 2019)); *see also* FPL Br. at 19 ("FPL also emphasized to AT&T several times that FPL was unwilling to negotiate a new rate going forward.").

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

[141] *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216).

[142] *See FPL Order*, 30 FCC Rcd at 1143, 1150 (¶¶ 10, 25).

[143] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475); *see also id.* (¶ 127 & n.479) (rejecting argument "that we should not apply the presumption to existing agreements").

Indeed, the new telecom rate presumption *must* apply to existing attachments on existing poles under existing JUAs because there lie the "outdated rate disparities" that the presumption is intended to eliminate.[144] As the Commission explained, a federal statutory right "may not be defeated by private contractual provisions."[145] Any other standard "would subvert the supremacy of federal law over contracts."[146] Thus, as FPL admits, FCC orders override contrary JUA language.[147] AT&T has stated a claim for relief from the unjust and unreasonable rates imposed under the JUA.

D. Forbearance

AT&T denies this affirmative defense for reasons detailed in Section II.F.3 of AT&T's Reply Legal Analysis. FPL argues that the Commission should forbear from enforcing its rules, claiming that "the Commission's justifications for the assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles are not supported by the facts in this case." To the contrary, there is even greater justification in this case: AT&T has been paying rates under the JUA that far exceed the average $26.12 per-pole rate that, in part, led the Commission to adopt the new telecom rate presumption in order to accelerate rate relief to ILECs.[148] FPL also has not filed a proper forbearance request and the Commission cannot

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[144] *Third Report and Order*, 33 FCC Rcd at 7767, 7770 (¶ 127).

[145] *Id.* at 7731 (¶ 50) (citation omitted).

[146] *Id.* (internal quotation and alternation omitted); *see also In the Matter of Implementation of Section 224 of the Act*, 25 FCC Rcd 11864, 11908 (¶ 105) (2010) ("*Pole Attachment Order NPRM*") ("The Commission would not be fulfilling [its statutory] duty if it were to substitute the requirements of contract law for the dictates of section 224.").

[147] *See* Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11) ("Under FCC order, FPL is not permitted to reserve four feet of space on each FPL pole for AT&T's use" even though the JUA reserves 4 feet for AT&T's exclusive use.); *see also* Compl. Ex. 1 at ATT00111 (JUA § 1.1.7).

[148] *See Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125); *see also* Compl. ¶ 13.

forbear from applying its rules only to one ILEC's attachments on one electric utility's poles.[149] Forbearance is also precluded by statute because enforcement of AT&T's right to just and reasonable rates is (1) "necessary to ensure that the ... regulations ... in connection with ... telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory," (2) "necessary for the protection of consumers," and (3) "consistent with the public interest."[150]

E. Waiver of Rule 1.1413

AT&T denies this affirmative defense for reasons detailed in Section II.F.3 of AT&T's Reply Legal Analysis. FPL argues that the Commission should waive the applicability of Rule 1.1413 under 47 C.F.R. § 1.3.[151] FPL's request is facially invalid as FPL has not demonstrated "good cause" or "plead[ed] with particularity the facts and circumstances which warrant such action."[152] Nor could FPL meet the applicable standard because "a party seeking waiver of a rule's requirements must demonstrate that 'special circumstances warrant a deviation from the general rule' and 'such deviation will serve the public interest.'"[153] "In order to demonstrate the required special circumstances, [the party seeking waiver] must show that the application of the

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[149] 47 C.F.R. §§ 1.53-1.59.

[150] *See* 47 U.S.C. § 160(a); *see also Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) (finding "just and reasonable" rates for ILECs "will promote broadband deployment and serve the public interest [because] greater rate parity between [ILECs] and their telecommunications competitors can energize and further accelerate broadband deployment").

[151] Answer, Affirmative Defense E.

[152] 47 C.F.R. § 1.3; *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

[153] *See In the Matter of Results Broad. Rhinelander, Inc. Pet. for Waiver of Final Payment Deadline for Winning Bids in Auction 94*, No. DA19-1002, 2019 WL 4942573, at *3 (Oct. 3, 2019) (citing case law interpreting 47 C.F.R. § 1.3).

… rule would be inequitable, unduly burdensome or contrary to the public interest or that no reasonable alternative existed which would have allowed it to comply with the rule."[154] FPL has not met, and cannot meet, that standard. A "just and reasonable" rate for AT&T's use of FPL's poles cannot be "inequitable."[155] Collection of a "fully compensatory" new telecom rate cannot be "unduly burdensome."[156] And application of the Commission's rules to ensure just and reasonable rates *will* "*serve the public interest* [because] greater rate parity between [ILECs] and their telecommunications competitors can energize and further accelerate broadband deployment."[157]

F. Placement of Burden to Rebut the Presumption

AT&T denies this affirmative defense for reasons detailed in Section II.F.3 of AT&T's Reply Legal Analysis. FPL inappropriately tries to reopen the Commission's rulemaking by again arguing that the Commission cannot lawfully put the burden of proof on FPL to rebut the new telecom rate presumption. To the contrary, the burden *should* be on the party that seeks to benefit from an exception to a general rule.[158] The Commission, therefore, has regularly and

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[154] *Id.*

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

[156] *See Rhinelander*, 2019 WL 4942573, at *3; *see also Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (quoting *National Broadband Plan* at 110).

[157] *See Rhinelander*, 2019 WL 4942573, at *3; *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *see also, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5241 (¶ 1) ("Th[is] Order is designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation."). For this same reason, FPL cannot show that no reasonable alternative existed which would have allowed it to comply with the "just and reasonable" rate requirement.

[158] *See, e.g.*, *United States v. Taylor*, 686 F.3d 182, 190 n.5 (3d Cir. 2012) ("[N]umerous Supreme Court decisions … dating back at least to 1841, held that the party who wishes to rely on an exception … must raise it and establish it.") (citing cases); *see also FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) ("[T]he general rule of statutory construction [is] that the burden

correctly placed the burden on the party that seeks a rate different from the "just and reasonable" rate that is calculated using the Commission's presumptive inputs.[159] This presumption is no different.[160] Indeed, the only two cases FPL cites to support this defense explain that "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims ... admits of exceptions,"[161] including by administrative regulation.[162]

G. Lawfulness of the Sign-and-Sue Rule

AT&T denies this affirmative defense for reasons detailed in Section II.F.3 of AT&T's Reply Legal Analysis. FPL asks the Commission to change its longstanding sign-and-sue rule, arguing that it is arbitrary and capricious because AT&T should have been required to take exception to the rates in the JUA when it was negotiated. But "the rule is a reasonable exercise of the agency's duty under the statute to guarantee fair competition in the [pole] attachment market,"[163] and this is not the time or the appropriate vehicle to reconsider the sign and sue

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of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.").

[159] *See, e.g., Ala. Cable Telecomms. Ass'n* , 16 FCC Rcd at 12236 (¶ 59) ("[I]n any individual complaint proceeding, the pole height presumption may be overcome with credible evidence that the utility's poles have a different average height."); *Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, 2 FCC Rcd 4387, 4390 (¶ 19) (1987) ("These [appurtenance factor] ratios shall be rebuttable presumptions to be utilized in the event no party chooses to present probative, direct evidence on the actual investment in non-pole-related appurtenances.").

[160] *See, e.g., S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 584-85 (D.C. Cir. 2002) ("The possibility that a utility can present information [rebutting the presumption] makes it clear that the rule is not facially unreasonable.").

[161] *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005) (cited at Answer at 31 n.82).

[162] *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 295 (1994) (cited at Answer p. 31 n.82).

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

rule.[164] The Commission is required to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and … to hear and resolve complaints concerning such rates, terms, and conditions."[165] The FCC, therefore, must ensure "just and reasonable" rates even if "the attacher has agreed, for one reason or another, to pay a rate above the statutory maximum or otherwise relinquish a valuable right to which it is entitled under the Pole Attachments Act and the Commission's rules."[166] Any other standard "would subvert the supremacy of federal law over contracts."[167]

H. Commission Authority of ILEC Attachments

AT&T denies this affirmative defense for reasons detailed in Section II.F.3 of AT&T's Reply Legal Analysis. FPL argues that the Commission's assertion of jurisdiction over the rates charged ILECs is "unlawful, ultra vires, arbitrary, capricious and unreasonable" because the statutory term "providers of telecommunications service" should be read as "synonymous with 'telecommunications carrier,'" a term that excludes ILECs. The Commission correctly rejected this argument in its 2011 *Pole Attachment Order* when it found that ILECs, including AT&T, are "providers of telecommunications service" that are statutorily entitled to just and reasonable pole attachment rates.[168] The D.C. Circuit affirmed.[169]

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

[165] 47 U.S.C. § 224(b).

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

[167] *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50) (internal quotation and alteration omitted); *see also Pole Attachment Order NPRM*, 25 FCC Rcd at 11908 (¶ 105) ("The Commission would not be fulfilling [its statutory] duty if it were to substitute the requirements of contract law for the dictates of section 224.").

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

[169] *See Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d at 188.

I. Arbitrary and Capricious Rulemaking

AT&T denies this affirmative defense for reasons detailed in Section II.F.3 of AT&T's Reply Legal Analysis. FPL argues that the Commission's new telecom rate presumption reflects arbitrary and capricious rulemaking because it reflects "continually shifting positions with respect to the regulatory treatment of ILECs." But the Commission's 2018 *Order* reasonably and incrementally built upon the approach adopted in the 2011 *Order* in an effort to accelerate the rate reductions that should have taken effect then.[170] The same principle of competitive neutrality applies, but the Commission clarified that an electric utility cannot charge ILECs rates higher than the competitively neutral new telecom rate unless it can back up its allegations with more than its own, self-serving say-so.[171] It also sought to narrow disputes by clarifying maximum "just and reasonable" rates that may be charged where an electric utility can do so.[172] These refinements to the approach adopted in 2011 were lawful, reasonable, correct, within the Commission's authority, and are effective pending appeal.[173]

J. Statute of Limitations

AT&T denies this affirmative defense for reasons detailed in Section II.E.2 of AT&T's Reply Legal Analysis. FPL asks the Commission to ignore the 5-year statute of limitations that

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[170] *See, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7706 (¶ 1) ("Today, we continue our efforts to promote broadband deployment by speeding the process and reducing the costs of attaching....").

[171] *Id.* at 7770-71 (¶ 128).

[172] *Id.* at 7771 (¶ 129) ("This conclusion builds on and clarifies the Commission's determination in the *2011 Pole Attachment Order* that the pre-2011 telecommunications carrier rate should serve 'as a reference point in complaint proceedings' where a joint use agreement was found to give net advantages to an [I]LEC as compared to other attachers.").

[173] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Final Rule, 84 Fed. Reg. 2460-01 (Feb. 7, 2019).

applies to actions involving a Florida contract[174] and instead apply the 2-year statute of limitations of 47 U.S.C. § 415, which bears no relation to this dispute. Section 415 applies only to a carrier action to recover *lawful* charges and to an action against a carrier to recover damages and overcharges. This dispute is neither. And FPL does not explain why the 2-year statute of limitations under Section 415 is "applicable" to a refund of unjust and unreasonable pole attachment rentals, except to say that Section 415 is included in the Communications Act and has been applied to cases covered by its express terms.[175]

But the Commission did not incorporate Section 415 when it adopted a statute of limitations for disputes involving violations of the Pole Attachment Act, instead deciding that they should be treated consistently "with the way that claims for monetary recovery are generally treated under the law."[176] This followed a long line of precedent that "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.'"[177]

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

[175] *See Am. Cellular Corp., et al. v. BellSouth Telecomms., Inc.*, 22 FCC Rcd 1083, 1088 (¶ 12) (2007) ("[C]laims (like [Complainant]'s) for recovery of damages from carriers are specifically governed by the limitations period set forth in section 415(b)."); *Michael J. Valenti, et al. v. Am. Tel. and Telegraph Co.*, No. FCC 97-26, 1997 WL 818519, at *3 (¶ 11) (OHMSV Feb. 26, 1997) (finding damages claim barred by Section 415(b) where "both defendants were 'common carriers'"); *Municipality of Anchorage d/b/a Anchorage Tel. Util. v. Alascom, Inc.*, 4 FCC Rcd 2472, 2474 (¶ 19) (1989) (finding Section 415(b) applicable because the action was against a "carrier[ ] for the recovery of damages").

[176] *See Pole Attachment Order*, 26 FCC Rcd at 5289-90 (¶¶ 110-12); *see also Pole Attachment Order NPRM*, 25 FCC Rcd at 11902 (¶ 88) ("Generally speaking, a plaintiff is entitled to recompense going back as far as the applicable statute of limitations allows. There does not appear to be a justification for treating pole attachment disputes differently.").

[177] *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018) (quoting *Cnty. of Oneida v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 240 (1985)); *see also Spiegler v. District of Columbia*, 866 F.2d 461, 463-64 (D.C. Cir. 1989) ("When Congress has not established a statute

Section 415 is not "expressly applicable" to the Pole Attachment Act or to this case, which does not seek to recover "lawful" charges or to obtain damages from a "carrier."[178] But the federal claim in this case *does* involve a contract, and so "contract law provides the best analogy."[179] The Commission should "adopt the general contract law statute of limitations,"[180] which is 5 years in Florida.[181]

K. Takings Clause

AT&T denies this affirmative defense for reasons detailed in Sections II.B.1 and II.C.2 of AT&T's Reply Legal Analysis. FPL argues that setting a new telecom rate or a pre-existing telecom rate for AT&T's use of FPL's poles "would fall well short of providing FPL with 'just compensation.'" This defense also conflicts with precedent finding that the new telecom rate is "fully compensatory"[182] and does not violate the Takings Clause.[183]

FPL acknowledges that the Eleventh Circuit has rejected its Takings Claim, but asks the Commission to distinguish that precedent based on an unrealistic hypothetical. FPL pretends that without the JUA, it would have installed poles that could not accommodate *any* communications attachers.[184] FPL then claims that "FPL's poles would have always been at full

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of limitations for a federal cause of action, it is well-settled that federal courts may 'borrow' one from an analogous state cause of action, provided that the state limitations period is not inconsistent with underlying federal policies.").

[178] *See* 47 U.S.C. § 415.

[179] *Hoang*, 910 F.3d at 1101.

[180] *Id.*

[181] Fla. Stat. § 95.11(2)(b).

[182] *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (quoting National Broadband Plan at 110); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987).

[183] *Ala. Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002).

[184] Affirmative Defense K; *see also* FPL Br. at 48.

capacity absent the parties' JUA" such that AT&T would be "in the position of the buyer 'waiting in the wings' [for pole space] hypothesized by the 11th Circuit Court of Appeals."[185] In that scenario, FPL postulates that the Eleventh Circuit may have found that pole space was "rivalrous," such that the provision of pole space to one entity precludes another from attaching to the pole.[186] Then, FPL guesses, the Eleventh Circuit may have found that FPL's monopoly rates are the proper measure of "just compensation."[187]

But none of this happened. FPL installed distribution poles that "stand 55-feet tall" for FPL's own purposes—to "strengthen [the] electric grid."[188] It also installed poles with the expectation that several communications providers would attach.[189] And several can attach; FPL claims that its average pole height is 40.4 feet,[190] and a shorter 37.5-foot pole presumptively holds 4 communications attachers.[191] Space is not scarce on FPL's poles. Moreover, and as the Enforcement Bureau found in FPL's last pole attachment complaint proceeding, FPL has "collected rates under the Agreement for [over] 40 years[,] would be paid a just and reasonable rate going forward," and will continue to "generate[ ] revenue by renting space to cable

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[185] Affirmative Defense K at n.105 (quoting *Ala. Power Co.*, 311 F.3d at 1370).

[186] FPL Br. at 48 n.179; *see also Ala. Power Co.*, 311 F.3d at 1370-71.

[187] FPL Br. at 48 n.179; *see also Ala. Power Co.*, 311 F.3d at 1370-71.

[188] *See* Reply Ex. 6 (Featured Stories: FPL installs new poles to strengthen electric grid and help communities prepare for hurricane season).

[189] *See* Initial Comments of FPL et al. Regarding Safety and Reliability at 6, *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules* (Mar. 7, 2008) ("Third party attachment standards … are part in parcel of an electric utility's overhead distribution construction standards."). Data show that FPL has installed poles of comparable height regardless of whether FPL is the only attacher, whether AT&T is attached, or whether a third party is also attached. *See* Reply Ex. D at ATT01001-02 (Dippon Reply Aff. ¶ 42).

[190] *See* Answer Ex. A at FPL00015 (Kennedy Decl. ¶ 28).

[191] 47 C.F.R. §§ 1.1409(b), 1.1410.

companies and [C]LECs."[192] Thus, ensuring FPL receives a "just and reasonable" rate from AT&T "will not result in unreasonably low rates."[193] Precedent thus requires the rejection of this affirmative defense as well.[194]

L. Timing of Remedy

AT&T denies this affirmative defense for reasons detailed in Section II.F.3 of AT&T's Reply Legal Analysis. FPL argues that the Commission should apply laches to postpone rate relief until the date it issues an Order in this case. Were laches an available defense in a pole attachment complaint proceeding,[195] it would fail here. Equity does *not* support non-compliance with federal law.[196] And, in any event, rate relief has never been appropriate only as of the date of the Commission's Order in a pole attachment complaint proceeding. The Commission's pre-2011 rule provided rate relief as of the date a Pole Attachment Complaint was filed. The Commission decided that the filing-date approach "fails to make injured attachers whole," rejected an interim approach that would "preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge," and adopted the current approach that authorizes rate relief as far back as the statute of limitations allows.[197] The D.C. Circuit

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[192] *FPL Order*, 30 FCC Rcd at 1146 (¶ 19); *see also* Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11) (admitting that FPL leases space to third party attachers, including attachers in the space reserved for AT&T).

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

[194] *See id.*; *Ala. Power Co.*, 311 F.3d at 1370-71.

[195] *But see Air Touch Cellular v. Pac. Bell*, 16 FCC Rcd 13502, 13508 (¶ 17) (2001) (questioning whether equitable defenses, including laches, are available in formal complaint proceedings); *see also AT&T Servs. Inc.*, 30 FCC Rcd at 2597 (¶ 36 & n.123) (same).

[196] *See, e.g.*, *AT&T Servs. Inc.*, 30 FCC Rcd at 2597 (¶ 36); *Qwest Commc'ns Co.*, 28 FCC Rcd at 1993-94 (¶ 27); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[197] *Pole Attachment Order*, 26 FCC Rcd at 5289-90 (¶¶ 110-12); 47 C.F.R. § 1.1407(a)(3).

affirmed, finding it "hard to see any legal objection to the Commission's selection" of this "reasonable period for accrual of compensation for overcharges or other violations of the statute or rules."[198] FPL cannot escape liability for violations of federal law during the applicable statute of limitations.

M. Mootness

AT&T denies this affirmative defense for reasons detailed in Section II.F.3 of AT&T's Reply Legal Analysis. FPL argues that the case should be dismissed as moot based on the incredible assertion that "there is no ongoing contractual relationship between the parties" because FPL terminated the JUA. But notwithstanding such termination, the JUA "shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."[199] In other words, the JUA was "terminated and the parties continue to operate under an 'evergreen' clause" following the effective date of the *Third Report and Order*.[200] The new telecom rate presumption applies,[201] and it should be promptly enforced to ensure the "just and reasonable" rates required by law.

Respectfully submitted,

By: _____

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[198] *Am. Elec. Power Serv. Corp.*, 708 F.3d at 190.

[199] Compl. Ex. 1 at ATT00128 (JUA, Art. XVI).

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

[201] *Id.*

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Dated: November 6, 2019

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

INFORMATION DESIGNATION

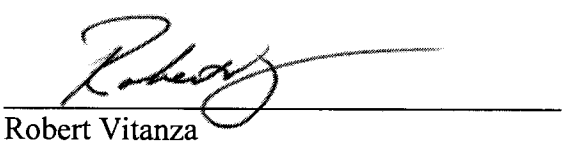
1. The AT&T employees and former employees with relevant information about this rental rate dispute are identified in AT&T's Pole Attachment Complaint, Pole Attachment Complaint Reply, and their supporting Affidavits and Exhibits.

2. Attached to this Pole Attachment Complaint Reply are Affidavits from AT&T employees involved in the rate negotiations and an Affidavit from outside expert Christian M. Dippon, Ph.D.

3. AT&T reserves the right to rely on information that is not appended to this Pole Attachment Complaint Reply as additional information becomes available.

RULE 1.721(M) VERIFICATION

I, Robert Vitanza, as signatory to this submission, hereby verify that I have read this Pole Attachment Complaint Reply and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.



Robert Vitanza

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2019, I caused a copy of the foregoing Reply to FPL's Answer to be served on the following (service method indicated):

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