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Before the
Federal Communications Commission
Washington, DC 20554

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

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AT&T'S REPLY TO DUKE ENERGY FLORIDA'S ANSWER

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TABLE OF CONTENTS

AT&T'S REPLY TO DUKE FLORIDA'S ANSWER 1

I. PARTIES AND JURISDICTION 1

II. DUKE FLORIDA HAS LONG CHARGED AT&T UNJUST AND UNREASONABLE POLE ATTACHMENT RENTAL RATES. 9

A. AT&T Is Entitled To The New Telecom Rental Rate Under The Commission's 2018 *Third Report And Order*. 18

1. The New Telecom Rate Presumption Applies, But Duke Florida Charges AT&T Rates That Are Far Higher. 20

2. AT&T Is Entitled To The New Telecom Rate Because Duke Florida Cannot Rebut The Presumption. 29

B. Even Apart From The 2018 Third Report and Order, AT&T Was Entitled To Just And Reasonable Rates Back To 2011. 42

C. AT&T Should Pay A Properly Calculated New Telecom Rate And Be Refunded Its Overpayments. 54

III. COUNT I – UNJUST AND UNREASONABLE RATES 58

AT&T'S DENIAL OF DUKE FLORIDA'S AFFIRMATIVE DEFENSES 60

* Certain information in this Reply to Duke Florida's Answer 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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AT&T'S REPLY TO DUKE FLORIDA'S ANSWER

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 Duke Energy Florida, LLC ("Duke Florida" or "DEF"). Any claims not specifically addressed are denied for reasons detailed in AT&T's Pole Attachment Complaint ("Complaint"), Reply Legal Analysis, and supporting affidavits and exhibits.[1]

I. PARTIES AND JURISDICTION

1. In its response to paragraph 1, Duke Florida admits AT&T is an ILEC within some parts of the state of Florida, including parts of Duke Florida's service territory, that AT&T provides telecommunications and other services in Florida, and that AT&T is a Georgia limited liability company with its principal place of business at One CNN Center, 1424C, Atlanta, GA 30303, so no response is required. AT&T denies the rest of Duke Florida's response to paragraph 1 because it does not respond to the allegations of paragraph 1. To the extent a response is

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

required, AT&T denies that its commercial success is due to a "power of incumbency" or to alleged "benefits under the joint use agreement" ("JUA") because AT&T does not enjoy net material competitive benefits under the JUA and has instead been competitively disadvantaged by the JUA, including the JUA's pole attachment rates that are over █ times the new telecom rates, for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply. The last sentence of Duke Florida's response to paragraph 1 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

2. The first sentence of Duke Florida's response to paragraph 2 admits the allegations of paragraph 2, so no response is required. AT&T lacks sufficient information to admit or deny the rest of Duke Florida's response to paragraph 2, which does not respond to the allegations of paragraph 2, so AT&T denies.

3. The first 2 sentences of Duke Florida's response to paragraph 3 admit that AT&T and Duke Florida are parties to a 1969 JUA, amended in 1980 and 1990, so no response is required except to note that the provision Duke Florida describes as a "cost sharing obligation" is, in fact, a pole attachment rental rate provision.[2]

The third through seventh sentences of Duke Florida's response to paragraph 3 contain legal conclusions to which no response is required. To the extent a response is required, AT&T denies these five sentences because the JUA automatically renewed and extended after the March 11, 2019 effective date of the *Third Report and Order* for reasons detailed in Section III.A.1 of AT&T's Complaint, Section II.A.1 of AT&T's Reply Legal Analysis, and this Reply. The new telecom rate presumption applies to agreements that "automatically renewed [or]

[2] *See* Compl. Ex. 1 at ATT000109 (JUA, § 10.4(a)-(b)) (setting "rental charges" for "joint use pole attachments").

extended" after the *Order*'s effective date,[3] and by its terms, the JUA automatically extended after that date. Its initial term expired on January 1, 1979, but it "*shall continue* in force thereafter" until it is terminated upon 6 months written notice.[4] The words "continue" and "extend" are synonyms,[5] and Duke Florida admits the JUA "continues in effect today."[6] That is only possible because the JUA automatically renewed and extended after the March 11, 2019 effective date of the *Third Report and Order*.[7]

AT&T also denies the third through seventh sentences of Duke Florida's response to paragraph 3 because the Commission did not require a "right to terminate the agreement" for the new telecom rate presumption to apply[8] and, in any event, the parties have the right to terminate the JUA.[9] AT&T further states that the JUA's evergreen provision speaks for itself.[10]

The eighth sentence of Duke Florida's response to paragraph 3 admits the parties share approximately 67,500 jointly used poles, with Duke Florida owning approximately 62,300 and AT&T owning approximately 5,200, so no response is required, except to note that Duke Florida's most recent invoice includes 67,569 joint use poles, with Duke Florida owning 62,363

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

[4] Compl. Ex. 1 at ATT00103 (JUA, Art. XVI).

[5] *See* Compl. ¶ 11 ("'Continue' means '[t]o carry further in time, space or development: *extend*' and 'extend' means 'to lengthen, prolong; to *continue* …'") (citations omitted).

[6] Answer ¶ 21.

[7] *See* Memorandum Opinion and Order at 6-7 (¶ 15), *Verizon Md. LLC v. The Potomac Edison Co.*, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (Nov. 23, 2020) ("*Potomac Edison Order*").

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

[9] Compl. Ex. 1 at ATT00102-103 (JUA, Art. XVI).

[10] Compl. Ex. 1 at ATT000102-103 (JUA, Art. XVI).

(92.3%) and AT&T owning 5,233 (7.7%).[11] The last sentence of Duke Florida's response to paragraph 3 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

4. Duke Florida's response to paragraph 4 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies Duke Florida's allegation that the Commission has jurisdiction over some, but not all, of the issues raised by AT&T's complaint. 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.[12] AT&T also denies Duke Florida's claim that the Commission should forbear from exercising its jurisdiction for reasons detailed in Section II.D of AT&T's Reply Legal Analysis, paragraphs 10 and 35 of this Reply, and AT&T's denials of Duke Florida's affirmative defenses. The Enforcement Bureau recently rejected this same argument because it "is without merit."[13]

5. Duke Florida's response to paragraph 5 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies that Florida has jurisdiction over this dispute because Florida has not reverse-preempted the Commission's authority pursuant to 47 U.S.C. § 224(c). AT&T states that Duke Florida'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

[11] Compl. Ex. 3 at ATT00159 (Invoice dated Dec. 30, 2019).

[12] *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); *see also Potomac Edison Order* at 6, 23 (¶¶ 14 n.43, 50).

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

massive shift of the cost of the jointly used network to [Duke Florida]'s electric customers." Rather, a new telecom rate is "fully compensatory" to the pole owner.[14] AT&T also denies that the FCC's enforcement of AT&T's federal statutory right to "just and reasonable" rates could result in Duke Florida "being 'assigned' the cost of any space on its own poles that has no relevance to the provision of electric service." This is an apparent reference to Duke Florida's refusal[15] to accept the Commission's longstanding precedent holding that 3.33 feet of safety space on a utility pole is "is usable and used *by the electric utility*."[16]

AT&T denies Duke Florida's categorization of this proceeding as involving "at least four 'buckets' of substantive issues: (1) the rates AT&T pays for access to DEF's poles; (2) the rates DEF pays for access to AT&T's poles; (3) AT&T's access rights to DEF's poles; and (4) DEF's access rights to AT&T's poles." The parties have access to each other's poles under the JUA and Duke Florida did not challenge AT&T's calculation of the proportional rates that would apply to Duke Florida'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.[17] This proceeding, therefore, only involves a dispute over the "just and reasonable" rate for AT&T's use of Duke Florida's poles, an issue squarely

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[14] *Pole Attachment Order*, 26 FCC Rcd 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).

[15] *See, e.g.*, Answer ¶ 25.

[16] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); *see also In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("*Consolidated Partial Order*") (holding "the 40-inch safety space … is usable and used by the electric utility").

[17] *See, e.g.*, Answer ¶ 38 & n.155 ("presum[ing] the accuracy of AT&T's calculation").

within the Commission's jurisdiction.[18] The last sentence of Duke Florida's response to paragraph 5 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

6. Duke Florida admits the first sentence of paragraph 6, so no response is required. With respect to the last three sentences of Duke Florida's response to 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 notes that AT&T disclosed that fact in its Complaint.[19] AT&T denies that the relevant question under Rule 1.722(h) is whether there is any "overlap with any issue" in those proceedings[20] and states that the pending petition does 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 Duke Florida's poles.

7. The first sentence of Duke Florida's response to paragraph 7 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. With respect to the second sentence, AT&T states that the Enforcement Bureau's August 28, 2020 letter speaks for itself and denies that the May 22, 2019 letter was the only time AT&T notified Duke Florida about the allegations that form the basis of its Complaint and invited a response within a reasonable period of time.[21] AT&T further states that any concern related to the parties' Rule 1.722(g) negotiations

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[18] 47 U.S.C. § 224(b).

[19] Compl. ¶ 6 n.8.

[20] 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.").

[21] *See, e.g.*, Compl. Ex. B at ATT00025-30 (Miller Aff. ¶¶ 10-17); Compl. Ex. C at ATT00034-44 (Peters Aff. ¶¶ 6-26); Compl. Ex. 8 at ATT00181 (Letter from D. Miller, AT&T to S.

was cured by compliance with the Enforcement Bureau's August 28, 2020 letter,[22] and that Duke Florida waived an affirmative defense related to Rule 1.722(g) by omitting it from its affirmative defenses.[23]

With respect to the third sentence of Duke Florida's response to paragraph 7, AT&T denies Duke Florida's suggestion that AT&T's participation in the parties' two executive-level meetings was in bad faith[24] and states that the 2 Duke Florida executives who participated in the meetings do not allege "bad faith" in their declarations.[25] With respect to the fourth sentence of Duke Florida's response to paragraph 7, AT&T admits that it is entitled to a new telecom rate calculated using the Commission's presumptive inputs (including 1 foot of space occupied) for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply, but denies that AT&T refused to consider Duke Florida's arguments or try to negotiate a business compromise.[26]

With respect to the fifth and sixth sentences of Duke Florida's response to paragraph 7, AT&T denies Duke Florida's characterization of Duke Florida's position during negotiations, when Duke Florida took the position that AT&T should forever pay the JUA rates for existing

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Freeburn, Duke (Sept. 5, 2019)); Compl. Ex. 15 at ATT00200-202 (Emails between D. Miller, AT&T and S. Freeburn, Duke) (Jan. 30-Feb. 18, 2020)).

[22] *See, e.g.*, Answer Ex. 5 at DEF000271-276.

[23] *See* Answer, Affirmative Defenses; 47 C.F.R. § 1.726(e) ("Affirmative defenses to allegations in the complaint shall be specifically captioned as such and presented separately from any denials made in accordance with paragraph (b) of this section.").

[24] Reply Ex. A at ATT00249-252 (Rhinehart Reply Aff. ¶¶ 20-24); Reply Ex. B at ATT00267 (Miller Reply Aff. ¶ 2); Reply Ex. C at ATT00275-277 (Peters Reply Aff. ¶¶ 3-5).

[25] *See* Answer Ex. A (Freeburn Decl.); Answer Ex. B (Hatcher Decl.).

[26] Reply Ex. A at ATT00249-252 (Rhinehart Reply Aff. ¶¶ 20-24); Reply Ex. B at ATT00270-271 (Miller Reply Aff. ¶ 7); Reply Ex. C at ATT00275-277 (Peters Reply Aff. ¶¶ 3-5); *see also*, *e.g.*, Compl. Ex. 15 at ATT00200 (Email from D. Miller, AT&T to S. Freeburn, Duke (Feb. 18, 2020)) ("AT&T prefers a negotiated resolution…").

attachments.[27] AT&T further states that Duke Florida was *not* willing to negotiate rates that complied with the Commission's regulations and orders, which is the only relevant standard,[28] as it refused to honor relevant FCC precedent,[29] refused to make an offer for over 15 months,[30] and ultimately offered rates [REDACTED] .[31] Duke Florida has now stated it "would never … negotiate[ ] an agreement like [the JUA] if the most it could recover was the one-foot CATV or telecom rate (old or new)."[32]

Because AT&T is "not required to engage in extended negotiations where the parties apparently are far apart in their analysis of the issues," the Commission's negotiation

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[27] *See, e.g.*, Answer ¶ 9 ("In two separate face-to-face meetings between representatives of the parties, DEF offered numerous valid reasons to retain the existing cost-sharing relationship…"); Answer Ex. B at DEF000156 (Hatcher Decl. ¶ 15) (during negotiations, Duke Florida would consider the new telecom rate *only* for "poles that are not already in joint use").

[28] *See, e.g.*, *FPL 2020 Order*, 35 FCC Rcd at 4327 (¶ 12) ("AT&T has shown that its attempts to negotiate a new rate with FPL in light of the *Pole Attachment Order* were unsuccessful.").

[29] *See, e.g.*, Answer Ex. B at DEF000157 (Hatcher Decl. ¶ 16) (stating that any rate proposal that required Duke Florida to "bear[ ] the entire cost of the safety space … was a nonstarter"); Answer Ex. 5 at DEF000273 (Letter from S. Freeburn, Duke, to D. Miller, AT&T (Sept. 10, 2020)) [REDACTED]

[30] *See* Compl. Ex. B at ATT00026-30 (Miller Aff. ¶¶ 10-17); *see also* Answer Ex. 5 at DEF000273 (Letter from S. Freeburn, Duke, to D. Miller, AT&T (Sept. 10, 2020)) [REDACTED]

[31] *See* Answer Ex. 5 at DEF000276 (Letter from S. Freeburn, Duke, to D. Miller, AT&T (Sept. 10, 2020)) [REDACTED]; *see also Pole Attachment Order*, 26 FCC Rcd at 5297 (¶ 131 n.399) (stating an attacher pays about 7.4% of a pole owner's annual pole costs under the new telecom rate formula and about 11.2% of a pole owner's annual pole costs under the old telecom rate formula in urbanized areas); Reply Ex. A at ATT00249-252 (Rhinehart Reply Aff. ¶¶ 20-24).

[32] Answer ¶ 21.

requirement has been satisfied.[33] But even if there were "any procedural aspect of the rule with which [AT&T] may not have strictly complied," there is "good cause to waive" it given AT&T's "executive-level, pre-Complaint coordination and preview of substantive allegations."[34]

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

8. The first sentence of Duke Florida's response to paragraph 8 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of the first paragraph of Duke Florida's response to paragraph 8 because AT&T does *not* attach "to DEF's poles on terms and conditions that materially advantage AT&T over CATVs and CLECs" for reasons detailed in Section III.A-B of AT&T's Complaint, Section II.A-B of AT&T's Reply Legal Analysis, and Sections II.A-B this Reply.

AT&T specifically denies that the 3 alleged "advantages" Duke Florida describes as "primary" are net material competitive advantages. *First*, AT&T denies that it has a net material competitive advantage based on the allegation that "DEF has built and maintained, and continues to build and maintain, poles of sufficient height and strength to accommodate AT&T with de minimis make-ready cost to AT&T." The Enforcement Bureau already rejected this argument, finding that an electric utility "did not build its poles just to accommodate AT&T."[35] In addition, Duke Florida's allegation is based entirely on Duke Florida's claim that it installed joint use

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[33] *Nev. State Cable Tel. Ass'n v. Nev. Bell*, 13 FCC Rcd 16774 (¶¶ 4-6) (1998).

[34] *Dominion Order*, 32 FCC Rcd at 3764 (¶ 28 n.105); *see also* Compl. Ex. B at ATT00025-30 (Miller Aff. ¶¶ 10-17); Compl. Ex. C at ATT00034-44 (Peters Aff. ¶¶ 6-26); Reply Ex. A at ATT00249-252 (Rhinehart Reply Aff. ¶¶ 20-24); Reply Ex. B at ATT00267-271 (Miller Reply Aff. ¶¶ 2-9); Reply Ex. C at ATT00275-277 (Peters Reply Aff. ¶¶ 3-5).

[35] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *see also Potomac Edison Order* at 13-14 (¶ 32).

poles "taller and stronger than necessary to provide electric service,"[36] which is not true[37] and, regardless, is not a relevant comparison under the Commission's principle of competitive neutrality because AT&T *and* its competitors require Duke Florida's joint use poles.[38] AT&T further states that AT&T and its competitors require materially comparable make-ready when attaching to Duke Florida's poles today.[39] AT&T further notes that the JUA did not require Duke Florida to install 40-foot poles[40] because the JUA defines a normal joint use pole as a 35- or 40-foot pole and allows for the use of even shorter poles,[41] and Duke Florida says its "typical vertical three-phase construction" requires a 45-foot pole without any other companies attached.[42] AT&T also denies this allegation for reasons detailed in Section II.A.3 of AT&T's Reply Legal Analysis and Paragraphs 10, 15, 16, 22, and 25 of this Reply.

Second, AT&T denies that it has a net material competitive advantage based on Duke Florida's allegation that it "contractually agreed that, even in the event of a termination [of the JUA], AT&T can remain attached to DEF's poles" because AT&T's competitors have a statutory right of access to Duke Florida's poles, which means that they can remain attached to Duke Florida's poles even if their license agreements are terminated.[43] AT&T also denies this

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[36] *See, e.g.*, Answer, Executive Summary at ii.

[37] *See, e.g.*, Reply Ex. C at ATT00278-281 (Peters Reply Aff. ¶¶ 8-12); Reply Ex. E at ATT00333-335 (Dippon Reply Aff. ¶¶ 49-52).

[38] *See, e.g.*, Reply Ex. C at ATT00278-281 (Peters Reply Aff. ¶¶ 8-12); Reply Ex. E at ATT00332 (Dippon Reply Aff. ¶ 48).

[39] Reply Ex. C at ATT00291-292 (Peters Reply Aff. ¶ 33); Reply Ex. D at ATT00297-300 (Davis Reply Aff. ¶¶ 4-7).

[40] *See, e.g.*, Answer Ex. A at DEF000131 (Freeburn Decl. ¶ 10).

[41] Compl. Ex. 1 at ATT00090 (JUA, § 1.1.5).

[42] Answer Ex. C at DEF000165 (Burlison Decl. ¶ 14).

[43] 47 U.S.C. § 224(f); *see also* Answer Ex. E at DEF000208 (Metcalfe Aff. ¶ 9) ("Duke Energy Florida is required by the FCC to provide mandatory access to CLECs and CATVs, but is not required to provide mandatory access to AT&T, which is an ILEC. This represents a

allegation for reasons detailed in Section II.A.3 of AT&T's Reply Legal Analysis and Paragraphs 10, 15, 21, and 30 of this Reply.

Third, AT&T denies that it has a net material competitive advantage based on Duke Florida's allegation that "AT&T occupies space on DEF poles in a much different way than DEF's CATV and CLEC licensees" because AT&T instead "installs light-weight copper and fiber optic cables that are comparable in size to the facilities of AT&T's competitors and occupy about the same amount of space across Duke Florida's poles, which is presumed to be 1 foot of space."[44] AT&T admits it is allocated 3 feet of space under the JUA, but denies that it occupies, wants, or needs 3 feet of space across Duke Florida's poles for its existing facilities, for future facilities, or for any other purpose, and states that it cannot sublet the space to others.[45] AT&T further states that Duke Florida does not and cannot reserve extra space for AT&T on its poles[46] and that space allocated by the JUA is irrelevant when setting rates under the Commission's rate formulas because they require that rates be set based on "space that is 'actually occupied'" on the pole.[47] AT&T denies that Duke Florida provided any "data" to substantiate its allegations, let alone data about the space "AT&T is actually occupying" on the pole. Instead, Duke Florida's claim is based on *where* AT&T's facilities are placed on a pole, arguing that AT&T should pay

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fundamental difference between CLECs or CATVs, as compared to ILECs.... ILECs are at a material disadvantage compared to CLECs and CATVs.").

[44] Compl. Ex. C at ATT00044 (Peters Aff. ¶ 25); *see also* Reply Ex. C at ATT00287-289 (Peters Reply Aff. ¶¶ 26-28).

[45] *See* Compl. Ex. C at ATT00044 (Peters Aff. ¶ 25).

[46] Compl. Ex. C at ATT00044 (Peters Aff. ¶ 25); *see also* Reply Ex. C at ATT00289 (Peters Reply Aff. ¶ 29); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16053 (¶ 1170) (1996) ("Permitting an incumbent LEC, for example, to reserve space for local exchange service ... would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.")

[47] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) (citing authorities).

for unoccupied space below its facilities if they are not placed as low as possible on the pole.[48] But Duke Florida does not even have data to corroborate this allegation, as it pairs uncorroborated hearsay about 941 poles (1.5% of the Duke Florida's joint use poles) with a presumptive value to manufacture its claim about constructively occupied pole space.[49] AT&T also denies this allegation for reasons detailed in Section II.A.2 and II.A.3 of AT&T's Reply Legal Analysis and Paragraphs 10, 12, 15, 18, 22, 24, 25, 31, and 37 of this Reply.

AT&T denies Duke Florida's conclusory allegation that "AT&T also enjoys other valuable advantages under the joint use agreement, as compared to DEF's CATV and CLEC licensees"[50] because AT&T does not enjoy a net material competitive advantage under the JUA.[51] AT&T further denies the last sentence of the first paragraph of Duke Florida's response to paragraph 8 because Duke Florida does not "absorb[ ] the costs of permitting, engineering and inspections in connection with AT&T's attachments" under the JUA because the JUA instead requires AT&T to complete its own permitting, engineering, and inspections at AT&T's cost.[52] AT&T also denies this allegation for reasons detailed in Section II.A.3 of AT&T's Reply Legal Analysis and Paragraphs 14, 15, and 17 of this Reply.

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[48] *See, e.g.*, Reply Ex. E at ATT00321 (Dippon Reply Aff. ¶ 23); *see also* Answer ¶ 12. *But see Potomac Edison Order* at 18 (¶ 37) (rejecting assumption that an ILEC occupies space below its attachments).

[49] *See, e.g.*, Reply Ex. E at ATT00321-333 (Dippon Reply Aff. ¶ 24); *see also* Answer ¶ 12 & Answer Ex. A at DEF000132 (Freeburn Decl. ¶ 12) (stating that [redacted] feet is the difference between the "average height of AT&T's highest attachment" on a set of 941 unidentified poles and 18 feet, which is the FCC's minimum ground clearance presumption).

[50] *In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

[51] *See* Compl. §§ III.A-B; Reply Legal Analysis §§ II.A.2-3; Reply § II.A-B.

[52] *See* Compl. Ex. 1 at ATT00092 (JUA, §§ 3.3, 3.4); *see also* Reply Ex. C at ATT00291 (Peters Reply Aff. ¶ 32); Reply Ex. E at ATT00340-341 (Dippon Reply Aff. ¶ 62).

AT&T denies the second paragraph of Duke Florida's response to paragraph 8 because the new telecom rate *does* apply to AT&T's use of Duke Florida's poles[53] and Duke Florida *has* 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:

Comparison of per-pole rates[54]	2015	2016	2017	2018	2019
Properly calculated new telecom rate	$4.56	$4.46	$4.51	$4.78	$4.54
Rate Duke Florida charged AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

AT&T also denies Duke Florida'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, and not "per foot" rates.[55] 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.[56] This is not the appropriate place to reconsider that decision.[57]

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[53] *See* Compl.; Reply Legal Analysis; Reply.

[54] *See* Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1); Compl. Ex. B at ATT00026 (Miller Aff. ¶ 8); Reply Ex. A at ATT00240 ATT00259 (Rhinehart Reply Aff. ¶ 4 & Ex. R-5).

[55] *See* 47 C.F.R. § 1.1406(d); *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*"); *id.* at 12173-74 (App'x D-1, D-2) (showing calculation of "maximum rate per pole" under cable formula); *see also* Reply Ex. A at ATT00246-47 (Rhinehart Reply Aff. ¶¶ 13-14); Reply Ex. E at ATT00319 (Dippon Reply Aff. ¶ 20).

[56] *See* 47 C.F.R. § 1.1413(b).

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

With respect to the last sentence of the second paragraph of Duke Florida's response to paragraph 8, AT&T admits it sent Duke Florida a letter dated May 22, 2019 requesting the just and reasonable rates required by law, but denies that the letter was Duke Florida's first notice that the JUA rates are unjust and unreasonable, as Duke Florida's parent company was an active participate in the rulemakings that resulted in the 2011 *Pole Attachment Order* and the 2018 *Third Report and Order*. AT&T further denies that the timing of its request for just and reasonable rates is relevant to Duke Florida's obligation to comply to the law, and notes that the Commission expressly "decline[d] the invitation ... to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge."[58]

AT&T denies the last paragraph of Duke Florida's response to paragraph 8 because AT&T did not avoid "make-ready, permitting, and inspection costs" or "system replacement costs" that its competitors incurred, let alone costs in the amounts Duke Florida alleges.[59] Rather, Duke Florida's allegations are based entirely on a hypothetical world in which Duke Florida shares poles with communications attachers and one in which it does not:

- Under its "avoided make-ready, permitting, and inspection cost" theory ([REDACTED] per pole per year), Duke Florida claims that, but for the JUA, it would have installed a network of shorter poles and "AT&T would have paid make-ready costs" at 2019 values "to replace virtually all of Duke Energy Florida's poles with taller poles."[60]
- Under its "system replacement cost" theory ([REDACTED] per pole per year), Duke Florida claims that, but for the JUA, AT&T would need to stand ready to "construct[ ] a new network of 62,000 poles in the event of a termination" at 2019 costs.[61]

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

[59] *See* Reply Aff. A at ATT00252-255 (Rhinehart Reply Aff. ¶¶ 25-28); Reply Aff. C at ATT00291-293 (Peters Reply Aff. ¶¶ 32-35); Reply Aff. E at ATT00328-342 (Dippon Reply Aff. ¶¶ 39-65).

[60] *See* Metcalfe Aff., Ex. E-3.1.

[61] Answer, Executive Summary.

Duke Florida's hypotheticals are fanciful, redundant, and not supported by the facts.[62] They do not involve costs Duke Florida has or will ever incur, so Duke Florida "may not embed" those nonexistent costs in AT&T's rental rate.[63] And they inappropriately seek to set pole attachment rates "by assuming that, without the JUA, AT&T would have built a duplicate pole network."[64] AT&T also denies the allegations for reasons detailed in Section II.A.3 of AT&T's Reply Legal Analysis. The last sentence of Duke Florida's response to paragraph 8 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

9. The first sentence of Duke Florida's response to paragraph 9 admits the existence of the Commission's new telecom rate presumption, so no response is required. AT&T denies the second sentence of Duke Florida'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[65] that automatically renewed and extended after March 11, 2019 for reasons detailed in Section III.A.1 of AT&T's Complaint, Section II.A.1 of AT&T's Reply Legal Analysis, and Paragraph 3 of this Reply. With respect to the third and fourth sentences of Duke Florida's Answer to paragraph 9, AT&T admits the JUA is dated June 1, 1969 and that an amendment is dated January 2, 1990, but notes that the provision Duke Florida describes as a "cost sharing obligation" is, in fact, a pole attachment rental provision.[66] With respect to the fifth sentence of Duke Florida's Answer to paragraph 9, AT&T admits that neither party has terminated the agreement and that AT&T

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[62] *See* Reply Aff. A at ATT00252-255 (Rhinehart Reply Aff. ¶¶ 25-28); Reply Aff. C at ATT00290-293 (Peters Reply Aff. ¶¶ 30-35); Reply Aff. E at ATT00328-341 (Dippon Reply Aff. ¶¶ 39-62).

[63] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

[64] *FPL 2020 Order* 35 FCC Rcd at 5322 (¶ 15).

[65] *See* Compl. Ex. 1 at ATT00089-110 (JUA).

[66] *See* Compl. Ex. 1 at ATT000109 (JUA, § 10.4(a)-(b)) (setting "rental charges" for "joint use pole attachments").

asked Duke Florida on May 22, 2019 to negotiate the just and reasonable rates required by law, but is unable to admit or deny whether either party has requested renegotiation of the 1990 Amendment to the JUA during the last 30 years. The last sentence of the first paragraph of Duke Florida's response to paragraph 9 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

AT&T denies the first 3 sentences of the second paragraph of Duke Florida's response to paragraph 9 because Duke Florida did not offer "numerous valid reasons to retain the existing cost-sharing relationship" during the parties' executive level meetings because there is no "valid reason" under the Commission's regulations to charge AT&T ███ per pole rates that are over █ times the presumptive new telecom rate and over █ times the "hard cap" set by the pre-existing telecom formula.[67] AT&T also denies Duke Florida has identified "actual, quantifiable competitive advantages" because it instead has relied on hypotheticals and theories already rejected by the Commission and Enforcement Bureau for reasons detailed in Section III.A.2 of AT&T's Complaint, Section II.A.2-3 of AT&T's Reply Legal Analysis, and Paragraphs 8, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22, 24, 25, 28, 29, 30, 31, 37 of this Reply. AT&T admits upon information and belief that Duke Florida did not "endeavor[ ] to perform any kind of precise economic quantification of those competitive advantages" during the parties' negotiations and states that Duke Florida's refusal to do so prior to an FCC pole attachment complaint proceeding establishes that Duke Florida made no attempt to comply with the Commission's 2011 *Pole Attachment Order* or the 2018 *Third Report and Order*, had no legal basis for invoicing the

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[67] 47 C.F.R. § 1.1413(b); *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); *see also* Compl. Ex. A at ATT00007, ATT00013-14, ATT00009-10 (Rhinehart Aff. ¶¶ 11-12, 17-18 & Ex. R-1); Reply Ex. A at ATT00249-252 (Rhinehart Reply Aff. ¶¶ 20-24); Reply Ex. E at ATT00311-312 (Dippon Reply Aff. ¶¶ 4-5).

rental rates it charged AT&T, and thwarted the Commission's effort to "reduce the number of disputes regarding pole attachment rates" by "enabl[ing] *better informed* pole attachment negotiations."[68]

AT&T denies the first five sentences of the third paragraph of Duke Florida's response to paragraph 9 because AT&T did not refuse to negotiate or insist on Duke Florida's "entire 'case in chief'" during negotiations; instead, AT&T negotiated in good faith, sought relevant information to make the negotiations more efficient, and repeatedly asked Duke Florida to at least make the settlement offer it promised, but did not provide until 10 months later after this case was filed.[69] AT&T denies that "good faith negotiation demands more" than the good faith that AT&T devoted to the negotiations, denies that AT&T lacked "a level of vision and intellectual honesty" or that ignoring relevant FCC precedent as Duke Florida requested would be consistent with such, and denies that AT&T was somehow not "intellectually honest or efficient" when it asked to negotiate within the framework established by the Commission's new telecom rate presumption and applicable Commission orders.[70] AT&T further denies that it was dishonest in stating that "DEF offered no valid basis to rebut the presumption" during the executive-level meetings because Duke Florida did not then, and still has not, offered a valid basis to rebut the presumption for reasons detailed in Section III.A.2 of AT&T's Complaint,

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[68] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129) (citation omitted) (emphasis added); *see also* Reply Ex. B at ATT00267-271 (Miller Reply Aff. ¶¶ 3-7).

[69] *See* Compl. Ex. B at ATT00027-30 (Miller Aff. ¶¶ 11-17); Reply Ex. A at ATT00249-252 (Rhinehart Reply Aff. ¶¶ 20-24); Reply Ex. B at ATT00267-271 (Miller Reply Aff. ¶¶ 3-7); Reply Ex. C at ATT00275-277 (Peters Reply Aff. ¶¶ 3-5); *see also, e.g.*, Compl. Ex. 15 at ATT00200-02 (Emails between D. Miller, AT&T and S. Freeburn, Duke (Jan. 30-Feb. 18, 2020)).

[70] *See* Compl. Ex. B at ATT00027-30 (Miller Aff. ¶¶ 11-17); Reply Ex. A at ATT00249-252 (Rhinehart Reply Aff. ¶¶ 20-24); Reply Ex. B at ATT00267-271 (Miller Reply Aff. ¶¶ 3-7); Reply Ex. C at ATT00275-277 (Peters Reply Aff. ¶¶ 3-5).

Section II.A.2-3 of AT&T's Reply Legal Analysis, and this Reply. AT&T further notes that the third paragraph of Duke Florida's response to paragraph 9 is conclusory and unsupported,[71] and that the 2 Duke Florida executives who participated in the parties' executive level meetings do not allege "bad faith" in their declarations.[72] The last sentence of Duke Florida's response to paragraph 9 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

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

10. With respect to the first sentence of Duke Florida's response to paragraph 10, AT&T admits "that, under the Commission's rules, similarly situated attachers should pay similar pole attachment rates for comparable access," but denies that Duke Florida has shown that AT&T is not "similarly situated to the attaching entities who pay the new telecom rate for attachments to DEF's poles" with clear and convincing evidence of net material competitive advantages sufficient to rebut the new telecom rate presumption for reasons detailed in Section III.A.2 of AT&T's Complaint, Section II.A.2-3 of AT&T's Reply Legal Analysis, and this Reply. AT&T denies the second sentence of Duke Florida's response to paragraph 10, which contains allegations that are substantially similar or identical to allegations in Duke Florida's responses to paragraphs 8, 10, 12, 15, 16, 18, 21, 22, 24, 25, 30, 31, 37, and AT&T hereby incorporates its response to those allegations. AT&T further denies that AT&T's competitors bear any "risk of displacement" from Duke Florida's poles; as Duke Florida's witness explains, "Duke Energy Florida is required by the FCC to provide mandatory access to CLECs and CATVs," which is "a fundamental difference" that sets "ILECs … at a material disadvantage

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[71] *In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

[72] *See* Answer Ex. A (Freeburn Decl.); Answer Ex. B (Hatcher Decl.).

compared to CLECs and CATVs."[73] The last sentence of the first paragraph of Duke Florida's response to paragraph 10 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

AT&T denies the rest of Duke Florida's response to paragraph 10 because it does not respond to the allegations of paragraph 10, but to the extent a response is required, AT&T denies that the JUA requires AT&T to own an "objective percentage" of the joint use poles,[74] denies that Duke Florida gave AT&T the opportunity to own an "objective percentage" of the joint use poles,[75] and denies that AT&T's annual "rental" payment to Duke Florida would be $0 if AT&T owned ██% of the joint use poles. Instead, if AT&T owned more poles, AT&T would pay lower *net* rent because it would pay rent on fewer poles, but AT&T would still pay a ██+ JUA per pole rate that is unjust and unreasonable and overcompensates Duke Florida. AT&T denies that the 1980 Amendment to the JUA is relevant because it was "deleted in its entirety" in 1990.[76] AT&T also denies Duke Florida's unsupported allegation that the deleted rate provision was "economically no different" than a pole ownership requirement or that "AT&T could not complain" about the JUA's rate provision—however described—because it requires AT&T to pay ██% of Duke Florida's pole costs even though its competitors pay a new telecom rate for comparable space that covers 7.4% of Duke Florida's pole costs and is fully compensatory to Duke Florida.[77] AT&T further states that Duke Florida's response to paragraph 10 repeats

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[73] Answer Ex. E at DEF000208 (Metcalfe Aff. ¶ 9).

[74] *See* Answer ¶ 10 (stating AT&T is "**<u>not</u>** … required to maintain ownership of ██% of the jointly used network); *see also* Compl. Ex. 1 at ATT00088-110 (JUA).

[75] *See* Reply Ex. C at ATT00294 (Peters Reply Aff. ¶ 36).

[76] Compl. Ex. 1 at ATT00108 (1990 Amendment ¶ 1).

[77] *See, e.g.*, Compl. Ex. D at ATT00061-66 (Dippon Aff. ¶¶ 30-38).

arguments the Commission has considered and rejected, finding that ILECs are presumptively entitled to a new telecom rate, in part, because ILECs own fewer poles.[78] This is not the appropriate place to reconsider that decision.[79]

AT&T denies the last sentence of Duke Florida's response to paragraph 10, which contains allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 4 and 35, and AT&T hereby incorporates its response to those allegations. As the Enforcement Bureau recently held, a request for forbearance in this context "is without merit."[80]

1. The New Telecom Rate Presumption Applies, But Duke Florida Charges AT&T Rates That Are Far Higher.

11. AT&T denies the first sentence of Duke Florida's response to paragraph 11, which contains allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 3, 9, 21, and 38, and AT&T hereby incorporates its response to those allegations. With respect to the remaining allegations in the first paragraph of Duke Florida's response to paragraph 11, AT&T admits that the JUA's initial term expired in 1979,

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[78] *See Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) ("We are convinced by the record evidence showing that … incumbent LEC pole ownership has declined"); *Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206) ("aggregate incumbent LEC pole ownership has diminished relative to that of electric utilities"). Duke Florida has tried unsuccessfully to recharacterize joint use agreements for more than a decade in its effort to avoid the Commission's rate reforms. *See, e.g.*, Reply Comments of Progress Energy Florida n/k/a Duke Energy Florida, et al. at 16, *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245 (Apr. 22, 2008) (arguing that ILECs are not entitled to just and reasonable rates because joint use agreements reflect "infrastructure cost sharing"); Reply Brief of Petitioners at 16, *Am. Elec. Power Serv. Co. v. FCC*, No. 11-1146 (D.C. Cir. Apr. 9, 2012) (arguing that "joint use agreements … are infrastructure cost sharing agreements").

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

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

but states it expired on January 1, 1979,[81] admits that the JUA has continued "in force thereafter" because it has not been terminated by either party, and admits the JUA automatically renewed in June 1979 and every other day since its initial term expired. Duke Florida's footnoted claim that it reserves the right to argue that AT&T's May 2019 request for just and reasonable rates "triggered a termination of the agreement" under Section 11.2 is speculative and requires no response, but if a response is required, it is denied because Duke Florida admits the JUA was *not* terminated and "continues in effect today."[82]

With respect to the second paragraph of Duke Florida's response to paragraph 11, AT&T states that the JUA speaks for itself. AT&T denies that the JUA is unable to renew because the JUA *renewed* when its initial term expired in 1979[83] and it continues to automatically renew each day that it is extended.[84] AT&T denies that a "renewal" for purposes of the new telecom rate presumption requires the parties to take some affirmative action because the Commission instead applied the presumption to agreements "that are *automatically* renewed, extended, or placed in evergreen status."[85] AT&T denies that the JUA cannot be "placed in evergreen status" *because* it includes an "evergreen" provision.[86] To the contrary, the Commission found that the

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[81] Compl. Ex. 1 at ATT00102-03 (JUA, Art. XVI).

[82] Answer ¶ 21. Duke Florida's argument also appears premised on a Section 11.1 renegotiation provision that was "deleted in its entirety" in 1990. *See* Compl. Ex. 1 at ATT00099 (JUA, Art. XI); *id.* at ATT00109 (1990 Amendment ¶ 2).

[83] Answer ¶ 11 (admitting that the JUA may have "renewed" in 1979); *see also* Compl. Ex. 1 at ATT00103 (JUA, Art. XVI) (stating that the JUA's initial term expired in 1979).

[84] *See* Compl. ¶ 11 & n.18 ("Renew" means to "repeat so as to reaffirm" or "begin again") (citations omitted).

[85] *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123); *see also Potomac Edison Order* at 7-8 (¶ 17).

[86] *See* Answer ¶¶ 11, 21, 27 (arguing that the presumption should not apply because the JUA includes an evergreen provision).

presumption applies in "circumstances where an agreement has been terminated and the parties continue to operate under an 'evergreen' clause," meaning a clause that gives "electric utilities … no right to demand removal of attachments upon termination."[87]

AT&T denies the third paragraph of Duke Florida's response to paragraph 11, which contains allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 3, 9, 21, and 38, and AT&T hereby incorporates its response to those allegations. AT&T denies that it "can remove its facilities from any or all of those 62,000 [Duke Florida] poles whenever it chooses" because, "as Congress has found, owing to a variety of factors, including environmental and zoning restrictions, there is 'often no practical alternative except to utilize available space on existing poles.'"[88] AT&T denies that the new telecom presumption does not apply to existing poles because the Commission found instead that the new telecom rate presumption *would* "impact privately-negotiated agreements."[89] AT&T also denies that the new telecom rate presumption "would be tantamount to forced access at regulated rates" contrary to the absence of a right of access for ILECs in the Pole Attachment Act because the Commission rejected this argument also, finding that "[a]lthough incumbent LECs have no right of access to utilities' poles pursuant to section 224(f)(1) of the Act, … where incumbent LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)."[90] AT&T denies that Duke Florida made any offer at the

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[87] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475); *see also* Compl. Ex. 1 at ATT00102-103 (JUA, Art. XVI).

[88] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15) (citing S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977 Senate Report), reprinted in 1978 U.S.C.C.A.N. 109).

[89] *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").

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

parties' executive level meetings, let alone an offer to provide new telecom rates for AT&T's attachments.[91] Duke Florida's subsequent settlement offer [redacted] .[92] The last sentence of Duke Florida's response to paragraph 11 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

12. Duke Florida's response to paragraph 12 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies the first sentence of Duke Florida's response to paragraph 12 because AT&T is entitled to a new telecom "'rate determined in accordance with Commission rule 1.1406(d)(2)' under the law and facts of this case" for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply. AT&T denies the first half of the second sentence of Duke Florida's response to paragraph 12 because AT&T properly calculated the applicable new telecom rates that apply to CLECs and cable companies providing telecommunications services for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and in the supporting Affidavits of Daniel P. Rhinehart. AT&T denies the second half of the second sentence and the third sentence of Duke Florida's response to paragraph 12 because the Commission's rules authorize refunds consistent with the length of the applicable statute of limitations,[93] the "applicable statute of limitations" is the 5-year statute of limitations that applies to actions involving a Florida contract,[94] and the 2-year statute of limitations of 47 U.S.C. § 415 is not the

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[91] *See* Compl. Ex. B at ATT00027-30 (Miller Aff. ¶¶ 11-17); Reply Ex. B at ATT00267, ATT00269 (Miller Reply Aff. ¶¶ 2, 5 n.9); Reply Ex. C at ATT00275-277 (Peters Reply Aff. ¶¶ 3-5).

[92] Answer Ex. 5 at DEF000276.

[93] *See* 47 C.F.R. § 1.1407(a)(3).

[94] *See Potomac Edison Order* at 22 (¶ 46) (holding the "applicable statute of limitations" is the "statute of limitations for contract actions" under State law); *see also* Fla. Stat. § 95.11(2)(b)

"applicable statute of limitations" because it does not apply to the Pole Attachment Act or to this case, which does not seek to recover "lawful" charges or obtain damages from a "carrier"[95] for reasons detailed in Section III.C of AT&T's Complaint and Section II.C of AT&T's Reply Legal Analysis.[96]

With respect to the first two sentences of the second paragraph of Duke Florida's response to paragraph 12, Duke Florida admits AT&T has correctly stated the JUA rates, so no response is required, but AT&T denies that Duke Florida properly calculated the new telecom rates that apply to CLECs and cable companies providing telecommunications services for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and in the supporting Affidavits of Daniel P. Rhinehart. AT&T notes that, even under Duke Florida's erroneous rate calculations, Duke Florida admits it charged AT&T JUA rates about [redacted] times the rates it charged CLECs and cable companies for use of comparable space on Duke Florida's poles:

Comparison of per-pole rates[97]	2015	2016	2017	2018	2019
Properly calculated new telecom rate	$4.56	$4.46	$4.51	$4.78	$4.54
Inflated "CATV rate" Duke Florida charged	$5.14	$5.20	$5.35	$4.99	$4.97
Inflated "CLEC rate" Duke Florida charged	$7.74	$7.81	$5.37	$5.00	$4.99
Rate Duke Florida charged AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

(applying to "legal or equitable action[s] on a contract, obligation, or liability founded on a written instrument …").

[95] *See* 47 U.S.C. § 415.

[96] *See also Potomac Edison Order* at 21 (¶¶ 44-45).

[97] *See* Answer ¶ 12 (listing "CATV" and "CLEC" rates, although by regulation the new telecom rate applies to both CLECs and cable companies providing telecommunications services, *see* 47 C.F.R. § 1.1406(d)(2)); *see also* Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1); Compl. Ex. B at ATT00026 (Miller Aff. ¶ 8); Reply Ex. A at ATT00240, ATT00259 (Rhinehart Reply Aff. ¶ 4 & Ex. R-5).

With respect to the third sentence of the second paragraph of Duke Florida's response to paragraph 12 (following the table), AT&T denies Duke Florida's unsupported allegation that AT&T's facilities occupy "significantly more space" on Duke Florida's poles "than the one foot occupied by CATV and CLEC licensees" for reasons detailed in Section II.A.2 of AT&T's Reply Legal Analysis and Paragraphs 8, 10, 15, 18, 22, 24, 25, 31, and 37 of this Reply[98] and because Duke Florida provided *no* data about the space actually occupied by AT&T *or* by AT&T's competitors to permit this comparison.[99] AT&T admits the JUA allocates 3 feet of space to AT&T, but denies that allocation reflects the "lowest 3 feet of space" on a pole because Duke Florida admits communications facilities may be, and have been, placed below AT&T's.[100] AT&T further denies that the space allocated by the JUA is relevant to rate formulas dependent on "space occupied" (not merely allocated) and states that Duke Florida does not and cannot reserve space additional to the space AT&T actually occupies on its poles, which is presumed to be 1 foot.[101]

AT&T denies that field data shows that AT&T "actually occupies, on average, at least ███ feet of space on DEF's poles" for reasons detailed in Section II.A.2 of AT&T's Reply Legal

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[98] *See also* Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 25); Reply Ex. C at ATT00283-290 (Peters Reply Aff. ¶¶ 16-29).

[99] *In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

[100] *See* Answer Ex. C at DEF000166 (Burlison Decl. ¶ 17); *see also* Compl. Ex. C at ATT00041 (Peters Aff. ¶ 20); Reply Ex. C at ATT00283-290 (Peters Reply Aff. ¶¶ 16-29).

[101] Compl. Ex. C at ATT00044 (Peters Aff. ¶ 25); *see also* Reply Ex. C at ATT00289 (Peters Reply Aff. ¶ 29); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16053 (¶ 1170) (1996) ("Permitting an incumbent LEC, for example, to reserve space for local exchange service … would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.").

Analysis and Paragraphs 8, 10, 15, 18, 22, 24, 25, 31, and 37 of this Reply.[102] Duke Florida provided no field data to substantiate its claim, and admits its unsupported allegation does not involve a measurement taken on *any* pole. Rather, Duke Florida pairs hearsay from an unnamed contractor that AT&T's "highest attachment" averaged [REDACTED] feet above ground on 941 unidentified poles (1.5% of the 62,363 Duke Florida poles to which AT&T is attached) with a presumption that the minimum ground clearance for poles is 18 feet.[103] But minimum ground clearance is highly variable and does *not* necessarily reflect the "lowest point of attachment" given topographical variations,[104] rendering Duke Florida's calculation unreliable as well as hypothetical and insufficient to rebut the Commission's 1-foot space occupied presumption.[105]

AT&T further notes that Duke Florida admits it is *not* asserting that AT&T's physical attachment occupies [REDACTED] feet of space on a pole, but that Duke Florida instead seeks to assign AT&T unoccupied space *below* AT&T's attachment based on the factually incorrect claim that other communications attachers cannot attach below AT&T's facilities.[106] The measurement is therefore irrelevant for rate-setting purposes because "under the Commission's rate formula,

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[102] *See also* Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 25); Reply Ex. C at ATT00283-290 (Peters Reply Aff. ¶¶ 16-29); Reply Ex. E at ATT00318-325 (Dippon Reply Aff. ¶¶ 18-32).

[103] Answer ¶ 12 & n.32 ([REDACTED] – 18 = [REDACTED]); Answer Ex. A at DEF000132 (Freeburn Decl. ¶ 12).

[104] The Commission did not, as DEF alleges, "presume[ ] that the lowest point of attachment is at 18 feet." Instead, as DEF's footnote concedes, the Commission presumed "an average of 18 feet for minimum ground clearance." *See In Re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6468 (¶ 23) (2000).

[105] 47 C.F.R. § 1.1410; *see also Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19866 (¶ 18) (2002); Reply Ex. A at ATT00244 (Rhinehart Reply Aff. ¶ 11); Reply Ex. C at ATT00283-290 (Peters Reply Aff. ¶¶ 16-29); Reply Ex. E at ATT00321-322 (Dippon Reply Aff. ¶ 24).

[106] *See* Answer Ex. A at DEF000130 (Freeburn Decl. ¶ 8). *But see* Answer Ex. C at DEF000166 (Burlison Decl. ¶ 17) (admitting there are communications facilities below AT&T's facilities); Compl. Ex. C at ATT00041 (Peters Aff. ¶ 20); Reply Ex. C at ATT00284-285 (Peters Reply Aff. ¶¶ 18-19).

'space occupied' means space that is 'actually occupied'" on a pole[107] and AT&T by definition does not occupy unoccupied space below its facilities.[108] AT&T denies the last sentence of the second paragraph of Duke Florida's response to paragraph 12 because AT&T does not use the space it is allocated under the JUA, let alone additional space.[109] AT&T notes that, in contrast, Duke Florida's pleadings confirm that Duke Florida *does* use space in excess of the space it is allocated under the JUA, without additional charge.[110]

AT&T denies the first sentence of the third paragraph of Duke Florida's response to paragraph 12 and footnote 34 because, as the Enforcement Bureau recently reaffirmed, AT&T is not the cost-causer of the safety space on Duke Florida's poles because the safety "space is usable and used by the electric utilities."[111] AT&T denies the second sentence of the third paragraph because AT&T is not "actually or constructively occupying between ▮ and ▮ feet of space on joint use poles owned by DEF," because these allegations are dependent on Duke Florida's unsupported attempt to assign AT&T space that AT&T does not "actually occupy" on Duke Florida's poles for reasons detailed in Section II.A.2 of AT&T's Reply Legal Analysis and Paragraphs 8, 10, 12, 15, 18, 22, 24, 25, 31, and 37 of this Reply.[112] AT&T denies the third

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[107] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16).

[108] *Potomac Edison Order* at 18 (¶ 37) (rejecting assumption that an ILEC occupies space below its attachments).

[109] *See, e.g.*, Reply Ex. C at ATT00283-290 (Peters Reply Aff. ¶¶ 16-29).

[110] *See* Compl. Ex. 1 at ATT00090 (JUA, § 1.1.6) (allocating DEF 4 feet on 35-foot poles and 8.5 feet on 40-foot poles, not including 3.33 feet of safety space); Answer Ex. C at DEF000165 (Burlison Decl. ¶ 14) (stating that Duke Florida's "typical vertical three-phase construction" requires 15.1 feet of space, not including 3.33 feet of safety space).

[111] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); *see also* Reply Ex. C at ATT00280-281 (Peters Aff. ¶ 11).

[112] *See also* Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 25); Reply Ex. C at ATT00283-290 (Peters Reply Aff. ¶¶ 16-29); Reply Ex. E at ATT00318-325 (Dippon Reply Aff. ¶¶ 18-32).

sentence of the third paragraph of Duke Florida's response to paragraph 12 and footnote 35, which contain allegations that are substantially similar or identical to allegations in Duke Florida's responses to paragraphs 8, and AT&T hereby incorporates its response to those allegations. AT&T denies that new telecom rates can lawfully be "multiplied" by the amount of space occupied even if there were valid survey data (which there is not) because the new telecom formula includes a "space occupied" input that must instead be used to derive a "per pole" rate, not a "per foot" rate.[113] AT&T denies that the JUA rate "is roughly equivalent to what a CATV or CLEC would have paid for the same burden on the pole" or is not "excessively and unreasonably high" because the JUA rates are about [redacted] times the rates Duke Florida claims to have charged CLECs and cable companies for comparable space as follows:

Comparison of per-pole rates[114]	2015	2016	2017	2018	2019
Inflated "CATV rate" Duke Florida charged	$5.14	$5.20	$5.35	$4.99	$4.97
Inflated "CLEC rate" Duke Florida charged	$7.74	$7.81	$5.37	$5.00	$4.99
Rate Duke Florida charged AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

AT&T denies the next-to-last sentence of Duke Florida's response to paragraph 12, which contains a conclusory allegation that is substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22, 24, 25, 28, 29, 30, 31, 37, and AT&T hereby incorporates its response to those allegations. The last sentence of Duke

[113] Reply Ex. A at ATT00246-247 (Rhinehart Reply Aff. ¶¶ 13-16); Reply Ex. E at ATT00320 (Dippon Reply Aff. ¶ 21); 47 C.F.R. § 1.1410; *Teleport Commc'ns Atlanta, Inc.*, 17 FCC Rcd at 19869 (¶ 25).

[114] *See* Answer ¶ 12 (listing "CATV" and "CLEC" rates, although by regulation the new telecom rate applies to both CLECs and cable companies providing telecommunications services, *see* 47 C.F.R. § 1.1406(d)(2)); *see also* Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1); Compl. Ex. B at ATT00026 (Miller Aff. ¶ 8); Reply Ex. A at ATT00240, ATT00259 (Rhinehart Reply Aff. ¶ 4 & Ex. R-5).

Florida's response to paragraph 12 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

2. AT&T Is Entitled To The New Telecom Rate Because Duke Florida Cannot Rebut The Presumption.

13. In the first paragraph of its response to paragraph 13, Duke Florida admits the new telecom rate presumption is rebuttable and admits the Commission's regulation requires an electric utility to provide clear and convincing evidence that it provides an ILEC net material competitive benefits under the JUA to rebut the presumption, so no response is required. AT&T denies the second sentence of Duke Florida's response to paragraph 13 because Duke Florida has not rebutted, and cannot rebut, the new telecom rate presumption with "the clear language of the JUA" since the relevant standard requires a comparison of the JUA with the terms and conditions of Duke Florida's license agreements with AT&T's competitors.[115] AT&T denies the third and fifth sentences of Duke Florida's response to paragraph 13 because Duke Florida's witnesses have not provided actual verifiable data from the field, testimony, or an economic evaluation that rebuts the presumption or even a complete set of license agreements, for reasons detailed in Section II.A.3 of AT&T's Reply Legal Analysis. AT&T denies the fourth sentence and footnote 38 to the extent they seek to limit the applicability of the new telecom rate presumption to only a portion of this case because the presumptions adopted in the 2018 *Third Report and Order* apply to the entirety of a pole attachment complaint proceeding (and not just to the post-March 11, 2019 time period) if the proceeding involves a "pole attachment contract [that was] entered into or renewed after" March 11, 2019,[116] including agreements that, like the JUA, "automatically

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

[116] 47 C.F.R. § 1.1413(b).

renewed [or] extended."[117] AT&T further denies footnote 38 because ILECs do not have the sole burden under the standard adopted in the 2011 *Pole Attachment Order*; rather, the burden shifts to the electric utility to justify its rates once an ILEC makes a *prima facie* case of their unreasonableness as AT&T did here, for reasons detailed in Section III.B of AT&T's Complaint, Section II.B of AT&T's Reply Legal Analysis, and this Reply.[118] AT&T denies the last sentence of Duke Florida's response to paragraph 13 because the Commission has not yet found *net material* competitive benefits in any complaint proceeding, and Duke Florida instead quotes only the finding of "benefits" (not net material benefits) in 2 interim decisions and omits a third decision where the Enforcement Bureau rejected the electric utility's allegations.[119] AT&T denies the rest of Duke Florida's response to paragraph 13, which contains conclusory allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22, 24, 25, 28, 29, 30, 31, 37, and AT&T hereby incorporates its response to those allegations.

14. The first sentence of Duke Florida's response to paragraph 14 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. The rest of the first paragraph of Duke Florida's response to paragraph 14 contain legal conclusions to which no response is required. To the extent a response is required, AT&T states that the 2011 *Pole Attachment Order* speaks for itself and denies that the Commission acknowledged "the many benefits to ILECs

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[117] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475); *see also* Reply Legal Analysis § II.A.1.

[118] *See also Dominion Order*, 32 FCC Rcd at 3759-61 (¶¶ 20-22) (requiring electric utility to justify its rates under the standard adopted in 2011); *Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co.*, 11 FCC Rcd 11202, 11207 (¶ 11) (1996) ("A *prima facie* case is established by "a statement of the specific unreasonable pole attachment rate, term or condition and all arguments used to support its claim of unreasonableness.").

[119] *See Dominion Order*, 32 FCC Rcd at 3757-61 (¶¶ 15-22).

under joint use agreements" or found that "giving ILECs the same one-foot rate paid by CATVs and CLECs would give ILECs an unfair advantage"—allegations that are the exact opposite of the presumptions adopted in 2018[120] and the Commission's decision in 2011 that an ILEC must be charged "*the same rate* as the comparable provider" if an electric utility does not provide the ILEC a net material competitive advantage under a JUA as compared to its license agreements.[121] AT&T further states that the Commission in 2011 and 2018 simply noted that electric utilities alleged that competitive benefits exist and reserved decision by providing electric utilities an opportunity to prove their allegations on a case-by-case basis in negotiations or pole attachment complaint proceedings.[122]

AT&T denies the second paragraph of Duke Florida's response to paragraph 14 because it conflicts with precedent establishing that, where an ILEC incurs costs "by performing the work itself," an electric utility "may not justify charging higher rates" based on costs it does not incur.[123] AT&T denies that the Commission's precedent is "generically incorrect" even if cable companies and CLECs perform some of their own work themselves (a speculative and unsupported allegation)[124] because an electric utility still has no cost-based reason to charge an ILEC for work the electric utility does not perform for the ILEC.[125] AT&T also denies that the

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[120] 47 C.F.R. § 1.1413(b).

[121] *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217).

[122] *See, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7770 ("To the extent [I]LECs receive net benefits distinct from those given to other telecommunications attachers, a utility may rebut the presumption."); *Pole Attachment Order*, 26 FCC Rcd at 5334 (¶ 214) ("We therefore … find[ ] it more appropriate to proceed on a case-by-case basis").

[123] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18 & n.67).

[124] *In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

[125] *See id.* at 3759 (¶ 18 n.67) (requiring electric utility to prove it incurred "costs that Verizon has not covered").

Commission's precedent is "specifically incorrect" in this case where AT&T completes its own make-ready, engineering, and survey work, or pays Duke Florida at cost for the work it asks Duke Florida to perform.[126] Duke Florida instead tries to create the illusion of value where none exists by (1) asking the Commission to ignore "internal costs incurred by AT&T" and focus *only* on "the costs that AT&T is required (or not required) to pay" to Duke Florida and (2) claiming that it may double-check AT&T's inspections.[127] But Duke Florida is not contractually obligated and does not need to perform any inspection work for AT&T under the JUA, so AT&T cannot be materially advantaged *by the JUA* if Duke Florida unilaterally decides to perform such work.[128] AT&T denies the last two sentences of the second paragraph of Duke Florida's response to paragraph 14 because Duke Florida provided no evidence that any attacher paid the fees Mr. Metcalfe relies upon, inflated its alleged valuation, and failed to provide any offset for the far higher rental rates AT&T has paid for decades to deploy its facilities on Duke Florida's poles.[129] AT&T also denies the second paragraph of Duke Florida's response to paragraph 14 for reasons detailed in Section II.A.3 of AT&T's Reply Legal Analysis.

In the last paragraph of Duke Florida's response to paragraph 14, Duke Florida admits the JUA imposes "certain burdens" on AT&T "that differ from those in a CATV or CLEC license agreement," so no response is required. AT&T otherwise denies the last paragraph of Duke Florida's response to paragraph 14 because some reciprocal JUA terms have an equal

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[126] Compl. Ex. C at ATT00039-40 (Peters Aff. ¶¶ 16-17); Reply Ex. C at ATT00291-292 (Peters Reply Aff. ¶ 33).

[127] *See* Answer ¶¶ 14, 17.

[128] *See* Compl. Ex. 1 at ATT00092 (JUA §§ 3.2, 3.3). It is not clear what uncompensated work Duke Florida claims to perform for AT&T, particularly when it admits that it does not perform "pre-construction and post-construction inspections" out of "deference" to ILECs. Answer ¶ 14.

[129] *See* Reply Ex. C at ATT00291-292 (Peters Reply Aff. ¶ 33); Reply Ex. E at ATT00340-342 (Dippon Reply Aff. ¶¶ 61-65).

effect on Duke Florida and AT&T irrespective of pole ownership numbers (such as a provision that applies to each facility a company has on a joint use pole) and others disproportionally *burden* AT&T given the parties' relative pole ownership numbers (such as a provision permitting termination of future joint use).[130] AT&T denies the rest of the last paragraph of Duke Florida's response to paragraph 14, which contains general and conclusory allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 10 and 25, and AT&T hereby incorporates its response to those allegations.

15. AT&T denies Duke Florida's response to paragraph 15, which contains conclusory allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 9, 10, 12, 15, 16, 18, 21, 22, 24, 25, 28, 30, 31 and 37, and AT&T hereby incorporates its response to those allegations. AT&T also denies Duke Florida's allegation that it "specifically identified (by substance, if not by section) the relevant provisions of the joint use agreement and how similar subjects were addressed in DEF's CATV and CLEC license agreements,"[131] and notes that Duke Florida has still not produced over ■ of its license agreements that are necessary to allow such a comparison.[132]

16. AT&T denies Duke Florida's response to paragraph 16, which contains allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 10, 15, 16, 22, and 25, and AT&T hereby incorporates its response to those allegations. AT&T also denies Duke Florida's unsupported allegations that it "does not build capacity in its network for CATV and CLEC licensees" and that "CATVs and CLECs are often

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[130] *See* Reply Ex. C at ATT00276 (Peters Reply Aff. ¶ 4); Reply Ex. E at ATT00347 (Dippon Reply Aff. ¶¶ 74-75).

[131] *See* Compl. Ex. C at ATT0035 (Peters Aff. ¶ 8).

[132] Answer ¶ 30 n.123 (describing 1 recent license agreement as an "exemplar"); *see also* Duke Florida Response to Interrogatories at DEF000007-8 (Ex. 2).

required to pay for pole replacements" because Duke Florida describes a "typical" pole without AT&T attached as a 45-foot pole when a 37.5 foot pole will presumptively hold Duke Florida and 4 communications attachers[133] and Duke Florida's parent company recently informed the Commission that just 0.024% of electric utility poles require replacement each year to increase capacity.[134]

17. The first sentence of Duke Florida's response to paragraph 17 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T lacks sufficient information to admit or deny why Duke Florida requires "permits for new loads on its pole lines." AT&T denies the rest of the first paragraph of Duke Florida's response to paragraph 17 and the second paragraph, which contain allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 14, and 15, and AT&T hereby incorporates its response to those allegations. AT&T denies Duke Florida's unsupported allegation that "DEF performs the inspections and engineering the same as it would for a CATV or CLEC applying for a new attachment" because Duke Florida is not required by the JUA to perform inspections or engineering for AT&T's facilities and has not proven that it does or explain why it would duplicate effort.[135] AT&T also denies Duke Florida's unsupported allegation that the "differences are that: (1) AT&T does not pay for the inspections or engineering work; and (2) the new attachment does not alter the per pole rate paid by AT&T" because (1) AT&T incurs comparable costs for the inspection and engineering work it performs

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[133] *See* Answer Ex. C at DEF000165 (Burlison Decl. ¶ 14); 47 C.F.R. §§ 1.1409(c), 1.1410.

[134] Initial Comments of Duke Energy Corp., et. al in Opposition to NCTA's Petition For Expedited Declaratory Ruling at 16-17, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (Sept. 2, 2020).

[135] *See* Reply Ex. C at ATT00291 (Peters Reply Aff. ¶ 32); Reply Ex. E at ATT00340-342 (Dippon Reply Aff. ¶¶ 61-65); Compl. Ex. 1 at ATT00092 (JUA §§ 3.2, 3.3).

for itself, and (2) a new attachment cannot alter the per pole rate paid by AT&T *or* AT&T's competitors absent statistically valid survey data proving the attacher requires more than 1 foot of space across Duke Florida's poles.[136]

AT&T denies the last paragraph of Duke Florida's response to paragraph 17 because AT&T explained the type of work that AT&T completes for itself, but Duke Florida may complete at cost for AT&T's competitors.[137] AT&T admits that, if electric supply space make-ready or pole replacements within energized lines are required to accommodate AT&T's modification or expansion of facilities, Duke Florida performs this work and AT&T pays for the work Duke Florida performs. AT&T denies that the "costs that matter are the costs that AT&T is required (or not required) to pay to Duke Florida as compared to what Duke Florida's CATV and CLEC licensees are required to pay," because the Enforcement Bureau found otherwise, stating that "[w]here [an ILEC] performs a particular service itself and incurs costs comparable to its competitors in performing that service, we agree … that [an electric utility] may not embed in [the ILEC]'s rental rate costs that [the electric utility] does not incur."[138]

18. AT&T denies the first sentence of Duke Florida's response to paragraph 18 because it misrepresents the allegations of paragraph 18, which states that AT&T has *not* defended its location at the bottom of the communications space on a pole.[139] The rest of Duke Florida's response to paragraph 18 misrepresents AT&T's comments and asks the Commission

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[136] Compl. Ex. C at ATT00039-40 (Peters Aff. ¶¶ 16-17); Reply Ex. A at ATT00244-245 (Rhinehart Reply Aff. ¶ 11); Reply Ex. C at ATT00283-290 (Peters Reply Aff. ¶¶ 16-29); Reply Ex. E at ATT00318-325, ATT00340-342 (Dippon Reply Aff. ¶¶ 18-32, 61-65); 47 C.F.R. § 1.1410; *Teleport Commc'ns Atlanta, Inc.*, 17 FCC Rcd at 19869 (¶ 25).

[137] Compl. ¶ 17; *see also* Compl. Ex. C at ATT00039 (Peters Aff. ¶ 17).

[138] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

[139] *See also* Compl. Ex. C at ATT00041 (Peters Aff. ¶ 20); Reply Ex. C at ATT00290-291 (Peters Reply Aff. ¶¶ 30-31).

to ignore AT&T's effort to encourage the placement of communications facilities below its attachments if the communications facilities are wireless facilities and is therefore denied. AT&T further denies that this distinction between wireline and wireless facilities is relevant, particularly when wireless facilities "are entitled to the benefits and protection of section 224"[140] and squarely within the Commission's effort to "eliminate[ ] barriers to broadband deployment by streamlining the process for attaching new communications facilities to utility poles and reducing associated costs."[141] AT&T denies the last sentence of Duke Florida's response to paragraph 18, which contains allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 10, 12, 15, 22, 24, 25, 31, and 37, and AT&T hereby incorporates its response to those allegations.

19. AT&T denies the first sentence of paragraph 19 because AT&T has not "explain[ed] away the benefits of occupying the lowest position on DEF's poles," but has shown that its location on Duke Florida's poles is a competitive disadvantage.[142] AT&T denies that this is a "specious claim" because AT&T proved that its location on the pole is a competitive disadvantage with testimony and damage claims,[143] causing Duke Florida to admit "there may, indeed, be certain costs and risks attendant to the lowest position on the pole."[144] AT&T denies that its typical location on the pole is the result of the JUA or was something AT&T could seek to change because AT&T's location is the result of the origin of joint use, and must generally

[140] *Pole Attachment Order*, 26 FCC Rcd at 5306 (¶ 153).

[141] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, 35 FCC Rcd 7936, 7936 (¶ 1) (2020).

[142] Compl. Ex. C at ATT00041-43 (Peters Aff. ¶ 21-23); Compl. Ex. D at ATT00070-71 (Dippon Aff. ¶ 46); Compl. Ex. 17 at ATT00206-209 (Damage Reports); Reply Ex. C at ATT00290-291 (Peters Reply Aff. ¶¶ 30-31).

[143] *Id.*

[144] Answer ¶ 19.

continue so that various communications facilities do not crisscross midspan.[145] AT&T denies Duke Florida's unsupported and speculative claim that "it is safe to assume that those costs and risks are outweighed by" unsubstantiated "ease of access" and "ability to sag cable" benefits, which are rebutted by AT&T's testimony.[146] AT&T admits that Duke Florida has not attempted to quantify its alleged "benefit." AT&T denies the rest of Duke Florida's response to paragraph 19, which contains conclusory allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22, 24, 25, 28, 29, 30, 31, 37, and AT&T hereby incorporates its response to those allegations.

20. AT&T denies the first half of the first sentence of Duke Florida's response to paragraph 20 because it misrepresents the allegations of paragraph 20, which states that AT&T is competitively *disadvantaged* because it must incur the cost to replace poles following an emergency.[147] Duke Florida admits that "when DEF replaces an AT&T pole following an emergency … AT&T pays for these pole replacements," so no response is required. Duke Florida also admits AT&T's competitors do not incur similar costs because they "are not required to own any poles at all," so no response is required. AT&T denies that there is a "financial benefit" to AT&T, let alone a competitive benefit to AT&T, if Duke Florida replaces AT&T's poles following an emergency because AT&T covers Duke Florida's costs for the pole replacement and also bears its own cost to have "crews, equipment, inventory, dispatchers, engineers and all of the other things necessary to replacing a pole in the middle of the night at a

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[145] Compl. Ex. C at ATT00041-42 (Peters Aff. ¶ 21).

[146] Compl. Ex. C at ATT00041-43 (Peters Aff. ¶¶ 21-23); Reply Ex. C at ATT00290-291 (Peters Reply Aff. ¶¶ 30-31); *see also In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

[147] *See also* Compl. See Ex. C at ATT00040-41 (Peters Aff. ¶¶ 18-19); Compl. Ex. D at ATT00068 (Dippon Aff. ¶ 41).

moment's notice"—costs AT&T's competitors need not incur because they do not own poles.[148] AT&T denies that the JUA does not require AT&T to own poles simply because the JUA does not require AT&T to own █% of the poles shared by the parties.[149] As Duke Florida previously explained, joint use agreements require "ILECs and electric utilities [to] share the benefits (and burdens) of pole ownership…"[150] AT&T denies the rest of Duke Florida's response to paragraph 20, which contains general and conclusory allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22, 24, 25, 28, 29, 30, 31, 37, and AT&T hereby incorporates its response to those allegations.

21. The first sentence of Duke Florida's response to paragraph 21 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. The rest of the first paragraph of Duke Florida's response to paragraph 21 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies the rest of the first paragraph of Duke Florida's response to paragraph 21, which contains general and conclusory allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 3, 9, 11, 21, 27, and 38, and AT&T hereby incorporates its response to those allegations.

AT&T admits upon information and belief from the positions Duke Florida took during the parties' negotiations that Duke Florida will not voluntarily agree to charge AT&T a new or old telecom rate despite the Commission's regulations and orders and the fact that the new

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[148] *See* Reply Ex. C at ATT00293 (Peters Reply Aff. ¶ 35).

[149] *See, e.g.*, Compl. Ex. 1 at ATT00096 (JUA, Art. V) (requiring each party to share "its poles").

[150] Reply Comments of Progress Energy Florida n/k/a Duke Energy Florida, et al. at 28-29, *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245 (Oct. 4, 2010).

telecom rate is "fully compensatory," which necessitated the filing of AT&T's complaint.[151] AT&T lacks sufficient information to admit or deny Duke Florida's speculative claim that it "would never have agreed to give AT&T the right to remain attached to DEF's poles even in the event of a termination" when the JUA was entered more than 50 years ago but states that this claim, even if true, is not relevant given the change in applicable law. AT&T denies the rest of the second paragraph of Duke Florida's response to paragraph 21, which contains general and conclusory allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 3, 9, 11, 21, 27, and 38, and AT&T hereby incorporates its response to those allegations.

The third paragraph of Duke Florida's response to paragraph 21 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies that the Commission identified "distinct categories" of existing agreements for purposes of the new telecom rate presumption. Rather, the Commission applied the presumption to all "existing contracts, upon renewal of those agreements" (with "renewal includ[ing] agreements that are automatically renewed, extended, or placed in evergreen status") and stated that "[u]ntil that time, ... the 2011 *Pole Attachment Order*'s guidance regarding review of incumbent LEC pole attachment complaints will continue to apply."[152] AT&T also denies Duke Florida's claim that the Commission in 2018 created some "temporal categor[y]" of existing agreements "by implication" that escape the review extended to them in 2011 because the Commission did not and cannot "depart from a prior policy *sub silentio*."[153] With respect to the last sentence of Duke

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[151] *See Pole Attachment Order*, 26 FCC Rcd. at 5321 (¶ 183 n.569) (citations omitted); *see also* Reply Ex. B at ATT00267-271 (Miller Reply Aff. ¶¶ 2-7); Reply Ex. C at ATT00275-277 (Peters Reply Aff. ¶¶ 3-5).

[152] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 nn.474, 478).

[153] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Florida's response to paragraph 21, AT&T admits the preexisting telecom rate is the product of a rate formula that changes from year-to-year based on the pole owner's rate of return and publicly reported pole costs, but denies that Duke Florida has accurately described the preexisting telecom rates or rate formula in its response to paragraph 22 for reasons detailed in Section II.C of AT&T's Reply Legal Analysis, Paragraph 22 of this Reply, and the Reply Affidavit of Daniel P. Rhinehart.

22. The first sentence of Duke Florida's response to paragraph 22 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies that the "pre-existing telecom rate formula validates, rather than undermines, the justness and reasonableness" of the JUA rates because the JUA rates are more than █ times properly calculated pre-existing telecom rates, as the following table shows:

Comparison of per-pole rates[154]	2015	2016	2017	2018	2019
Properly calculated pre-existing telecom rate	$6.91	$6.76	$6.83	$7.25	$6.89
Rate Duke Florida charged AT&T	█	█	█	█	█

AT&T denies that Duke Florida has properly calculated the preexisting rates which, by regulation, should be 1.51 times the approximately $5 new telecom rate.[155] AT&T denies that Duke Florida has rebutted the presumptive inputs for space occupied (1 foot) and average number of attaching entities (5) because Duke Florida has not provided any data, let alone actual verifiable data about the joint use poles, sufficient to rebut the Commission's presumptions, for

[154] *See* Compl. Ex. A at ATT00009, ATT00013-14 (Rhinehart Aff. ¶ 17 & Ex. R-1); Compl. Ex. B at ATT00026 (Miller Aff. ¶ 8); Reply Ex. A at ATT00241, ATT00259 (Rhinehart Reply Aff. ¶ 5 & Ex. R-5).

[155] *See* Reply Ex. A at ATT00241 (Rhinehart Reply Aff. ¶ 5).

reasons detailed in Section II.C of AT&T's Reply Legal Analysis and Paragraphs 8, 10, 12, 15, 18, 24, 25, 31, 37 of this Reply.[156]

AT&T denies the first four sentences of the second paragraph of Duke Florida's response to paragraph 22, which contain conclusory allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 10, 12, 15, 18, 24, 25, 31, 37, and AT&T hereby incorporates its response to those allegations. AT&T notes that, even under Duke Florida's erroneous rate calculations, Duke Florida still admits it charged AT&T JUA rates about ■ per pole higher than its significantly inflated version of the preexisting telecom rate.

The last three sentences of the second paragraph of Duke Florida's response to paragraph 22 are denied because they do not respond to the allegations of paragraph 22, but to the extent a response is required, AT&T denies because Duke Florida will not have "paid AT&T a per pole rate that exceeds, on average, ■% of AT&T's actual annual pole cost" for the 2015 to 2019 rental years if AT&T's complaint is granted because AT&T calculated the proportional new telecom rates that will apply to Duke Florida's use of AT&T's poles for the 2015 to 2019 rental years if AT&T is granted the new telecom rates it seeks.[157] As a result, if AT&T's complaint is granted, Duke Florida will pay a proportional new telecom rate for 10.5 feet of the 13.5 feet of usable space on AT&T's poles,[158] which will cover ■ of AT&T's annual pole costs:[159]

[156] *See also* 47 C.F.R. §§ 1.1409(c), 1.1410; *see also Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19866 (¶ 18) (2002); Reply Ex. A at ATT00243-247 (Rhinehart Reply Aff. ¶¶ 10-16); Reply Ex. E at ATT00318-325 (Dippon Reply Aff. ¶¶ 18-32).

[157] *See* Compl. Ex. A at ATT00007-8, ATT00017-21 (Rhinehart Aff. ¶¶ 13-15 & Exs. R-3, R-4).

[158] *See* 47 C.F.R. § 1.1410; Compl. Ex. C at ATT00037 (Peters Aff. ¶ 12 n.5).

[159] *See* Compl. Ex. A at ATT00007-8, ATT00017-21 (Rhinehart Aff. ¶¶ 13-15 & Exs. R-3, R-4).

	2015	2016	2017	2018	2019
Proportional new telecom rate for Duke Florida's use of AT&T's poles if AT&T's complaint is granted (per pole)	$12.58	$11.66	$9.44	$12.60	$10.31
AT&T's annual pole cost for purposes of the new telecom rate formula	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
New telecom rate for 10.5 feet of space as percentage of AT&T's annual pole cost	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

B. Even Apart From The 2018 Third Report and Order, AT&T Was Entitled To Just And Reasonable Rates Back To 2011.

23. AT&T denies Duke Florida's response to paragraph 23 because it does not respond to the allegations of paragraph 23, but to the extent a response is required, AT&T admits that it had the right to just and reasonable rates as of July 12, 2011 and denies the rest of Duke Florida's response to paragraph 23 because the JUA rates are unjust and unreasonable for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply. AT&T denies that "AT&T itself viewed the joint use agreement [rates] as just and reasonable until very recently" because AT&T did not, but instead gave Duke Florida an opportunity to voluntarily comply with the Commission's orders and regulations and provided the Enforcement Bureau an opportunity to first resolve other ILEC rate disputes.[160] AT&T denies that AT&T "expressly affirmed the correctness of both the rate methodology and the rate itself each year through 2018" or "indicat[ed] its agreement with the calculations" because AT&T did *not* affirm that the invoiced rates, rate methodology, or calculations complied with federal law.[161] Instead, AT&T

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[160] *See, e.g.*, Reply Ex. B at ATT00271 (Miller Reply Aff. ¶ 8); *see also Dominion Order*, 32 FCC Rcd at 3763 (¶ 28) ("[T]he Commission declined to impose time limits on the filing of pole attachment complaints").

[161] Compl. Ex. 1 at ATT00098, ATT00109 (JUA, §§ 10.2, 11.1); Answer Ex. A at DEF000145-48 (Freeburn Decl., Ex. A-2) (stating "that we now have attachments on the total number of poles as shown below, at the rentals and under the terms and conditions of the AGREEMENT FOR JOINT USE OF POLES").

complied with the JUA's requirement that it "cooperat[e]" with Duke Florida in determining "the total number of poles in use by each party as Licensee" and "review and accept[]" Duke Florida's rate calculation as consistent with the JUA's rate formula,[162] which is unjust and unreasonable for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply. AT&T also denies Duke Florida's response to paragraph 23, which contains allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 9, 23, 26, 28, 29, 32, 33, and 40-42, and AT&T hereby incorporates its response to those allegations. The last sentence of Duke Florida's response to paragraph 23 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

24. The first sentence of Duke Florida's response to paragraph 24 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of Duke Florida's response to paragraph 24, which contains allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 12 and 22, and AT&T hereby incorporates its response to those allegations.

25. AT&T denies the conclusory first sentence of Duke Florida's response to paragraph 25 because the JUA disproportionately divides the cost of attaching to Duke Florida's poles between AT&T and Duke Florida by requiring AT&T to pay █% of Duke Florida's pole cost for use of 1 foot of space, leaving Duke Florida with █% of its pole cost for use of at least 10.5 feet of space—not accounting for the additional rent Duke Florida collects from third parties, which reduces Duke Florida's cost responsibility to about █% of its pole costs for use of

[162] Compl. Ex. 1 at ATT00098, ATT00109 (JUA, §§ 10.2, 11.1); Answer Ex. A at DEF000145-48 (Freeburn Decl., Ex. A-2) (stating "that we now have attachments on the total number of poles as shown below, at the rentals and under the terms and conditions of the AGREEMENT FOR JOINT USE OF POLES").

3 times the space occupied by all communications attachers on its poles combined.[163] AT&T denies the second through fourth sentences of Duke Florida's response to paragraph 25 because they ignore the proportional rates AT&T has calculated for Duke Florida's use of space on AT&T's poles, which are based on AT&T's pole costs and will ensure the parties each pay "roughly the same proportionate rate given the parties' relative usage of the pole."[164] AT&T denies the remainder of the first paragraph of Duke Florida's response to paragraph 25, which contains unsupported and conclusory allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 10, 14, 20, 26, and 27, and AT&T hereby incorporates its response to those allegations.

AT&T denies the second paragraph of Duke Florida's response to paragraph 25, which contains unsupported and conclusory allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 10, 12, 15, 18, 22, 24, 31, and 37, and AT&T hereby incorporates its response to those allegations. AT&T also denies that Duke Florida's "space 'occupancy' levels were carefully balanced between the parties" "in the rate-related amendments in 1980 and 1990" because the amendments do not reference space occupancy and, in any case, are not balanced with respect to the space actually required and used by each party.[165] And AT&T denies that "on DEF-owned poles, the parties occupy roughly the same amount of space," which is an absurd allegation given the Commission's space occupied presumptions[166] and Duke Florida's admission that its "typical vertical three-phase construction"

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[163] *See, e.g.*, Compl. Ex. D at ATT00064-65 (Dippon Aff. ¶¶ 34-36).

[164] *See Dominion Order*, 32 FCC Rcd at 3760 (¶ 21 n.78) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662)).

[165] *See* Compl. Ex. 1 at ATT000106-110 (JUA, 1980 and 1990 Amendments).

[166] *See, e.g.*, Compl. Ex. D at ATT00064-65 (Dippon Aff. ¶¶ 34-36).

requires 15.1 feet of space for its facilities, not including the 3.33 feet of safety space required by its facilities.[167]

The first sentence of the third paragraph of Duke Florida's response to paragraph 25 and footnote 86 contain legal conclusions to which no response is required. To the extent a response is required, AT&T denies that Duke Florida may lawfully reserve space for AT&T in addition to the space AT&T occupies on Duke Florida's poles.[168] Duke Florida's ongoing refusal to comply with this longstanding Commission precedent is not supported by the language it cites, which "permit[s] an electric utility to reserve space" under specified circumstances related to "the provision of its core utility service."[169] AT&T further denies Duke Florida's claim in footnote 86 that may lawfully charge AT&T for space AT&T does not in fact occupy as part of Duke Florida's "core utility service." The Commission instead set the new telecom rate as the just and reasonable rate because it "is compensatory and is designed so that utilities will not be cross-subsidizing attachers" and vice versa.[170] AT&T denies the unsupported hypothetical in footnote 86 about what Duke Florida thinks is "likely" to happen in a scenario that it does not show has, in fact, happened, and the allegation that AT&T "actually occupies most or all of its reserved space" for reasons detailed in Section Sections II.A.2 and II.A.3 of AT&T's Reply Legal Analysis and Paragraphs 8, 10, 12, 15, 18, 22, 24, 31, and 37 of this Reply.

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[167] *See* Answer Ex. C at DEF000165, DEF000168 (Burlison Decl. ¶ 14 & Ex. C-1).

[168] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16053 (¶ 1170) (1996) ("Permitting an [I]LEC, for example, to reserve space for local exchange service … would favor the future needs of the [I]LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.").

[169] *See id.* at 16078 (¶ 1169).

[170] *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 182).

AT&T denies the second sentence of the third paragraph of Duke Florida's response to paragraph 25 because it is unsupported and contradicted by the evidence[171] and because the JUA and Commission precedent speak for themselves. AT&T admits the third sentence because it "does not want, use or require 3 feet of space for its current or future attachments" on Duke Florida's poles and denies the fourth and sixth sentences, which contain allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 10, 12, 15, 18, 22, 24, 31, and 37, and AT&T hereby incorporates its response to those allegations. With respect to the fifth sentence of the third paragraph of Duke Florida's response to paragraph 25, AT&T denies it has not proven it "does not want, use or require 3 feet of space for its current or future attachments" on Duke Florida's poles,[172] admits that neither party had data proving the space AT&T's physical facilities occupy, on average, across Duke Florida's 62,000+ poles, and states that the Commission adopted the presumption that communications attachers occupy 1 foot of space on a pole to *avoid* the need for costly pole surveys every time rates are set.[173]

AT&T denies the fourth through seventh paragraphs of Duke Florida's response to paragraph 25 (subheading 2) because the Commission's longstanding precedent establishes that the safety space "is usable and used *by the electric utility*" and that the "communication [safety] space should *not* be attributed to AT&T because … AT&T's attachments do not actually occupy the communications safety space."[174] This is not the appropriate place to reconsider that settled

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[171] *See* Compl. Ex. C at ATT00041 (Peters Aff. ¶ 20).

[172] *See, e.g.*, Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 25); Reply Ex. C at ATT00289 (Peters Reply Aff. ¶ 29).

[173] *See, e.g.*, Reply Ex. C at ATT00286 (Peters Reply Aff. ¶ 23).

[174] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) (emphases added); *see also In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("*Consolidated Partial Order*") (holding "the 40-inch safety space … is usable and used by the electric utility"); *Television Cable Serv., Inc. v. Monongahela Power Co.*, 88 FCC.2d 63, 68 (¶¶ 10-11) (1981)

decision.[175] AT&T denies the safety space "serves no purpose in the provision of electric service" because "[i]t is the presence of the potentially hazardous electric lines that makes the safety space necessary"[176] and Duke Florida admits it has placed streetlights within the safety space.[177] AT&T also denies the fourth through seventh paragraphs of Duke Florida's response to paragraph 25 for reasons detailed in Section II.A.2 of AT&T's Reply Legal Analysis and paragraphs 12, 16, and 22 of this Reply.

26. AT&T denies the first two paragraphs of Duke Florida's response to paragraph 26 because the Commission has held that a two-to-one pole ownership advantage is indicative of "market power" and "bargaining leverage"[178] and Duke Florida has an over a nine-to-one pole ownership advantage over AT&T that it has exercised to preserve its unjust and unreasonable rates.[179] AT&T also denies the first two paragraphs for reasons detailed in Section III.B of AT&T's Complaint and Section II.B of AT&T's Reply Legal Analysis.

AT&T denies the third paragraph of Duke Florida's response to paragraph 26 because Duke Florida's allegations about an outdated 1972 document are not supported by the document itself and say nothing about whether the pole attachment rates that Duke Florida charges AT&T

(rejecting argument that "the 40-inch safety space" should be added "to the 12 inches regularly allotted to [a cable attacher] to compute the space occupied").

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

176 *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) (citation omitted).

177 Answer Ex. A at DEF000134 (Freeburn Decl. ¶ 16); Answer Ex. C at DEF000163-64 (Burlison Decl. ¶¶ 9-10).

178 *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 18); *Dominion Order*, 32 FCC Rcd at 3757 (¶ 13); *see also Potomac Edison Order* at 11-12 (¶¶ 25-26) (finding rate relief required where the electric utility has a 4-to-1 pole ownership advantage); *Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206) (estimating that electric utilities "own approximately 65-70 percent of poles").

179 Compl. Ex. 3 at ATT00159 (Invoice dated Dec. 30, 2019); *see also, e.g.*, Compl. Ex. D at ATT00061-66 (Dippon Aff. ¶¶ 30-38).

today are just, reasonable, or competitively neutral as required by law.[180] AT&T denies the rest of the third paragraph of Duke Florida's response to paragraph 26, which contain allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 9, 23, 28, 29, 32, 33, and 40-42, and AT&T hereby incorporates its response to those allegations. AT&T also denies that AT&T "certified the correctness of ... the applicable rates" under federal law or completed a certification "at AT&T's prompting." Rather, AT&T complied with the JUA's requirement that it "cooperat[e]" with Duke Florida in determining "the total number of poles in use by each party as Licensee" and "review and accept[]" Duke Florida's rate calculation as consistent with the JUA's rate formula,[181] which is unjust and unreasonable for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply.

With respect to the last paragraph of Duke Florida's response to paragraph 26, Duke Florida admits that the cost sharing methodology in the joint use agreement "cannot be changed without Duke Florida's agreement," so no response is required. With respect to the second sentence of the last paragraph of Duke Florida's response to paragraph 26, AT&T states that the JUA speaks for itself. AT&T denies the third sentence because the Commission has held that a pole ownership advantage is indicative of "market power" and "bargaining leverage"[182] and for reasons detailed in Section III.B of AT&T's Complaint and Section II.B of AT&T's Reply Legal

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[180] *See* Reply Ex. E at ATT00342-345 (Dippon Reply Aff. ¶¶ 66-70).

[181] Compl. Ex. 1 at ATT00098, ATT00109 (JUA, §§ 10.2, 11.1); Answer Ex. A at DEF000145-48 (Freeburn Decl., Ex. A-2) (stating "that we now have attachments on the total number of poles as shown below, at the rentals and under the terms and conditions of the AGREEMENT FOR JOINT USE OF POLES").

[182] *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 18); *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").

Analysis. The last sentence of Duke Florida's response to paragraph 26 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

27. With respect to the first four sentences of Duke Florida's response to paragraph 27, AT&T admits the Commission has authority to terminate the unjust and unreasonable rental provision in the JUA and replace it with a just and reasonable rate[183] and admits that Duke Florida cannot remove AT&T's existing attachments from Duke Florida's poles and AT&T cannot remove Duke Florida's existing attachments from AT&T's poles if either party terminates the JUA.[184] AT&T otherwise denies the first four sentences of Duke Florida's response to paragraph 27, and states that Duke Florida's declaration that AT&T must remove its existing facilities from 62,000+ Duke Florida poles to obtain a different rate (which is, of course, practically impossible)[185] confirms the need for Commission intervention because AT&T genuinely lacks the ability to terminate the JUA rates.[186] AT&T denies the rest of the first paragraph of Duke Florida's response to paragraph 27 because AT&T correctly identified the evergreen provision in the JUA, which the Commission defined as a provision that gives "electric utilities ... no right to demand removal of attachments upon termination."[187]

The second paragraph of Duke Florida's response to paragraph 27 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies

[183] 47 C.F.R. § 1.1407(a).

[184] Compl. Ex. 1 at ATT00102-03 (JUA, Art. XVI).

[185] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15) ("But, as Congress has found, owing to a variety of factors, including environmental and zoning restrictions, there is 'often no practical alternative except to utilize available space on existing poles.'"); *see also* Reply Ex. C at ATT00282 (Peters Reply Aff. ¶ 14).

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

[187] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475); *see also* Compl. Ex. 1 at ATT00102-103 (JUA, Art. XVI).

the rest of the first paragraph of Duke Florida's response to paragraph 27, which contains general and conclusory allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 3, 9, 11, 21, and 38, and AT&T hereby incorporates its response to those allegations.

In the third paragraph of Duke Florida's response to paragraph 27, Duke Florida admits AT&T requested "appropriate rental rates" in a letter dated May 22, 2019 and admits the parties met face-to-face on July 26, 2019 and October 24, 2019, so no response is required. With respect to the rest of the third paragraph of Duke Florida's response to paragraph 27, AT&T admits Duke Florida made a settlement offer on September 10, 2020 after AT&T's complaint was filed, but denies that AT&T's counsel did not respond to Duke Florida's counsel and denies that the offer would result in [REDACTED] in light of the pole attachment rates required by law.[188] AT&T also denies the allegations of paragraph 27 for reasons detailed in Section III.B of AT&T's Complaint, Section II.B of AT&T's Reply Legal Analysis, and this Reply.

28. The first and third sentences of Duke Florida's response to paragraph 28 contain legal conclusions to which no response is required. To the extent a response is required, AT&T denies these sentences because AT&T is entitled to a new telecom rate under the 2018 *Third Report and Order* and under the 2011 *Pole Attachment Order* for reasons detailed in Sections III.A-B of AT&T's Complaint, Section II.A-B of AT&T's Reply Legal Analysis, and this Reply. AT&T denies the second and fourth sentences of Duke Florida's response to paragraph 28 and footnote 118, which contain allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 9, 15, 23, 26, 28, 29, 32, 33, and 40-42, and AT&T hereby incorporates its response to those allegations. The last sentence of Duke Florida's

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[188] *See* Reply Ex. A at ATT00250-251 (Rhinehart Reply Aff. ¶ 22).

response to paragraph 28 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

29. With respect to paragraph 29, Duke Florida admits "that similarly situated attaching entities should pay similar rates" under the standard set in the *Pole Attachment Order*, so no response is required. AT&T denies the rest of Duke Florida's response to paragraph 29, which contains general and conclusory allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 9, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22, 23, 24, 25, 26, 28, 30, 31, 32, 37, and 40-42, and AT&T hereby incorporates its response to those allegations. AT&T denies that the "irreversible" fact that AT&T is an ILEC can mean "AT&T has never been similarly situated to DEF's CATV and CLEC licensees, and … never will be" because the Commission instead found in 2011 that ILECs may be—and presumed in 2018 that ILECs *are*—similarly situated to CLECs and cable companies providing telecommunications services on Duke Florida's poles.[189] AT&T also denies Duke Florida's response to paragraph 29 for reasons detailed in Sections III.A-B of AT&T's Complaint, Section II.A-B of AT&T's Reply Legal Analysis, and this Reply.

30. With respect to the first sentence of Duke Florida's response to paragraph 30, Duke Florida "admits that any analysis of competitive neutrality should account for the different rights and responsibilities in joint use agreements and license agreements," so no response is required, but AT&T denies Duke Florida's unsupported and conclusory statement that AT&T is not disadvantaged relative to Duke Florida's license agreements, which is rebutted by Duke Florida's admission "that the joint use agreement … imposes certain *burdens* [on AT&T] that

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[189] *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217); 47 C.F.R. § 1.1413(b).

differ from those in a CATV or CLEC license agreement."[190] AT&T denies the second sentence of Duke Florida's response to paragraph 30 and the irrelevant and inapt agricultural hypothetical that follows because it misrepresents the allegations of paragraph 30, which states that AT&T is disadvantaged *as compared to CLECs and cable companies* (not as compared to Duke Florida) because the JUA requires AT&T to own poles and incur related costs, but Duke Florida's license agreements—as Duke Florida admits—do not require CLECs and cable companies to own poles or incur these same costs. AT&T denies the last four sentences of the first paragraph of Duke Florida's response to paragraph 30 because they are incomprehensible. It appears Duke Florida may have sought to create an analogy to its "built-to-suit" network claim, which is denied for reasons detailed in Section III.A.2 of AT&T's Complaint, Section II.A.3 of AT&T's Reply Legal Analysis, and paragraphs 8, 10, 15, 16, 22, and 25 of this Reply. There is typically room on Duke Florida's poles for AT&T and AT&T's competitors but if there is no room for AT&T on a pole, AT&T pays for Duke Florida to replace the pole just as its competitors would in similar circumstances.[191]

AT&T denies the second paragraph of Duke Florida's Answer to paragraph 30 because AT&T has not sought to "have it both ways," but has instead properly relied on the fact that AT&T both owns far fewer poles than Duke Florida 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."[192] At the same

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[190] Answer ¶ 14 (emphasis added); *see also*, *e.g.*, Compl. Ex. C at ATT00040-45 (Peters Aff. ¶¶ 18-26); Compl. Ex. D at ATT00067-69 (Dippon Aff. ¶¶ 41, 44).

[191] *See, e.g.*, Compl. Ex. C at ATT00037 (Peters Aff. ¶ 12); Reply Ex. C at ATT00280, ATT00284-285 (Peters Reply Aff. ¶¶ 10, 19).

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

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.[193] AT&T denies the rest of the second paragraph of Duke Florida's Answer to paragraph 30, which contains allegations that are substantially similar or identical to allegations in Duke Florida's responses to paragraphs 10, 14, 20, 25, 26, and 27, and AT&T hereby incorporates its response to those allegations. AT&T further states that Duke Florida's claim that it seeks to charge AT&T rates equal to the cost of "actual pole ownership" confirms that the JUA rates are unjust and unreasonable.[194]

The first sentence of the last paragraph of Duke Florida's response to paragraph 30 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second sentence of the last paragraph of Duke Florida's response and footnote 128, which contain allegations that are substantially similar or identical to allegations in Duke Florida's responses to paragraphs 8, 10, 15, and 21, and AT&T hereby incorporates its response to those allegations. AT&T denies the third sentence because the terms of Duke Florida's cherry-picked and redacted license agreement, which speak for themselves, cannot override the mandatory statutory right of ongoing pole access enjoyed by AT&T's competitors, but not AT&T.[195] AT&T also denies the second and third sentence for reasons detailed in Section IIIA-B of AT&T's Complaint and Section II.A.3 of AT&T's Reply Legal Analysis.

The next six sentences of Duke Florida's response to paragraph 30 contain legal conclusions and conclusory allegations to which no response is required. To the extent a

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[193] *Id.* at 5335 (¶ 216 n.654).

[194] *See, e.g.*, *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15) (rejecting attempt to calculate rates "by assuming that, without the JUA, AT&T would have built a duplicate pole network").

[195] 47 U.S.C. § 224(f).

response is required, AT&T denies these six sentences because the JUA states in the sections Duke Florida cites that Duke Florida may deny AT&T access to a pole,[196] which sets AT&T at a competitive disadvantage as compared to the statutory right of access enjoyed by AT&T's competitors. The last sentence of Duke Florida's response to paragraph 30 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

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

31. The first sentence of Duke Florida's response to paragraph 31 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies this sentence because AT&T is entitled to a just and reasonable new telecom rate for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply. AT&T denies the next three sentences of Duke Florida's response to paragraph 31 because Duke Florida did not make an offer at either of the parties' executive-level meetings and did not include "a new pole license agreement (at the Commission's new telecom rate)" in a settlement offer, so there was no formal proposal for AT&T to consider or reject.[197] AT&T denies the fifth sentence of Duke Florida's response to paragraph 31 because AT&T properly calculated the applicable new telecom rates, and Duke Florida improperly calculated and inflated the new telecom rates, for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and in the supporting Affidavits of Daniel P. Rhinehart. The properly calculated new telecom rates for

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[196] Duke Florida admits Article II allows it to deny AT&T access to certain joint use poles, but says AT&T may still attach pursuant to Article III. Article III, however, states that only if "said pole is not one of those excluded [under Article II]" will "the applicant … have the right as Licensee hereunder to use said [pole]." Compl. Ex. 1 at ATT00092 (JUA, §§ 1.1, 3.1).

[197] Reply Ex. B at ATT00269 (Miller Reply Aff. ¶ 5 n.9).

AT&T's use of Duke Florida's poles for the 2015 through 2019 rental years are $4.56, $4.46, $4.51, $4.78, and $4.54 per pole, respectively.[198]

AT&T denies the second paragraph of Duke Florida's response to paragraph 31, which contains allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 23, 26, 29, and 33, and AT&T hereby incorporates its response to those allegations. AT&T also denies that Duke Florida's new telecom rates, which are not supported by rate calculations, "should not be in dispute" because AT&T complied with its obligation under the JUA to "review and accept[]" Duke Florida's rate calculations as consistent with the JUA's rate formula—not with federal law.[199]

AT&T denies the first three sentences of the third paragraph of Duke Florida's response to paragraph 31 and the table, which contain allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 10, 12, 15, 18, 22, 24, 25, and 37, and AT&T hereby incorporates its response to those allegations. The last sentence of Duke Florida's response to paragraph 31 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

32. The first sentence of Duke Florida's response to paragraph 32 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. The second and fourth sentences of Duke Florida's response to paragraph 32 contain legal conclusions to which no response is required. To the extent a response is required, AT&T denies these sentences for reasons detailed

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[198] *See* Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1); Reply Ex. A at ATT00240, ATT00259 (Rhinehart Reply Aff. ¶ 4 & Ex. R-5).

[199] Compl. Ex. 1 at ATT00098, ATT00109 (JUA, §§ 10.2, 11.1); Answer Ex. A at DEF000145-48 (Freeburn Decl., Ex. A-2) (stating "that we now have attachments on the total number of poles as shown below, at the rentals and under the terms and conditions of the AGREEMENT FOR JOINT USE OF POLES").

in AT&T's Complaint, AT&T's Reply Legal Analysis, and this Reply. The third sentence of Duke Florida's response to paragraph 32 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the fifth sentence of Duke Florida's response to paragraph 32, which contain allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 9, 23, 26, 28, 29, 33, and 40-42, and AT&T hereby incorporates its response to those allegations. The sixth sentence contains a legal conclusion to which no response is required. To the extent a response is required, AT&T denies the sixth sentence because estoppel is not an available defense in a pole attachment complaint[200] and, even if it were available, it would fail because 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."[201]

With respect to the seventh sentence of Duke Florida's response to paragraph 32, the 2018 *Third Report and Order* speaks for itself and AT&T notes that the Commission declined to create a "*right* to refunds," but affirmed its authority to award refunds when appropriate.[202] And refunds are appropriate when a pole owner charges "unjust and unreasonable" rates in violation of federal law.[203]

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[200] *AT&T Servs., Inc.*, 35 FCC Rcd at 6414 (¶ 29) ("[Defendant] has cited no authority establishing that a party may assert equitable defenses in a formal complaint proceeding before the Commission."); *Air Touch Cellular v. Pac. Bell*, 16 FCC Rcd 13502, 13508 (¶ 17) (2001) (questioning whether equitable defenses, including waiver and estoppel, are available in formal complaint proceedings); *see also AT&T Servs. Inc. v. Great Lakes Comet, Inc.*, 30 FCC Rcd 2586, 2597 (¶ 36 & n.123) (2015) (same).

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

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

[203] *See, e.g.*, *Dominion Order*, 32 FCC Rcd at 3750 (¶ 1) ("Verizon is entitled to a refund of overpayments").

AT&T denies the last two sentences of the first paragraph of Duke Florida's response to paragraph 32, which contains conclusory allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraph 13, and AT&T hereby incorporates its response to those allegations. AT&T denies footnote 136 because AT&T supported its complaint with economic analysis, including the analysis of Dr. Christian Dippon.[204]

The rest of Duke Florida's response to paragraph 32 (after subheading 2) contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies the remainder of Duke Florida's response to paragraph 32 because the "applicable statute of limitations" is the 5-year statute of limitations that applies to actions involving a Florida contract[205] for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and paragraph 12 of this Reply. AT&T also denies the rest of Duke Florida's response to paragraph 32 because the 4-year statute of limitations that applies to Florida actions to *rescind* a contract is not "more analogous" to this case because it instead seeks to set the just and reasonable rate for the JUA going forward, and the 2-year statute of limitations of 47 U.S.C. § 415 is not "a closer analogy" 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"[206] as further detailed in Section II.C of AT&T's Reply Legal Analysis, and paragraph 12 of this Reply.[207]

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[204] Compl. Ex. D at ATT00047-73 (Dippon Aff.); Reply Ex. E at ATT00310-348 (Dippon Reply Aff.).

[205] *See Potomac Edison Order* at 22 (¶ 46) (holding the "applicable statute of limitations" is the "statute of limitations for contract actions" under State law); *see also* Fla. Stat. § 95.11(2)(b) (applying to "legal or equitable action[s] on a contract, obligation, or liability founded on a written instrument …").

[206] *See* 47 U.S.C. § 415.

[207] *See also Potomac Edison Order* at 21 (¶¶ 44-45).

33. The first and last sentences of Duke Florida's response to paragraph 33 are general denials prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of Duke Florida's response to paragraph 33, which contains allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraph 8, 9, 22, 23, 26, 28, 29, 31, 32, 33, and 40-42, and AT&T hereby incorporates its response to those allegations.

III. COUNT I – UNJUST AND UNREASONABLE RATES

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

35. Duke Florida's response to paragraph 35 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies Duke Florida's response to paragraph 35 because Duke Florida's response conflicts with Commission precedent and the plain language of 47 U.S.C. § 224. Duke Florida 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." On the contrary, 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."[208] 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)."[209] AT&T disagrees with Duke Florida's characterization and interpretation of the law before 2011, but states that it is irrelevant to any issue presented in this complaint proceeding. AT&T denies there is any lawful basis for Duke Florida's forbearance and waiver requests, which are substantially similar or identical to

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[208] 47 U.S.C. § 224(b)(1) (emphasis added).

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

allegations in Duke Florida's response to paragraphs 4 and 10, and AT&T hereby incorporates its response to those allegations. AT&T also denies Duke Florida's forbearance and waiver requests for reasons detailed in Section II.D of AT&T's Reply Legal Analysis and AT&T's denials of Duke Florida's affirmative defenses.

36. The first sentence of Duke Florida's response to paragraph 36 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of Duke Florida's response to paragraph 36, which contains allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 12, 26, 31, 37, and 39, and AT&T hereby incorporates its response to those allegations.

37. AT&T denies Duke Florida's response to paragraph 37, which contains allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 12, 26, 31, 32, 33, 36, 38, and 39, and AT&T hereby incorporates its response to those allegations. The properly calculated new telecom rates for AT&T's use of Duke Florida's poles for the 2015 through 2019 rental years are $4.56, $4.46, $4.51, $4.78, and $4.54 per pole, respectively.[210]

38. AT&T denies Duke Florida's response to paragraph 38, which contains allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 3, 9, 11, 21, 22, 24, 32, 33, 37, 38, and AT&T hereby incorporates its response to those allegations. The properly calculated pre-existing telecom rates for AT&T's use of Duke Florida's poles for the 2015 through 2019 rental years are $6.91, $6.76, $6.83, $7.25, and $6.89

[210] *See* Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1); Reply Ex. A at ATT00240, ATT00259 (Rhinehart Reply Aff. ¶ 4 & Ex. R-5).

per pole, respectively.[211] AT&T further states that the proportional pre-existing telecom rates for Duke Florida's use of AT&T's poles for the 2015 through 2019 rental years if the pre-existing telecom rates listed in the prior sentence apply are $15.62, $12.58, $11.66, $9.44, and $12.60 per pole, respectively, but denies that these rates are proportional to the inflated and improperly calculated rates that Duke Florida proposes to apply to AT&T's use of Duke Florida's poles.

39. Duke Florida's response to paragraph 39 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies Duke Florida's response to paragraph 39, which contains allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 23, 26, 32, 36, and 37, and AT&T hereby incorporates its response to those allegations. AT&T further states that Duke Florida's allegation that its overcharge has remained relatively constant since 1990 only confirms the need for Commission intervention to ensure just and reasonable rates.[212]

40-42. Duke Florida's response to paragraphs 40-42 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies Duke Florida's response to paragraphs 40-42, which contain allegations that are substantially similar or identical to allegations in Duke Florida's response to paragraphs 8, 9, 12, 21, 22, 23, 24, 26, 28, 29, 31, 32, 33, 37, and 38, and AT&T hereby incorporates its response to those allegations.

AT&T'S DENIAL OF DUKE FLORIDA'S AFFIRMATIVE DEFENSES

AT&T specifically denies each of Duke Florida's affirmative defenses,[213] which should be summarily rejected because Duke Florida "fails to adequately to explain in its Answer the

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[211] *See* Compl. Ex. A at ATT00009, ATT00013-14 (Rhinehart Aff. ¶ 17 & Ex. R-1); Reply Ex. A at ATT00241, ATT00259 (Rhinehart Reply Aff. ¶ 5 & Ex. R-5).

[212] Reply Ex. E at ATT00340 (Dippon Reply Aff. ¶ 60).

[213] AT&T incorporates its Pole Attachment Complaint, Reply Legal Analysis in Support of Pole Attachment Complaint, this Reply to Duke Florida's Answer, and all Affidavits and Exhibits

factual or legal basis for these defenses and their applicability to this dispute, as the Commission's rules require."[214] Duke Florida's affirmative defenses should also be denied because they lack merit on the facts and the law, assert defenses that are not available in a pole attachment complaint proceeding, and improperly seek to relitigate matters that "already fully have been considered and rejected by the Commission" in prior rulemakings.[215] In addition:

1. AT&T denies Duke Florida's first affirmative defense, which asserts that AT&T "is estopped from seeking a refund for periods that precede May 22, 2019," the date that AT&T asked Duke Florida to negotiate a just and reasonable rate. Whether an estoppel defense is available in a pole attachment complaint proceeding is doubtful.[216] But if it were available, it fails. 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" because it would "run[ ] counter to the very idea of a statute of limitations."[217]

2. AT&T denies Duke Florida's second affirmative defense, which asserts that AT&T "waived its right to seek a refund for periods that precede May 22, 2019," the date that AT&T asked Duke Florida to negotiate a just and reasonable rate. Whether a waiver defense is

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filed by AT&T in support of each, as if fully set forth in denial of each of Duke Florida's Affirmative Defenses.

[214] *AT&T Servs. v. 123.net*, 35 FCC Rcd 6401, 6414 (¶ 29) (2020) (citing 47 C.F.R. § 1.721(b), (d), (e) and 1.726(b), (c)).

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

[216] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29) ("[Defendant] has cited no authority establishing that a party may assert equitable defenses in a formal complaint proceeding before the Commission."); *Air Touch Cellular v. Pac. Bell*, 16 FCC Rcd 13502, 13508 (¶ 17) (2001) (questioning whether equitable defenses, including estoppel, laches, and waiver, are available in formal complaint proceedings); *see also AT&T Servs. v. Great Lakes Comet, Inc.*, 30 FCC Rcd 2586, 2597 (¶ 36 & n.123) (2015) (same).

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

available in a pole attachment complaint proceeding is doubtful.[218] But if it were available, it fails. 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" because it would "run[ ] counter to the very idea of a statute of limitations."[219]

3. AT&T denies Duke Florida's third affirmative defense, which asserts that AT&T's claim is barred by the 4-year statute of limitations applicable to actions to rescind a contract under Florida law. The "applicable statute of limitations" does not *bar* a claim for just and reasonable rates or limit the Commission's broad statutory authority to "take such action as it deems appropriate and necessary" to ensure just and reasonable rates,[220] but instead sets the effective date of just and reasonable rates under the Commission's remedies rule.[221] And the "applicable statute of limitations" in this case is the 5-year statute of limitations that applies to actions involving a Florida contract[222] for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and paragraphs 12 and 32 of this Reply. The 4-year statute of limitations that applies to Florida actions to *rescind* a contract is not "more analogous" because this case will leave the JUA in place and set the just and reasonable

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[218] *See AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

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

[220] 47 U.S.C. § 224(b)(1); *AEP v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013) ("Under this broad authorization [of 47 U.S.C. § 224(b)(1)], it is hard to see any legal objection to the Commission's selection of any reasonable period for accrual of compensation for overcharges or other violations of the statute or rules.").

[221] 47 C.F.R. § 1.1407(a)(3).

[222] *See Potomac Edison Order* at 22 (¶ 46) (holding the "applicable statute of limitations" is the "statute of limitations for contract actions" under State law); *see also* Fla. Stat. § 95.11(2)(b) (applying to "legal or equitable action[s] on a contract, obligation, or liability founded on a written instrument …").

rate for it as further detailed in Section II.C of AT&T's Reply Legal Analysis, and paragraphs 12 and 32 of this Reply.

4. AT&T denies Duke Florida's fourth affirmative defense, which asserts that AT&T's claim is barred by the 2-year statute of limitations applicable to actions to recover overcharges under 47 U.S.C. § 415(c). The "applicable statute of limitations" does not *bar* a claim for just and reasonable rates or limit the Commission's broad statutory authority to "take such action as it deems appropriate and necessary" to ensure just and reasonable rates,[223] but instead sets the effective date of just and reasonable rates under the Commission's remedies rule.[224] And the "applicable statute of limitations" in this case is the 5-year statute of limitations that applies to actions involving a Florida contract[225] for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and paragraphs 12 and 32 of this Reply. The 2-year statute of limitations of 47 U.S.C. § 415 is not "a closer analogy" 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"[226] as further detailed in Section II.C of AT&T's Reply Legal Analysis, and paragraphs 12 and 32 of this Reply.[227]

5. AT&T denies Duke Florida's fifth affirmative defense, which asserts that AT&T's claims for all years prior to 2019 are barred by accord and satisfaction because AT&T paid Duke Florida's invoices in full and agreed that the invoiced rates complied with the JUA's rate formula. Whether an accord and satisfaction defense is available in a pole attachment

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[223] 47 U.S.C. § 224(b)(1); *AEP*, 708 F.3d at 190.

[224] 47 C.F.R. § 1.1407(a)(3).

[225] *See* Fla. Stat. § 95.11(2)(b).

[226] *See* 47 U.S.C. § 415.

[227] *See also Potomac Edison Order* at 21 (¶¶ 44-45).

complaint proceeding is doubtful.[228] But if it were available, it fails. AT&T is statutorily entitled to "just and reasonable" rates for use of Duke Florida's poles; AT&T's payment of rates charged by Duke Florida that were in violation of federal law "is of no consequence."[229] Any other standard "would subvert the supremacy of federal law over contracts[230] and inappropriately reward Duke Florida for failing and refusing to comply with the law.

6. AT&T denies Duke Florida's sixth affirmative defense, which asserts that AT&T's claims for all years prior to 2019 are barred "because AT&T acquiesced, consented to, and ratified the rates billed for those years." Whether acquiescence, consent, or ratification defenses are available in a pole attachment complaint proceeding is doubtful.[231] But if it were available, it fails. AT&T is statutorily entitled to "just and reasonable" rates for use of Duke Florida's poles; that AT&T paid rates charged by Duke Florida that were in violation of federal law "is of no consequence."[232] Any other standard "would subvert the supremacy of federal law

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[228] *See AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[229] *AT&T Servs. Inc.*, 30 FCC Rcd at 2597 (¶ 36) ("[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."); *see also S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002) (The FCC 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.").

[230] *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.").

[231] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[232] *AT&T Servs. Inc.*, 30 FCC Rcd at 2597 (¶ 36); *see also S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002).

over contracts"[233] and inappropriately reward Duke Florida for failing and refusing to comply with the law.

7. AT&T denies Duke Florida's seventh affirmative defense, which asserts that AT&T's claims for all years prior to 2019 are barred "because AT&T waived any right to contest the rates billed for those years" when AT&T paid Duke Florida's invoices in full and agreed that the invoiced rates complied with the JUA's rate formula. Whether a waiver defense is available in a pole attachment complaint proceeding is doubtful.[234] But if it were available, it fails. AT&T is statutorily entitled to "just and reasonable" rates for use of Duke Florida's poles; AT&T's payment of rates charged by Duke Florida that were in violation of federal law "is of no consequence."[235] Any other standard "would subvert the supremacy of federal law over contracts"[236] and inappropriately reward Duke Florida for failing and refusing to comply with the law.

8. AT&T denies Duke Florida's eighth affirmative defense, which asserts that AT&T "received and continues to enjoy numerous valuable benefits and competitive advantages under the joint use agreement" such that "it would be inequitable for the Commission to grant any of the relief sought in AT&T's complaint because it would unjustly enrich AT&T." Whether an unjust enrichment defense is available in a pole attachment complaint proceeding is

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[233] *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).

[234] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[235] *AT&T Servs. Inc.*, 30 FCC Rcd at 2597 (¶ 36); *see also S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002).

[236] *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).

doubtful.[237] But if it were available, it fails. "The Commission made clear in the *Pole Attachment Order* that applying Section 224(b)(1) to [I]LEC attachments will not result in unreasonably low rates."[238] Instead, the new telecom "rate is just, reasonable, and fully compensatory."[239] Moreover, AT&T does not enjoy net material competitive benefits under the JUA and has instead been competitively disadvantaged by the JUA, including the JUA's pole attachment rates that are over ▮ times the new telecom rates, for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply.

9. AT&T denies Duke Florida's ninth affirmative defense, which asserts that granting the relief sought in AT&T's complaint "will render the joint use agreement unconscionable and therefore unenforceable." Whether an unconscionability defense is available in a pole attachment complaint proceeding is doubtful.[240] But if it were available, it fails. "The Commission made clear in the *Pole Attachment Order* that applying Section 224(b)(1) to [I]LEC attachments will not result in unreasonably low rates."[241] Instead, the new telecom "rate is just, reasonable, and fully compensatory."[242]

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[237] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[238] *FPL 2015 Order*, 30 FCC Rcd at 1146 (¶ 19).

[239] *Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137); *id.* at 531 (¶ 182) ("The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers.... The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate."); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987); *City of Portland v. United States*, 969 F.3d 1020, 1053 (9th Cir. 2020); *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002).

[240] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[241] *FPL 2015 Order*, 30 FCC Rcd at 1146 (¶ 19).

[242] *Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137); *id.* at 531 (¶ 182); *see also Fla. Power Corp.*, 480 U.S. at 254; *City of Portland*, 969 F.3d at 1053; *Ala. Power Co.*, 311 F.3d at 1370-71.

10. AT&T denies Duke Florida's tenth affirmative defense, which asserts that AT&T's claim "fails to state a claim upon which relief can be granted" under 47 C.F.R. § 1.1413(b) because the JUA "was not 'entered into or renewed' after the effective date of the rule." The new telecom rate presumption codified at 47 C.F.R. § 1.1413(b) applies to "new and newly-renewed joint use agreements," including agreements "that are automatically renewed, extended, or placed in evergreen status."[243] The JUA's initial term expired on January 1, 1979, and it "*shall continue* in force thereafter" until terminated upon six month's written notice.[244] "Continue" and "extend" are synonyms, meaning that the JUA has "automatically … extended" after the effective date of the new rule.[245] The new telecom rate presumption applies for reasons detailed in Section III.A.1 of AT&T's Complaint, Section II.A.1 of AT&T's Reply Legal Analysis, and this Reply.

11. AT&T denies Duke Florida's eleventh affirmative defense, which asserts that "[t]he Commission should forbear from exercising jurisdiction in this case because the facts and circumstances that gave rise to the Commission's assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles are not present in this case."[246] The Enforcement Bureau recently rejected this defense.[247] It should do so again here. The "facts that gave rise to the Commission's assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles"[248] *are* present in this case because "AT&T is, in fact,

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

[244] Compl. Ex. 1 at ATT00103 (JUA, Art. XVI).

[245] *Potomac Edison Order* at 6-7 (¶ 15).

[246] Answer, Affirmative Defense 11.

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

[248] Answer, Affirmative Defense 11.

in an inferior bargaining position and … the JUA rate is neither just nor reasonable."[249] Duke Florida also has not filed a proper forbearance request and the Commission cannot forbear from applying its rules only to one ILEC's attachments on one electric utility's poles.[250] 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."[251]

12. AT&T denies Duke Florida's twelfth affirmative defense, which asserts that the Commission should waive the applicability of its rules as they apply to ILECs under 47 C.F.R. § 1.3. Duke Florida's request is facially invalid as it has not demonstrated "good cause" or "plead with particularity the facts and circumstances which warrant such action."[252] Nor could Duke Florida 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.'"[253] "In order to demonstrate the required special circumstances, [the party seeking waiver] must show that the application of the … rule would be inequitable, unduly burdensome or contrary to the public interest or that no reasonable

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[249] *See FPL 2020 Order*, 35 FCC Rcd at 5332 (¶ 19); *see also* Reply Legal Analysis § II.A-B.

[250] *See* 47 C.F.R. §§ 1.53-1.59; *see also FPL 2020 Order*, 35 FCC Rcd at 5332 (¶ 19 n.83).

[251] *See* 47 U.S.C. § 160(a); *FPL 2020 Order*, 35 FCC Rcd at 5331-32 (¶ 19 & n.83); *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").

[252] 47 C.F.R. § 1.3; *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

[253] *See In the Matter of Results Broad. Rhinelander, Inc. Pet. for Waiver of Final Payment Deadline for Winning Bids in Auction 94*, 34 FCC Rcd 8520, 8522 (¶ 7) (2019) (citing case law interpreting 47 C.F.R. § 1.3).

alternative existed which would have allowed it to comply with the rule."[254] Duke Florida has not and cannot meet that standard. A "just and reasonable" rate for AT&T's use of Duke Florida's pole cannot be "inequitable."[255] Collection of a "fully compensatory" new telecom rate cannot be "unduly burdensome."[256] 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."[257]

13. AT&T denies Duke Florida's thirteenth affirmative defense, which asserts that "[t]he rule upon which AT&T's complaint is premised is unlawful, ultra vires, arbitrary, capricious and unreasonable." The U.S. Courts of Appeals for the D.C. Circuit and Ninth Circuit disagreed.[258]

14. AT&T denies Duke Florida's fourteenth affirmative defense, which asserts that the doctrine of laches bars some or all of AT&T's claims. Whether a laches defense is available

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[254] *Id.*

[255] *See id.*; *see also FPL 2015 Order*, 30 FCC Rcd at 1146 (¶ 18) ("'Just and reasonable' and 'arbitrary and capricious' are mutually exclusive concepts.").

[256] *See Rhinelander*, 34 FCC Rcd at 8522 (¶ 7); *see also Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (quoting National Broadband Plan at 110).

[257] *See id.*; *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, Duke Florida cannot show that no reasonable alternative existed which would have allowed it to comply with the "just and reasonable" rate requirement.

[258] *See Potomac Edison Order* at 6, 23 (¶¶ 14 n.43, 50); *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 19); *see also City of Portland*, 969 F.3d at 1052-53; *Am. Elec. Power Serv. Corp.*, 708 F.3d 183.

in a pole attachment complaint proceeding is doubtful.[259] But if it were available, it fails. The doctrine of "laches … do[es] not preclude AT&T from challenging [the] rates,"[260] particularly when "the Commission declined to impose time limits on the filing of pole attachment complaints."[261]

15. AT&T denies Duke Florida's fifteenth affirmative defense, which asserts that the "applicable statute of limitations bars some or all of AT&T's claims." The "applicable statute of limitations" does not *bar* a claim for just and reasonable rates or limit the Commission's broad statutory authority to "take such action as it deems appropriate and necessary" to ensure just and reasonable rates,[262] but instead sets the effective date of just and reasonable rates under the Commission's remedies rule.[263] And AT&T has sought relief consistent with the "applicable statute of limitations," which is the 5-year statute of limitations that applies to actions involving a Florida contract,[264] for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and paragraphs 12 and 32 of this Reply.[265]

16. AT&T denies Duke Florida's sixteenth affirmative defense, which purports to "reserve[ ] the right to assert other affirmative defenses as pleadings and discovery in this case progress." Whether this is an affirmative defense is doubtful.[266] But if it is, it fails. Under the

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[259] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[260] *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36).

[261] *Dominion Order*, 32 FCC Rcd at 3763 (¶ 28).

[262] 47 U.S.C. § 224(b)(1); *AEP*, 708 F.3d at 190.

[263] 47 C.F.R. § 1.1407(a)(3).

[264] *See* Fla. Stat. § 95.11(2)(b).

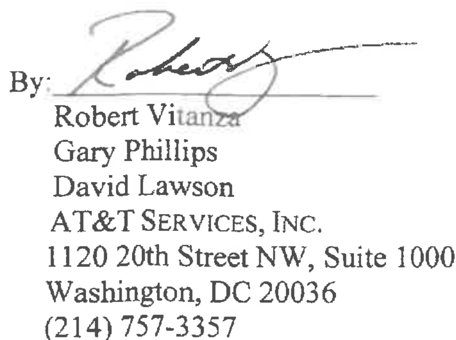
[265] *See also Potomac Edison Order* at 22 (¶ 46).

[266] *See* Black's Law Dictionary (11th ed. 2019) (an "affirmative defense" is an "assertion of facts and arguments that, if true, will defeat the plaintiff's … claim, even if all the allegations in the complaint are true.").

statute of limitations," which is the 5-year statute of limitations that applies to actions involving a Florida contract,[264] for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and paragraphs 12 and 32 of this Reply.[265]

16. AT&T denies Duke Florida's sixteenth affirmative defense, which purports to "reserve[ ] the right to assert other affirmative defenses as pleadings and discovery in this case progress." Whether this is an affirmative defense is doubtful.[266] But if it is, it fails. Under the Commission's rules, "[t]he answer shall advise the complainant and the Commission fully and completely of the nature of any defense ...."[267]

Respectfully submitted,



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Dated: November 24, 2020

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[264] *See* Fla. Stat. § 95.11(2)(b).

[265] *See also Potomac Edison Order* at 22 (¶ 46).

[266] *See* Black's Law Dictionary (11th ed. 2019) (an "affirmative defense" is an "assertion of facts and arguments that, if true, will defeat the plaintiff's ... claim, even if all the allegations in the complaint are true.").

[267] 47 C.F.R. § 1.726(b).

RULE 1.721(M) VERIFICATION

I, Robert Vitanza, as signatory to this submission, hereby verify that I have read this Reply to Duke Energy Florida's Answer 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 24, 2020, I caused a copy of the foregoing AT&T's Reply to Duke Energy Florida's Answer to be served on the following (service method indicated):

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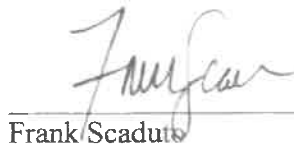

Frank Scaduto