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Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: 10/21/2021

TO: Adam Teitzman – Office of Commission Clerk

FROM: Hannah Barker – Office of Chairman Clark

RE: Bellsouth v. Duke Energy

Please file the attached document in Docket No. 20210000.

PUBLIC VERSION

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

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

DUKE ENERGY FLORIDA, LLC'S OPPOSITION TO AT&T FLORIDA'S APPLICATION FOR REVIEW

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October 12, 2021

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SUMMARY OF THE ARGUMENT

AT&T's application for review provides further evidence of AT&T's anti-competitive mindset. AT&T continues to insist upon the New Telecom Rate, while at the same time insisting that the other terms and conditions of the JUA remain undisturbed. It appears that for AT&T, this dispute was never about achieving competitive neutrality—it was always about maintaining the enormous competitive advantages of the JUA while undercutting the financial consideration supporting the JUA. Despite that the Bureau (erroneously) awarded AT&T refunds for periods prior to AT&T's first request to renegotiate the JUA rates, and despite that the Bureau favored AT&T with a massive going-forward rate reduction, AT&T still wants more.

AT&T first argues that the Bureau erred in finding that the JUA provides AT&T with net material benefits. But AT&T's argument relies almost exclusively on its policy preferences rather than any legitimate evidentiary exception to the Bureau's finding. For example, AT&T argues that the "new telecom rate presumption" applies to periods governed by the 2011 Order, even though the 2018 Order expressly states otherwise. Similarly, AT&T argues that its contractual rights under the JUA should be compared to the extracontractual rights of its purported competitors, even though: (a) the Commission has expressly stated otherwise; and (b) DEF has no control over how Congress or the Commission treats other attaching entities. The Bureau correctly found that the JUA provides AT&T with net material advantages, including guaranteed pole access, [redacted] of allocated space, no requirement to remove its attachments upon termination, no permitting fees, and the lowest position on the pole. These are real benefits with real value.

AT&T next argues that it was DEF's burden not only to prove that the JUA provided AT&T with net material benefits, but also to justify any rate above the New Telecom Rate through some form of cost quantification. This is not and has never been the standard. AT&T's wild claim is made worse by the fact that AT&T completely ignored its own burden of proof with respect to the periods governed by the 2011 Order. Commission precedent makes abundantly clear that, for periods governed by the 2011 Order, AT&T bore the burden of producing "evidence showing that the monetary value of those advantages is less that the difference between the Agreement Rates and the New or Old Telecom Rates over time."

AT&T next argues that the Bureau erred in accepting DEF's data regarding the average number of attaching entities ("AAE") on poles occupied by AT&T. AT&T, though, does not point to any contrary data or attribute an analytical error to the Bureau. Instead, it argues that because DEF uses the Commission's presumptive AAE to calculate the New Telecom Rate it charges other attaching entities, it cannot use a different AAE to calculate AT&T's rate under the Old Telecom Rate formula. This argument is "tilting at a windmill" because the New Telecom Rate formula's cost allocator is intentionally designed to neutralize the AAE input.

Finally, AT&T argues that rate relief should be the only adjustment to the JUA. This is inconsistent with Commission precedent, inconsistent with the Bureau's order, and inconsistent with legitimate business expectations. If the most DEF can recover is the Old Telecom Rate, then some of the "goodies" in the JUA must come out in order to ensure fairness to DEF's ratepayers and AT&T's alleged competitors. The Commission should deny AT&T's application for review.

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Complainant,	)	**Proceeding No.: 20-276**
v.	)	**Bureau ID No.: EB-20-MD-003**
DUKE ENERGY FLORIDA, LLC,	)	
Defendant.	)	

OPPOSITION TO APPLICATION FOR REVIEW

Duke Energy Florida, LLC ("DEF") submits this opposition to the application for review ("Application") filed by BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T") on September 27, 2021 in the above-captioned proceeding. For the reasons set forth below, the Commission should deny AT&T's Application.

ARGUMENT

I. THE BUREAU PROPERLY HELD THAT AT&T IS NOT ENTITLED TO THE NEW TELECOM RATE.

A. The "New Telecom Rate Presumption" Does Not Apply to Rental Periods Preceding the Effective Date of the 2018 Order.

AT&T argues that the Enforcement Bureau should have applied the 2018 Order (and the "new telecom rate presumption") to "all rental periods at issue":

> The Commission did not carve complaint proceedings into different time periods subject to different standards when it adopted the presumption; it adopted the presumption without temporal limitations to simplify disputes and accelerate rate

> reductions. By regulation, the presumption applies to an entire "complaint proceeding[] challenging utility pole attachment rates" under a newly renewed JUA, 47 C.F.R. § 1.1413(b), and it should have applied to all rental periods at issue here.[1]

In making this argument, AT&T ignores the fact that the Commission **did** "carve complaint proceedings into different time periods subject to different standards." The 2018 Order made abundantly clear that: (1) the "new telecom rate presumption" only applies to "newly-negotiated and newly-renewed" agreements following the effective date of the 2018 Order; and (2) the 2011 Order governs all "rental periods" preceding a "renewal" under the 2018 Order.[2] And if there was any doubt about whether the "new telecom rate presumption" applied retroactively to rental periods preceding the effective date of the 2018 Order, the Commission's *Verizon Maryland Decision* laid those doubts to rest.[3]

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[1] AT&T's Application at 4 n.11.

[2] *See Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705, 7770 at ¶ 127 (Aug. 3, 2019) (the "*2018 Order*") ("We extend this rebuttable presumption to newly-negotiated and newly-renewed joint use agreements....We recognize that this divergence from past practice will impact privately-negotiated agreements **and so the presumption will only apply, as it relates to existing contracts, upon renewal of those agreements**.") (emphasis added); *id.* at 7770, ¶ 127 n.475 ("A new or newly-renewed pole attachment agreement is one entered into, renewed, or in evergreen status **after the effective date of this Order**...") (emphasis added); *id.* at 7770, ¶ 127 n.478 ("**Until that time [i.e., renewal of an existing agreement], the *2011 Pole Attachment Order's* guidance regarding review of incumbent LEC pole attachment complaints will continue to apply**. Because our intention is to encourage broadband deployment going forward, **we decline to adopt USTelecom's proposal that we give incumbent LECs 'the right to refunds as far back as the statute of limitations allows.**'") (internal citations omitted) (emphasis added); *see also Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5333-37 at ¶¶ 214-19 (Apr. 7, 2011) (the "*2011 Order*").

[3] *See generally, Verizon Md. LLC v. Potomac Edison Co.*, Memorandum Opinion and Order, Proceeding No. 19-355, 35 FCC Rcd 13607 (Nov. 23, 2020) (the "*Verizon Maryland Decision*") (applying the 2011 Order to ILEC's claim for refunds of payments made prior to the effective date of the 2018 Order).

AT&T's intransigence on this issue not only waylaid any hope of resolving this dispute during pre-complaint negotiations but also caused AT&T to completely ignore its burden of proof under the 2011 Order, which governs the vast majority of AT&T's refund claim.[4] As explained more fully in DEF's petition for reconsideration,[5] in order to recover refunds for rental periods governed by the 2011 Order, AT&T was required to produce evidence "showing that the monetary value of [the advantages it enjoys under the JUA] is less than the difference between the [JUA rates] and the New or Old Telecom Rate over time."[6] As the Bureau expressly found, AT&T did not provide "a credible valuation of the advantages that AT&T received under the JUA."[7]

B. The Bureau Did Not Rely on AT&T's "Immutable Characteristics" as an ILEC to Find that AT&T Is Not Entitled to the New Telecom Rate.

AT&T argues that the Bureau "undercut" the "new telecom rate presumption" by finding AT&T was not "similarly situated" to other attachers because of its "immutable characteristics" as an ILEC.[8] AT&T contends that the following benefits under the JUA are actually "immutable characteristics" of ILECs and cannot be used to rebut the "new telecom rate presumption": (1) AT&T's right to guaranteed space on DEF's poles under the JUA; (2) AT&T's right to maintain its attachments on existing joint use poles following termination of the JUA; and (3) AT&T's right to occupy the lowermost portion of usable space on DEF's poles.[9] There is a gaping hole in AT&T's argument: the Commission has explicitly found that each of these benefits **can** be used

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[4] The Bureau found that the 2011 Order governed the rental periods spanning from August 25, 2015 to June 30, 2019. *See* Order at ¶ 14 ("[T]he JUA rates are subject to review under the *2018 Order* for the period starting July 1, 2019…"); *see id.* at ¶ 64 ("AT&T is entitled to a refund for the period beginning on August 25, 2015….").

[5] *See* DEF's Petition for Reconsideration at 1-4 (filed Sep. 27, 2021).

[6] *Verizon Fla. LLC v. Fla. Power and Light Co.*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1149-50 at ¶ 24 (Feb. 11, 2015) (the "*Verizon Florida Decision*").

[7] *See* Order at ¶ 45.

[8] *See* AT&T's Application at 4.

[9] *See id.* at 4-5.

to rebut the "new telecom rate presumption."[10] AT&T's attempt to reframe these obvious competitive advantages as nothing more than vestiges of its status as an ILEC reveals AT&T's anti-competitive motive. For AT&T, this dispute was never about achieving competitive neutrality—it was always about maintaining the enormous competitive advantages of the JUA while drastically undercutting the financial consideration supporting the JUA.

C. The Bureau Properly Compared AT&T's Rights Under the Joint Use Agreement Against the Contractual Rights of DEF's CATV and CLEC Licensees.

AT&T argues that the Bureau erred by comparing "only the '*contractual* rights and responsibilities' of AT&T and its competitors, while expressly dismissing acknowledged statutory and regulatory rights and responsibilities."[11] In particular, AT&T takes issue with the following finding in the Order:

> Although competitive attachers, as discussed above, have a statutory right of nondiscriminatory access to a utility's poles under section 224(f)(1), any discussion of such a right is outside the scope of the present analysis, which necessarily compares the *contractual* rights and responsibilities of AT&T under the JUA with those of AT&T's competitors under their respective license agreements with Duke.[12]

As pointed out by the Bureau, "[t]here is no indication in the *2018 Order* that the Commission

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[10] *See* 2018 Order, 33 FCC Rcd at 7770-71, ¶ 128 ("Utilities can rebut the presumption we adopt today in a complaint proceeding by demonstrating that the [ILEC] receives net benefits that materially advantage the [ILEC] over other telecommunications attachers. Such material benefits may include…guaranteed space on the pole; preferential location on pole…."); *Verizon Maryland Decision*, 35 FCC Rcd at 13614-15 (finding that right to remain attached on existing joint use poles following termination of JUA and right to guaranteed space on joint use poles provided ILEC with "material advantages over [CLEC and CATV] attachers on the same poles"); *BellSouth Telecomms., LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, Memorandum Opinion and Order, Proceeding No. 19-187, 35 FCC Rcd 5321, 5328-29, ¶ 14 (May 20, 2020) (the "*FPL I Decision*") (finding that right to guaranteed space on joint use poles and right to lowest position on joint use poles provided ILEC with competitive advantage over other attachers on the same poles).

[11] AT&T's Application at 5 (italics in original).

[12] Order at ¶ 25 (italics in original).

intended application of section 1.1413(b) to involve a comparison between statutory rights granted by Congress and negotiated rights granted by agreement."[13] Rather, the 2018 Order and subsequent Commission authority make clear that the "net material benefits" analysis should be done on a contract-to-contract basis.[14] Comparing AT&T's contractual rights to the extracontractual statutory and regulatory rights of DEF's CATV and CLEC licensees would be comparing apples and oranges. Moreover, DEF has no control over the statutory and regulatory rights of the various entities attached to its poles; DEF can only control the contractual rights and responsibilities within its various joint use and pole license agreements. Stated otherwise, the favor with which Congress and the Commission treats various types of attaching entities cannot be "held against" DEF.

D. The Bureau Properly Found that DEF Rebutted the "New Telecom Rate Presumption" for the Period Governed by the 2018 Order.

AT&T argues that the "Bureau Order absolves Duke Florida of its burden to prove relevant net material competitive advantages 'by clear and convincing evidence.'"[15] Specifically, AT&T disputes the Bureau's findings that the following provisions within the JUA provided AT&T with a competitive advantage over other attaching entities: (1) contractual right of access; (2) right to maintain existing attachments on DEF's poles following termination of the JUA; (3) allocation of

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[13] *Id.* at ¶ 25 n.81.

[14] *See* 2018 Order, 33 FCC Rcd at 7768, ¶ 124 (noting that "**joint use agreements** may provide benefits to the [ILECs] that are not typically found in **pole attachment agreements** between utilities and other telecommunications attachers"); *Verizon Maryland Decision*, 35 FCC Rcd at 13615-16, ¶ 20 & nn.60-69 (comparing the rights afforded to the ILEC under the joint use agreement against the rights afforded to the electric utility's CATV and CLEC licensees to determine whether the ILEC's rights under the JUA provided it with a competitive advantage).

[15] AT&T's Application at 6. AT&T's analysis fails to distinguish between the rental periods governed by the 2011 Order and the rental periods governed by the 2018 Order. AT&T's analysis, once again, improperly implies that the 2018 Order—along with its "new telecom rate presumption"—applies to all rental periods at issue.

[redacted] of usable space on DEF's poles, plus ability to occupy additional space at no charge; (4) avoidance of inspection and permitting costs; and (5) right to the lowest position on DEF's poles.[16] AT&T's arguments with respect to each material benefit are addressed separately below.

1. Contractual Right of Access.

AT&T claims that its contractual right of access under the JUA actually places it at a "material disadvantage" vis-à-vis DEF's CATV and CLEC licensees.[17] AT&T's argument, however, is nothing more than a recitation of its earlier argument that the Bureau erred by not comparing AT&T's **contractual** rights with the **statutory** *rights* of DEF's CATV and CLEC licensees under Section 224. As explained in Section I.C., the Bureau was bound by the 2018 Order and *Verizon Maryland Decision* to perform a contract-to-contract analysis.

Further, even though its analysis was supposed to be limited to a contract-to-contract comparison, the Bureau **did** compare AT&T's access rights under the JUA with the statutory right of access afforded to CATVs and CLECs. While no formal findings were made, the Bureau's analysis (based on the record evidence before it) suggests that it did not view AT&T's access rights under the JUA as inferior to the access rights afforded under Section 224.[18]

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[16] *See id.* at 8-14.

[17] *Id.* at 8. AT&T even goes so far as to argue that "Duke Florida admitted 'ILECs are at a material *disadvantage* compared to CLECs and CATVs.'" *See id.* at 6-7 (citing DEF's Answer at Exh. E, DEF000208 (Decl. of Kenneth Metcalfe, CPA, CVA, Oct. 30, 2020 ("Metcalfe Decl.") ¶ 9)). In making this argument, AT&T grossly mischaracterizes the testimony of DEF's expert witness Kenneth Metcalfe. Mr. Metcalfe's testimony actually provides: "[DEF] 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 fundamental difference between CLECs or CATVs, as compared to ILECs. **Without a contractual obligation for a utility to provide access, such as the terms in the JUA**, ILECs are at a material disadvantage compared to CLECs and CATVs." DEF's Answer at Exh. E, DEF000208 (Metcalfe Decl. ¶ 9) (emphasis added). The absence of a statutory right of access magnifies, rather than minimizes, the value of a contractual right of access.

[18] *See, e.g.,* Order at ¶ 23 ("The JUA specifically reserves for AT&T space on all joint use poles, including any that are newly erected or newly acquired. AT&T's competitors are not guaranteed space on any pole to which they are not already attached and [redacted]

2. Right to Remain Attached Following Termination.

AT&T argues that its right to remain attached to DEF's poles following termination of the JUA does not provide it with a competitive advantage because "AT&T's CLEC and cable competitors enjoy the permanent statutory right to access Duke Florida's poles that is unavailable to AT&T."[19] Once again, AT&T is comparing apples and oranges. As explained in Section I.C., this argument is without merit because the Bureau was bound by the 2018 Order and *Verizon Maryland Decision* to perform a contract-to-contract analysis.

Adhering to the Commission's guidance in the *Verizon Maryland Decision*, the Bureau correctly compared AT&T's express right to remain attached following termination of the JUA with the "removal upon termination" provisions within the pole license agreements executed by DEF's CATV and CLEC licensees.[20] AT&T further disputes the Bureau's contract-to-contract analysis by arguing that the "removal upon termination" within DEF's pole license agreements is unenforceable.[21] AT&T's argument ignores the *Verizon Maryland Decision*, wherein the Commission determined that an ILEC's right to remain attached following termination provided it with a competitive advantage over CATVs and CLECs, whose license agreements required them to remove their attachments within a specified time after termination.[22] As the Bureau points out in its Order, in order for the Commission to reach this finding in the *Verizon Maryland Decision*,

[redacted]; *id.* at ¶ 25 n.80 ("Notwithstanding AT&T's claim that Duke's licensees enjoy 'guaranteed statutory access,' we note that the right of access provided to [CLECs and CATVs] under section 224(f)(1) is subject to a list of specific exclusions in section 224(f)(2).") (citations omitted).

[19] AT&T's Application at 9.

[20] *See* Order at ¶ 27 & nn.86-87.

[21] *See* AT&T's Application at 9 n.40 ("AT&T's competitors have the right to maintain their existing attachments on Duke Florida's poles after their license agreements are terminated **regardless of what the agreements say**.") (emphasis added).

[22] *See Verizon Maryland Decision*, 35 FCC Rcd at 13615, ¶ 20 & nn.64-65.

the Commission "necessarily viewed the license agreements' 'removal upon termination' provisions, at least as a general matter, as enforceable."[23] AT&T's "unenforceability" argument also conveniently ignores the fact that AT&T's own pole license agreements include "removal upon termination" provisions.[24]

AT&T's arguments are seemingly designed to obscure the enormous value AT&T derives from its right to remain attached following termination. This provision of the JUA, in essence, gives AT&T a unilateral option on a perpetual license to remain attached to 62,000 DEF poles **indefinitely**, which allows AT&T to avoid the need for an alternate deployment solution in the event of a termination. According to Mr. Metcalfe's testimony, "this is a significant and fundamental contractual benefit" that provides AT&T with an annualized net benefit of $[redacted], or $[redacted] per pole.[25]

3. Allocation of [redacted] of Usable Space to AT&T.

AT&T argues that the "reservation of excess space" on DEF's poles "cannot materially or competitively advantage AT&T as a matter of law."[26] AT&T's argument appears to have two distinct components: (1) that AT&T's space allocation under JUA does not provide AT&T with a competitive advantage; and (2) that AT&T's space allocation is unlawful and unenforceable. AT&T is wrong on both counts.

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[23] Order at ¶ 28.

[24] *See* AT&T's License Agreement for Rights of Way (ROW), Conduits, and Pole Attachments, Section 18.1 ("Licensee, at its expense, will remove its attachments from any of BellSouth's poles within thirty (30) days after termination of the license covering such attachments."). AT&T's License Agreement can be accessed through the following URL: http://www.psc.state.fl.us/ClerkOffice/ShowDocket?casestatus=0&preHearingDate=01%2F01%2F0001%2000%3A00%3A00&document_id=0&cdocument=02722-2007&radioValue=DocumentNumber&isCompleted=False&docutype=0&EventType=All

[25] DEF's Answer at Exh. E, DEP000212-13 (Metcalfe Decl. ¶¶ 20-21).

[26] AT&T's Application at 10.

The JUA allocates [redacted] of usable space on DEF's poles to AT&T, plus the option to use additional space at no extra costs.[27] This provides AT&T with an enormous competitive advantage over DEF's CATV and CLEC licensees, which are not guaranteed space on any DEF pole and pay a per attachment rate premised upon a single foot of occupancy.[28] Moreover, AT&T's contention that the space allocation does not provide it with a competitive advantage unless it is utilizing the entire allotment is entirely without merit. The primary advantage of the space allocation is that it allows AT&T to avoid incurring make-ready costs. AT&T has guaranteed access to [redacted] of space on DEF's poles. If a pole is at capacity and there is another attacher within its space allocation, AT&T does not bear the cost of expanding capacity (either through make-ready or pole replacement) to accommodate its new attachment. In contrast, DEF's CATV and CLEC licensees take DEF's poles as they find them. If DEF agrees to expand capacity for their proposed attachments, DEF's CATV and CLEC licensees are required to bear the actual cost of any necessary make-ready or pole replacements. For these reasons, the Commission has consistently recognized that space allocations provide ILECs with a competitive advantage over other attaching entities.[29]

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[27] DEF's Answer at Exh. 1, DEF000246 (JUA, Art. I, § 1.1.6(B)&(C)).

[28] *See* DEF's Initial Supplemental Brief at 11 & n.36; *see also* Order at ¶ 23 ("AT&T's competitors are not guaranteed space on any pole to which they are not already attached…."); *id.* at ¶ 26 n.83 ("[L]anguage in the licensing agreements allowing Duke to [redacted] undermines AT&T's suggestion that the agreements grant licensees the right to occupy as much space as they desire.").

[29] 2018 Order, 33 FCC Rcd at 7770-71, ¶ 128 ("similarly situated" presumption can be rebutted by demonstrating that an ILEC enjoys "material benefits" under the joint use agreement, such as "guaranteed space on the pole"); *Verizon Florida Decision*, 30 FCC Rcd at 1148, ¶ 21 (acknowledging four-foot space allocation as benefit under joint use agreement); *FPL I Decision*, 35 FCC Rcd at 5328, ¶ 14 (acknowledging four-foot space allocation as "significant benefit" under joint use agreement); *Verizon Maryland Decision*, 35 FCC Rcd at 13615, ¶ 20 (describing ILEC's space allocation on electric utility's poles as a "material advantage").

AT&T's "unenforceability" argument is also without merit. In support of its argument, AT&T cites solely to the Commission's *Local Competition Order*.[30] As explained in DEF's answer, however, the *Local Competition Order* does **not** prohibit space allocations within joint use agreements; rather, it only barred ILECs from reserving space on their own poles in light of their anti-competitive motives.[31] The Bureau rejected AT&T's reading of the *Local Competition Order* on similar grounds, noting that:

> AT&T also suggests that the JUA's space allocation provision is unenforceable, and therefore not beneficial to AT&T, because the Commission invalidated reservations of space in the 1996 *Local Competition Order*. We disagree. The cited passage from the *Local Competition Order* appears to preclude an incumbent LEC from reserving excess capacity on its own poles to the detriment of competitive attachers who may later seek access to the poles.[32]

Finally, the long line of authority finding space allocations to be a material benefit under joint use agreements also dispels the notion that space allocations are somehow unlawful or unenforceable.[33]

4. Avoidance of Permitting Costs.

AT&T claims that the Bureau erred in finding that the avoidance of permitting costs under the JUA provided it with a competitive advantage.[34] Specifically, AT&T argues that it does not actually avoid permitting costs because "AT&T performs the work itself."[35] As explained in

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[30] *See* AT&T's Application at 10 n.43 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket No. 96-98, CC Docket No. 95-185, 11 FCC Rcd 15499, 16079, ¶ 1170 (Aug. 8, 1996) ("*Local Competition Order*").

[31] *See* DEF's Answer at ¶ 25 n.86 (citing *Local Competition Order*, 11 FCC Rcd at 16078-79, ¶¶ 1169-70).

[32] Order at ¶ 24 n.78 (internal citations omitted).

[33] *See supra* note 29.

[34] *See* AT&T's Application at 11.

[35] *See id.*

DEF's answer, however, AT&T's argument is beside the point:

> Whatever inspection, engineering and make-ready work AT&T performs on its own does not reduce the amount of inspection, engineering and make-ready work performed by DEF. As AT&T's own complaint alleges (and as DEF acknowledges), AT&T is required to submit a permit when making a new attachment. DEF performs the inspections and engineering the same as it would for a CATV or CLEC applying for a new attachment. The differences are that: (1) AT&T does not pay for the inspections or engineering work; and (2) the new attachment does not alter the per pole rate paid by AT&T.[36]

Thus, while AT&T's attachments are not exempt from DEF's permitting requirements, DEF absorbs the costs associated with permitting AT&T's attachments. Regardless of whether AT&T decides to duplicate this work, the ability to avoid permitting costs under the JUA is a valuable benefit that provides AT&T with a competitive advantage. In fact, according to DEF witness Kenneth Metcalfe, this provision alone provides AT&T with an annualized net benefit of $[redacted], or $[redacted] per pole.[37]

While the Bureau correctly found that the avoidance of permitting costs provides AT&T with a competitive advantage, the Bureau erred by discounting this advantage when analyzing whether the advantages under the JUA justify the "rates" under the JUA.[38] Specifically, the Bureau stated: "Because Duke fails to identify the inspections or engineering work that it purportedly performs on AT&T's behalf under the JUA, let alone the avoided cost savings to AT&T, we do not find that the JUA benefits AT&T with regard to avoided inspection and engineering costs."[39] This statement is not only at odds with the Bureau's finding in paragraph 29 of the Order (i.e., that "AT&T does not pay any fees in connection with Duke's permitting costs"

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[36] DEF's Answer at ¶ 17; *see also id.* at Exh. A, DEF000135-36 (Decl. of Gilbert Scott Freeburn, Oct. 30, 2020 ("Freeburn Decl.") ¶ 18).

[37] *See id.* at Exh. E, DEF000214-15, DEF000240 (Metcalfe Decl. ¶¶ 25-27, Exh. E- 3.2).

[38] *Compare* Order at ¶ 29 *with id.* at ¶¶ 32, 44.

[39] *See id.* at ¶ 32.

while "[i]ts competitors must pay permitting fees"), but it also ignores the record evidence in this case. In its answer, DEF provided both an explanation of the engineering and inspection costs avoided by AT&T, as well as a valuation of the benefit of those avoided costs to AT&T.[40]

AT&T also argues that it performs the requisite permitting work under "disadvantageous conditions, as the JUA does not guarantee timely make-ready when other attachers must modify…their facilities before AT&T can attach its facilities to Duke Florida's poles."[41] AT&T is once again attempting to draw a comparison between AT&T's contractual rights under the JUA and the extracontractual rights CATVs and CLECs have under the Commission's pole attachment regulations. As explained in Section I.C. *supra*, Commission authority requires a contract-to-contract analysis. AT&T's argument is irrelevant anyway because the make-ready timelines within the Commission's pole attachment regulations have no bearing on whether AT&T's avoidance of permitting costs (the benefit at issue) provides it with a competitive advantage.

5. Right to Lowest Position on DEF's Poles.

AT&T also disputes the Bureau's finding that the right to occupy the lowest position on DEF's poles provides AT&T with a competitive advantage.[42] The primary thrust of AT&T's argument is that occupying the lowest position on a pole is actually a "competitive disadvantage" for AT&T—an argument the Bureau rejected based on the weight of the evidence.[43] But AT&T's

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[40] *See* DEF's Answer at Exh. A, DEF000135 (Freeburn Decl. ¶ 18) ("When AT&T submits a permit application, DEF performs the same pre-construction and post-construction inspections as it performs for CATV and CLEC permit applications. The difference is that AT&T (unlike CATVs and CLECs) does not get charged for this work. The current permitting, engineering and inspection costs for CATV and CLEC licensees in DEF's service area are set forth in Exhibit A-1 attached hereto."); *id.* at Exh. A, DEF000142 (Freeburn Decl. Exh. A-1); *id.* at Exh. E, DEF000214-15, DEF000240 (Metcalfe Decl. ¶¶ 25-27, Exh. E- 3.2).

[41] AT&T's Application at 11.

[42] *See id.* at 12-14.

[43] *See* Order at ¶ 31.

argument, once again, ignores all of the benefits AT&T derives from occupying the lowest position in the communications space on DEF's poles—benefits that have repeatedly been found to provide a competitive advantage over other attaching entities.[44]

AT&T attempts to bolster its argument by claiming that its right to occupy the lowest position on DEF's poles "resulted from decades of history rather than affirmative decision-making."[45] But the record clearly shows that AT&T's position on DEF's poles was the product of arm's length negotiations and that AT&T "never sought to abandon its right to the lowest position in the communications space."[46] Thus, as the Bureau acknowledged, "AT&T's position on the pole is by choice and that choice has benefitted AT&T by providing a consistent and predictable space on each pole in a position of its choosing."[47]

Finally, AT&T argues that "[t]here is no evidence AT&T ever asserted a 'right' to the lowest position on a pole; instead, the record shows the opposite—photos of a third party attached *below* AT&T's facilities in the communications space."[48] AT&T grossly exaggerates the "record" on this issue, which is comprised of two photos, taken one block apart, showing a government

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[44] *See, e.g.,* DEF's Answer at ¶ 19; *id.* at Exh. A, DEF000134-35 (Freeburn Decl. ¶ 17); *id.* at Exh. C, DEF000166 (Decl. of Steven Burlison, P.E., Oct. 28, 2020 ("Burlison Decl.") ¶ 17); DEF's Initial Brief in Response to the Enforcement Bureau's March 8, 2021 Letter at 13-14; 2018 Order, 33 FCC Rcd at 7770-71, ¶ 128 (characterizing "preferential location" on poles as a material benefit); *Verizon Florida Decision*, 30 FCC Rcd at 1148, ¶ 21 (finding that JUA's allocation of *lowest* four feet of usable space provides ILEC with competitive advantage); *FPL I Decision*, 35 FCC Rcd at 5328-29, ¶ 14 (describing benefits ILEC enjoyed from occupying the lowest position on the pole).

[45] AT&T's Application at 13.

[46] *See* DEF's Response to AT&T's Initial Brief in Accordance with the Enforcement Bureau's March 8, 2021 Letter at 5 (filed Apr. 19, 2021); DEF's Answer at Exh. 1, DEF000246 (JUA, Art. I, § 1.1.6(C)) (allocating lowest portion of usable space to AT&T); *id.* at Exh. A, DEF000135 (Freeburn Decl. ¶ 17) (noting that, in 17 years as manager of Duke Energy Corporation's joint use department, AT&T never asked to "assume a higher position on the pole").

[47] Order at ¶ 31.

[48] AT&T's Application at 13.

traffic signal attached below AT&T.[49] These two photos hardly establish that AT&T's "competitors" routinely make their attachments below AT&T, especially in light of AT&T's repeated concessions that it is "typically the lowest on the pole."[50]

II. THE COMMISSION SHOULD REJECT AT&T'S ARGUMENT THAT DEF MUST JUSTIFY THE "HARD CAP" OLD TELECOM RATE THROUGH COST QUANTIFICATION.

The Bureau found that AT&T "is entitled to a pole attachment rate, covering both timeframes [i.e., the rental periods separately governed by the 2011 Order and the 2018 Order] at issue, that does not exceed the Old Telecom Rate."[51] AT&T takes issue with this finding and argues that DEF should have been required to justify any variation from the New Telecom Rate with cost data:

> While the *Bureau Order* correctly states that an electric utility can charge a rate "that *does not exceed* the Old Telecom Rate" where a JUA provides the ILEC with net material competitive benefits, it also refers to the old telecom rate as *the* lawful rate without quantifying (or requiring Duke Florida to quantify) the value of any of the identified advantages. But the old telecom rate is an upper bound, *not* a presumptive just and reasonable, or an automatically applied, rate, even if an ILEC receives net material competitive benefits. Any upward variation from the new telecom rate must be justified based on relevant costs, as an electric utility cannot lawfully recover "costs that [it] does not incur."[52]

There are a host of problems with AT&T's argument.

The most glaring problem is that AT&T is creating a new legal standard out of whole cloth. AT&T's contention that "[a]ny upward variation from the new telecom rate must be justified based on relevant costs" is entirely unmoored from the Commission's rules and authority. In the 2011

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[49] AT&T's Reply Legal Analysis in Support of Pole Attachment Complaint at Exh. D, ATT00306-307 (Decl. of Timothy R. Davis, Exh. D-1).

[50] *See id.* at 8 n.36; AT&T's Initial Supplemental Brief at 6 ("As the typical lowest attacher, AT&T is…").

[51] Order at ¶ 14.

[52] AT&T's Application at 14-15 (italics in original) (internal citations omitted).

Order, the Commission designated the Old Telecom Rate as a "reference point in complaint proceedings" regarding new agreements because, "[a]s a higher rate than the regulated rate available to telecommunications carriers and cable operators, **it helps account for particular arrangements that provide net advantages to [ILECs] relative to [CATVs and CLECs]**."[53] In making the Old Telecom Rate a "hard cap," the 2018 Order "reaffirm[ed] the conclusion that reference to [the Old Telecom Rate] is appropriate **where [ILECs] receive net material advantages in a pole attachment agreement.**"[54] The Commission's reliance on the Old Telecom Rate, therefore, was not about recovery of quantified costs; it was a "reference point" and later a "hard cap" that, in the Commission's view, helped to ensure competitive neutrality. Competitive neutrality dictates that ILECs, who enjoy unique, competitive advantages under joint use agreements, pay a higher rate than CATVs and CLECs.[55]

In arguing that DEF must justify "any upward variation from the new telecom rate" with cost data, AT&T cites various Commission precedent that stands for an entirely different (and opposing) proposition—i.e., that competitive neutrality requires an ILEC to pay a higher rate if the ILEC's joint use agreement provides it with competitive advantages over CATVs and

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[53] 2011 Order, 26 FCC Rcd at 5337, ¶ 218 (emphasis added).

[54] 2018 Order, 33 FCC Rcd at 7771, ¶ 129 (emphasis added). Quoting the 2011 Order, the Commission once again acknowledged that the Old Telecom Rate "accounted for particular arrangements that provide net advantages to [ILECs] because it was higher than the rate available to telecommunications attachers." *See id.* at 7771, ¶129 n.483 (quoting 2011 Order, 26 FCC Rcd at 5337, ¶ 218) (internal quotation marks omitted).

[55] *See* 2011 Order, 26 FCC Rcd at 5336-37, ¶ 218 ("[I]f a new pole attachment agreement between an [ILEC] and a pole owner includes provisions that materially advantage the [ILEC] *vis a vis* a telecommunications carrier or cable operator, we believe that a different rate should apply. Just as **considerations of competitive neutrality** counsel in favor of similar treatment of similarly situated providers, so too should **differently situated providers be treated differently**.") (emphasis added); 2018 Order, 33 FCC Rcd at 7771, ¶ 128 ("If the utility can demonstrate that the [ILEC] receives significant material benefits beyond basic pole attachment or other rights given to another telecommunications attacher, then we leave it to the parties to negotiate the appropriate rate or tradeoffs **to account for such additional benefits**.") (emphasis added).

CLECs.[56] Moreover, three of the four pieces of authority cited by AT&T are governed by the 2011 Order and thus predate the Commission's "new telecom rate presumption." And included amongst this authority is the *Verizon Florida Decision*, which required the **ILEC** to quantify the costs it avoided (and the benefits it received) under the joint use agreement:

> Third, we find that Verizon has adduced insufficient evidence to support a finding that the Agreement Rates are unreasonable, or for the Commission to set a just and reasonable rate. **Verizon concedes that it received and continues to receive benefits under the Agreement that are not provided to other attachers, but it has not produced any evidence showing that the monetary value of those advantages is less than the difference between the Agreement Rates and the New or Old Telecom Rates over time. Verizon provides no evidence regarding the value of access to Florida Power's poles or occupying the lowest usable space on each pole. Verizon likewise made no attempt to estimate the costs Florida Power incurred by installing taller poles to accommodate Verizon. For its 67,000 attachments, Verizon was not required to pay make-ready costs and post-attachment inspection fees that competitive LECs must pay, yet Verizon has made no attempt to quantify the expenses it avoided under the Agreement.** Absent such evidence, we are unable to determine whether the Agreement Rates are just and reasonable. Verizon's raw comparison of the Agreement Rates to the Old and New Telecom Rates is not sufficient to show that the Agreement Rates are unjust.[57]

The only authority AT&T cites that is not governed by the 2011 Order is the 2018 Order, and AT&T unironically cites the passage articulating the actual legal standard:

> Utilities can rebut the presumption we adopt today in a complaint proceeding by demonstrating that the [ILEC] receives net benefits that materially advantage the [ILEC] over other telecommunications attachers.... If the utility can demonstrate that the [ILEC] receives significant material benefits beyond basic pole attachment

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[56] *See* AT&T's Application at 15 n.68 (citing *Verizon Va. LLC v. Va. Elec. and Power Co.*, Order, Proceeding No. 15-190, 32 FCC Rcd 3750, 3759-59 at ¶ 18 (May 1, 2017) ("*Verizon Virginia Decision*"); *id.* at 3578-79, ¶ 20; 2018 Order, 33 FCC Rcd at 7770-71, ¶ 128; *Verizon Florida Decision*, 30 FCC Rcd at 1149-50, ¶ 24; 2011 Order, 26 FCC Rcd at 5336-37, ¶ 218).

[57] *Verizon Florida Decision*, 30 FCC Rcd at 1149-50, ¶ 24 (emphasis added). This language is particularly injurious to AT&T, as it articulates the burden of proof that AT&T was required—but failed—to meet under the 2011 Order, which governs the vast majority of its refund claim. As explained in DEF's petition for reconsideration, AT&T failed to provide any evidence demonstrating that the "monetary value" of the benefits it enjoys under the JUA does not account for the difference between the "rate" it paid under the JUA and the rate AT&T would have paid under the Old Telecom Rate formula. *See* DEF's Petition for Reconsideration at 2-4

> or other rights given to another telecommunications attacher, then we leave it to the parties to negotiate the appropriate rate or tradeoffs to account for such additional benefits.[58]

The foregoing makes clear that DEF is under no legal burden to quantify the costs it incurs under the JUA; DEF is only required to demonstrate that AT&T receives net material benefits. But as discussed *infra*, DEF actually **did** quantify the costs it incurs in providing AT&T with the material benefits under the JUA. Thus, DEF even satisfied AT&T's fabricated burden of proof.

Apart from having no basis in law, AT&T's argument also ignores the record here. AT&T claims that the "identified 'advantages' do not impose costs on Duke Florida and have admittedly 'little value,' if any."[59] However, the Bureau clearly credited DEF's valuation of the JUA's benefits to the extent that it found those benefits to justify AT&T's payment of the Old Telecom Rate.[60] AT&T's argument also ignores record evidence showing that certain of the JUA's benefits *do* impose costs on DEF. For example, DEF's witness Kenneth Metcalfe presented uncontroverted evidence that the annualized net benefit per pole to AT&T for its [redacted] space allocation (after taking into account DEF's allocation of space on AT&T's poles) is $[redacted] per pole.[61] Mr. Metcalfe made clear that this benefit corresponded directly to an actual cost, stating that the

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[58] 2018 Order, 33 FCC Rcd at 7770-71, ¶ 128.

[59] AT&T's Application at 15-16. AT&T misquotes and mischaracterizes the Order. The language AT&T quotes relates to the Bureau's characterization of only one of the many benefits of the JUA—AT&T's [redacted] space allocation. The Bureau found that while that reserved space allocation is a material benefit of the JUA, it "is of limited value" (as opposed to "little value") because DEF did not, in the Bureau's view, provide statistically reliable evidence that AT&T actually occupies the entire space allocation. *See* Order at ¶ 44.

[60] As set forth in DEF's Petition for Reconsideration, it was not DEF's burden of proof to quantify the value of the JUA's benefits to AT&T for the time period governed by the 2011 Order; instead, under the 2011 Order, AT&T bears the burden of proof for that period. AT&T has not even attempted to present such valuation evidence—much less succeeded in meeting its burden.

[61] *See* DEF's Answer at Exh. E, DEF000219-20 (Metcalfe Decl. ¶ 37); *see also* DEF's Supplemental Production at DEF001412 (Metcalfe Decl. Exh. E-4B).

annualized net benefit per pole was "[e]qual to AT&T's **cost** less Duke Energy Florida's **cost**."[62] Mr. Metcalfe also valued the annualized net benefit to AT&T of avoiding permitting and inspection costs at $[redacted] per pole.[63] AT&T avoids these permitting and inspection costs because DEF **absorbs** them.[64]

DEF also presented witness testimony showing that the JUA caused DEF to build a network of poles taller and stronger than necessary for its own use in order to accommodate AT&T:

> [B]ecause of the Joint Use Agreement, DEF constructed its pole infrastructure to be of sufficient height and strength to accommodate AT&T's facilities.
> ...
>
> For example, the Joint Use Agreement contemplates a 40-foot joint use pole to accommodate electric and telephone facilities, plus the required separation space. If DEF had constructed its network in the absence of the Joint Use Agreement, DEF would have built a network only to suit its own service needs; thus, the pole network would have been built with shorter poles. Given that AT&T's allocated space is [redacted] and the typical separation space is 40" (3.33 feet), and given that wood poles come in 5 foot increments, this mean DEF, because of the Joint Use Agreement, was on average installing poles that were 5-10 feet taller than necessary to provide electric service.[65]

DEF's installation of taller, stronger (and more expensive) poles in its overlapping service territory with AT&T imposed an enormous cost on DEF.[66] The foregoing demonstrates that, even in AT&T's

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[62] DEF's Supplemental Production at DEF001412 (Metcalfe Decl. Exh. E-4B).

[63] DEF's Answer at Exh. E, DEF000214-15, DEF000240 (Metcalfe Decl. ¶¶ 25-27, Exh. E-3.2).

[64] *See id.* at Exh. A, DEF000135-36, DEF000137-38 (Freeburn Decl. ¶¶ 18, 24).

[65] DEF's Answer at Exh. A, DEF 000131-32 (Freeburn Decl. ¶¶ 10-11); *see also id.* at Exh. B, DEF000153 (Decl. of David Hatcher, Oct. 29, 2020, ¶ 7) ("Though DEF's pole utilization needs have increased over time, DEF has always needed to set a pole 5-10 feet taller than necessary for electric service in order to provide AT&T's reserved space ([redacted]) and the safety space (3.33 feet)."); *id.* at Exh. C, DEF000164-66, DEF000168 (Burlison Decl. ¶¶ 11-16, Exh. C-1).

[66] Through its rate formulas, the Commission has always acknowledged that pole space has a measurable cost. *See* 47 C.F.R. § 1.1406(d)(1)-(2). Furthermore, previous decisions have recognized that the installation of taller, stronger poles pursuant to a joint use agreement imposes a cost on electric utilities. *See, e.g.*, *Verizon Florida Decision*, 30 FCC Rcd at 1148, ¶ 21; *id.* at 1150, ¶ 24. The Commission has also recognized that, in the absence of the JUA with AT&T, it would have been irrational for DEF to install taller, stronger poles solely in anticipation of potential third-party attachers. *See* 2011 Order, 26 FCC Rcd at 5302, ¶ 144 n.433 ("[I]t would typically not

make-believe legal framework, it would be inappropriate for AT&T to pay a penny less than the Old Telecom Rate for its use of DEF's poles during the rental periods governed by the 2018 Order.[67]

III. THE BUREAU PROPERLY ADOPTED DEF's [redacted] AVERAGE NUMBER OF ATTACHING ENTITIES INPUT.

AT&T argues that the Bureau "improperly adopts and applies a unique [redacted] attaching entities input for Duke Florida to use to calculate the rates it charges AT&T—different from the presumptive 5 attaching entities input that applies when calculating rates for AT&T's competitors to rent space on the same poles."[68] Notably, AT&T does not challenge the Bureau's finding regarding the validity of the underlying data, nor did AT&T present any data to dispute DEF's average number of attaching entities ("AAE") calculation. Instead, the gist of AT&T's argument is that, if DEF uses the Commission's presumptive AAE input to calculate the New Telecom Rate it charges to other attaching entities, DEF cannot use a different AAE input to calculate the rate it charges AT&T.

AT&T's argument ignores the fact that the New Telecom Rate formula, by design, sterilizes the AAE input. This is accomplished through the New Telecom Rate's "cost allocator" function, which is the only distinguishing factor between the New Telecom Rate and Old Telecom Rate formulas. The "cost allocator" in the New Telecom Rate, in essence, negates the component of the Old Telecom Rate that allocates 2/3 of the unusable space equally among the attaching entities on a pole. Therefore, the AAE input is only relevant within the context of the Old Telecom Rate. Stated otherwise, if the AAE still mattered for purposes of calculating the New Telecom

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be economically rational for utilities to build taller poles solely for the possibility of accommodating attachers and there incur unreimbursed capital costs....").

[67] Even though it is AT&T's burden to bear, DEF's valuation of the JUA's benefits more than justifies the "rate" AT&T was required to pay under the JUA for the rental periods governed by the 2011 Order.

[68] AT&T's Application at 17.

Rate, DEF would most certainly use the actual AAE rather than a presumptive value. Against this backdrop, AT&T's argument is "tilting at a windmill."

The rest of AT&T's argument on this point is incoherent. But to the extent AT&T is arguing that DEF should have developed a system-wide—rather than an AT&T-specific—AAE, AT&T is arguing against its own self-interest. As AT&T could discern from analyzing DEF's system-wide inventory data, the actual system wide AAE (including DEF) on all distribution poles is [redacted].[69] An AAE of [redacted] would increase AT&T's rate under the Old Telecom Rate formula by more than $[redacted]/pole (based on DEF's current pole cost data). Even if this analysis includes only DEF poles with at least one foreign (i.e., non-DEF) attachment, the system-wide AAE would still be lower ([redacted]) than DEF's AT&T-specific [redacted] figure. If either the [redacted] or [redacted] figure is more palatable to AT&T than the [redacted] figure, DEF is willing to use it.

In any event, the Commission has long held that "an attacher is only responsible to pay its Telecom Formula share of the costs of unusable space for the poles to which it is actually attached."[70] For this reason, an AAE based solely on the poles occupied by a specific attacher is the most consistent with Commission precedent. That is exactly the way the [redacted] AAE at issue here was calculated—using only those poles occupied by AT&T.

IV. THE BUREAU PROPERLY AND UNAMBIGUOUSLY DIRECTED THE PARTIES TO NEGOTIATE A "NEW RECIPROCAL JOINT USE AGREEMENT."

In the Order, the Bureau directs AT&T and DEF to "negotiate a new reciprocal joint use agreement."[71] Claiming that the Order is ambiguous and that the Bureau lacks authority to "order

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[69] *See* DEF's Supplemental Interrogatory Responses at Exh. 3, DEF0001392 (2017 VentureSum Inventory Data).

[70] *Teleport Comms. Atlanta, Inc. v. Ga. Power Co.*, Order on Review, File No. PA 00-005, 17 FCC Rcd 19859, 19869 at ¶ 25 (Oct. 9, 2002) (citing 47 U.S.C. § 224(e)(2)).

[71] Order at ¶ 65(b). In particular, the Order directs the parties to "negotiate a new reciprocal joint use agreement…**that reflects proportional reciprocal rates for Duke's attachments to**

a wholesale revision of the JUA," AT&T argues that the Commission should clarify that the parties "*only* need to amend the JUA to include the new lawful rate provision—and do *not* need to negotiate a whole new joint use agreement."[72] AT&T's arguments are a smoke screen for its real objective—to reap a massive rate reduction while retaining the enormous competitive benefits of the JUA.

As explained in Section II *supra*, the material benefits AT&T enjoys under the JUA are not free. They impose real, quantifiable costs on DEF. If DEF can recover no more than the Old Telecom Rate for AT&T's attachments, then DEF quite literally cannot afford to provide AT&T with the full range of benefits that AT&T currently enjoys under the JUA—in other words, without the JUA rate, DEF cannot prudently continue accepting all of the costs and risks of the JUA. This is especially true given the significant imbalance in pole ownership.[73] The Commission adopted the Old Telecom Rate as a "reference point" (and later as a "hard cap") because it "help[ed] account for particular arrangements that provide net advantages to [ILECs] relative to cable operators or telecommunications carriers."[74] It had nothing to do with cost recovery, and the Commission has

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AT&T's poles under the JUA." *See id.* (emphasis added). However, the Commission does not have jurisdiction over the "rate" DEF pays for its attachments on AT&T's poles. As explained in DEF's Petition for Reconsideration, the Florida Public Service Commission ("FPSC") is on the verge of reverse preempting the Commission's jurisdiction over pole attachments by no later than January 1, 2022. *See* DEF's Petition for Reconsideration at 24-25; *see also* Fla. Stat. § 366.04(8)(g). Unlike the Commission, the FPSC *will* have jurisdiction over the "rate" DEF pays. *See* Fla. Stat. § 366.04(8)(A) (providing FPSC with jurisdiction over rates of "pole attachments"); Fla. Stat. § 366.02(7) (defining "pole attachments" to include attachments by electric utilities and ILECs). Given the imminence of reverse preemption by the FPSC, and given that the FPSC's authority will govern the "rates" paid by each party to this dispute, as well as the terms and conditions of access applicable to each party, the Commission should vacate the Bureau's Order and allow the FPSC to resolve this dispute.

[72] AT&T's Application at 19 (italics in original).

[73] As explained in DEF's Answer, as disparity in pole ownership increases within a JUA, the rate provision in the JUA becomes more important because the costs and risks of pole ownership shift correspondingly. *See* DEF's Answer at ¶ 14.

[74] 2011 Order, 26 FCC Rcd at 5337, ¶ 218; *see also* 2018 Order, 33 FCC Rcd at 7771, ¶ 129 n.483.

never found that the Old Telecom Rate fully reimburses electric utilities for the actual costs they incur in providing ILECs with competitive advantages under joint use agreements. This is why the Commission decided to "leave it to the parties to negotiate the appropriate rate **or tradeoffs to account for such additional benefits**."[75] Because the "rate" DEF can charge for AT&T's attachments is no longer on the table, it was entirely appropriate for the Bureau to direct the parties to negotiate "tradeoffs" to account for AT&T's newly reduced rate. To put it bluntly, if the most DEF can charge AT&T is something in the $[redacted]/pole range, then some of the "goodies" in the JUA (which were premised upon a current rate in the $[redacted]/pole range) must come out.

AT&T's opposition to negotiating a new reciprocal joint use agreement also undercuts the main thrust of AT&T's complaint—i.e., that the JUA does not provide AT&T with competitive advantages over other attaching entities. AT&T has maintained throughout these proceedings that it derives no value or advantages from the JUA (e.g., [redacted] space allocation, avoidance of permitting and inspection costs, right to remain attached following termination, right to lowest position on DEF's poles, etc.).[76] AT&T has also maintained that certain provisions within the JUA are unlawful and unenforceable (e.g., [redacted] space allocation).[77] Despite ascribing no value to these provisions, AT&T is now seeking to retain them all. AT&T cannot have it both ways. The "rate" under the JUA is inextricably intertwined with benefits AT&T is afforded thereunder. Therefore, as the Bureau's Order recognizes, the parties must be permitted to negotiate "tradeoffs" to accommodate AT&T's newly reduced rate. Moreover, granting the "clarification" sought by AT&T would plunge this dispute into further discord, either before a Florida state court or the Florida Public Service Commission, rather than facilitating the ultimate resolution of this dispute.

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[75] 2018 Order, 33 FCC Rcd at 7771, ¶ 128 (emphasis added).
[76] *See, e.g.,* AT&T's Application at 8-14.
[77] *See id.* at 10-11.

CONCLUSION

For the reasons set forth above, the reasons set forth in the Bureau's Order, as well as the reasons previously stated in DEF's answer, declarations, documentary evidence and briefing, the Commission should deny AT&T's application for review.

Dated: October 12, 2021

Respectfully submitted,

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RULE 1.721(m) VERIFICATION

I, Eric B. Langley, as signatory to this submission, hereby verify that I have read DEF's Opposition to AT&T Florida's Application for Review and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

/s/ Eric B. Langley
Eric B. Langley

CERTIFICATE OF SERVICE

I hereby certify that on this day, October 12, 2021, a true and correct copy of Duke Energy Florida, LLC's Opposition to AT&T Florida's Application for Review was filed with the Commission via ECFS and was served on the following (service method indicated):

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