PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

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

REPLY IN FURTHER SUPPORT OF THE APPLICATION FOR REVIEW FILED BY BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA

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I. Introduction and Summary

Duke's arguments confirm that the Commission should review and revise the *Bureau Order*[1] so that it furthers its decade-long work to ensure competitive neutrality, reduce infrastructure costs, and promote broadband deployment. According to Duke, the *Bureau Order* sets pole attachment rates for AT&T "in the $[redacted]/pole range" when AT&T's competitors pay Duke a "just, reasonable, and fully compensatory"[2] new telecom rate of about $[redacted].[3] Duke says it may collect this extraordinary annual premium from AT&T regardless of whether Duke incurred a single additional cost to justify it.[4] And Duke misreads the *Bureau Order* to allow it to offset reductions to its unjust and unreasonable joint use agreement ("JUA") rates through increases to AT&T's operational costs.[5] In other words, Duke reads the *Bureau Order* to effectively do nothing about the "higher rates [that] inhibit broadband deployment" and frustrate competition.[6] The Commission should revise the *Bureau Order* so that it achieves its goals.

II. The Commission Should Eliminate the Rate Disparity Created by the *Bureau Order*.

Duke's arguments confirm the need for Commission review. *First*, Duke defends the *Bureau Order*'s reliance on immutable ILEC characteristics to rebut the presumption that ILECs are comparable to their competitors for purposes of pole attachment rates, arguing that the Commission found in 2018 that certain unchangeable ILEC characteristics (like access

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

[2] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 5299 (¶ 137) (2011) ("*Pole Attachment Order*").

[3] Opp'n to App. for Review at 22 (Oct. 12, 2021) ("Opp'n"); *Bureau Order* ¶ 12.

[4] Opp'n at 14-19.

[5] *Id.* at 20-22.

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

guaranteed by contract instead of statute) would rebut the presumption.[7] But the sentence Duke cites quotes *industry allegations* only.[8] The Commission did not accept the allegations, but referred them to complaint proceedings for consideration based on an evidentiary record.[9] By treating unproven and contested industry allegations as truth, the *Bureau Order* reduces the Commission's presumption to a nullity that can be rebutted *in every case* simply because an ILEC is an ILEC.

Second, Duke embraces the *Bureau Order*'s incomplete view of competitive neutrality, which compares only contract language and ignores relevant statutory and regulatory rights and responsibilities. Duke does not deny statutory and regulatory differences exist between AT&T and its competitors—or that they may competitively disadvantage AT&T. Instead, Duke argues that an incomplete analysis is justified by a background sentence in the Commission's *2018 Order* stating 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."[10] But the Commission's *regulation* contains no such limitation; it does *not* refer to, let alone limit the comparative analysis to, contractual terms in CLEC and cable television license agreements. For good reason: reviewing only a subset of market conditions cannot ensure the competitive neutrality the Commission's deployment and competition goals require.

Third, Duke fails to address head-on the *Bureau Order*'s failure to hold Duke to its burden to justify charging AT&T more than its competitors with evidence of net material

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[7] Duke also takes issue with a footnote in AT&T's Application for Review, which noted that the new telecom rate presumption should have applied to the entire proceeding. *See* Opp'n at 1-3. Duke's argument, while wrong, is academic because its rates are unjust and unreasonable under the new telecom rate presumption *and* the standard that preceded it. *See Bureau Order* ¶ 14.

[8] Opp'n at 3-4 (citing the *2018 Order*'s quoted allegations from Comcast and electric utilities).

[9] *See 2018 Order*, 33 FCC Rcd at 7771 (¶ 128); *see also* 47 C.F.R. § 1.1413(b).

[10] Opp'n at 4-5 & n.14 (quoting *2018 Order*, 33 FCC Rcd at 7768 (¶ 124)).

competitive advantages.[11] Instead, Duke simply repeats prior arguments the *Bureau Order* correctly rejected. For example, Duke continues to press its claim that AT&T is materially advantaged because it would cost AT&T more (by Duke's flawed estimation, $[redacted] more per pole per year) to build a needlessly redundant pole network.[12] Duke relies on excess space allocated to AT&T, even though it has "limited value," if any, because AT&T does not use the space[13] and cannot reserve it for future use.[14] And Duke points to "avoided inspection and engineering costs" that the *Bureau Order* found do not exist, to permitting fees AT&T incurs by performing the work itself, and to the typical location of AT&T's facilities about one foot below AT&T's competitors' facilities—a fact that cannot impose any additional cost on Duke.[15] That the *Bureau Order* found the presumption rebutted even though Duke is unable to quantify a single cost it incurs because of the identified advantages shows why further review is needed: Duke failed to prove any net *material* competitive advantages as required.[16]

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[11] *See* 47 C.F.R. § 1.1413(b); *see also Bureau Order* ¶ 41 (describing Duke's burden to justify a rate higher than the new telecom rate under the 2011 *Pole Attachment Order*).

[12] *See* Opp'n at 8; *see also Bureau Order* ¶ 42 ("The Commission has never condoned valuing an alleged advantage by assuming … an [I]LEC would have built a duplicate pole network").

[13] *Bureau Order* ¶ 44. The Commission has repeatedly held that just and reasonable rates must be based on space *occupied*. Opp'n to Pet'n for Recon. at 10-13 (Oct. 7, 2021) (citing cases).

[14] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16079 (¶ 1170) (1996) ("*Local Competition Order*"). Duke and the *Bureau Order* undercut the *Local Competition Order* and the Commission's deployment goals by restricting its space reservation prohibition to ILEC-owned poles. *See Bureau Order* ¶ 24 n.78; Opp'n at 10. But the *Local Competition Order* contains no such limitation. It broadly prohibits the reservation of "space for local exchange service" because "allowing space to go unused when a cable operator or [CLEC] could make use of it is directly contrary to the goals of Congress" and prohibited by Section 224(f)(1). *See* 11 FCC Rcd at 16078 (¶ 1168).

[15] Opp'n at 10-14. *But see Bureau Order* ¶¶ 32, 44.

[16] 47 C.F.R. § 1.1413(b); *Bureau Order* ¶ 41 (Duke's "attempts to calculate the monetary value of the advantages … [we]re speculative and unsupported by reliable evidence."); *see also Verizon Va. v. Va. Elec. and Power Co.*, 32 FCC Rcd 3750, 3759 (¶ 18) (EB 2017) (a pole owner may not recover "costs that [it] does not incur"); *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 182) (There is "no evidence [of] any category or type of costs that are caused by the attacher

Fourth, Duke's opposition confirms the need to again clarify the Commission's cost-causer approach to pole attachment rates, as Duke reads the *Bureau Order* to give Duke—the party with a 12-to-1 pole ownership advantage—a unilateral right to demand payment of the old telecom rate regardless of whether Duke has incurred any relevant costs that would justify it.[17] But the Commission requires cost-based rates to counteract such an exercise of bargaining power.[18] And so it adopted the old telecom rate as an *upper bound* on ILEC rates—not an automatically applied rate or even a presumptive rate—and expected electric utilities would charge rates that "account for" the value of any proven net material competitive advantages.[19] Duke's effort to jump straight to the old telecom rate irrespective of its costs would embed, instead of eliminate, the "artificial, non-cost-based differences" in pole attachment rates that "are bound to distort competition" and frustrate the Commission's deployment goals.[20]

Finally, Duke does not dispute that the *Bureau Order* fails to divide the unusable space on a pole equally "among *all* attaching entities" as required by 47 U.S.C. § 224(e) when it lets Duke use a unique average number of attaching entities input to calculate rates for AT&T ([redacted]) as compared to AT&T's competitors on the same poles (5).[21] Instead, Duke argues that it *should* be able to use a unique input to inflate the old telecom rate it calculates for AT&T because the Commission fixed the "loophole" in the new telecom rate formula that previously let Duke

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that are not recovered through the new telecom rate.").

[17] Opp'n at 15; *id.* at 17 ("[Duke] is under no legal burden to quantify the costs it incurs under the JUA."). Duke argues alternatively that it quantified relevant costs, *see* Opp'n at 17-19, but the *Bureau Order* correctly rejected each of its valuation attempts as "speculative and unsupported by reliable evidence," *Bureau Order* ¶ 41.

[18] *See Cost Allocator Order*, 30 FCC Rcd at 13744-45 (¶ 29).

[19] *See 2018 Order*, 33 FCC Rcd at 7770-71 (¶¶ 128-129); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

[20] *See AEP v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013).

[21] 47 U.S.C. § 224(e)(2) (emphasis added); *see also* App for Review at 17-18.

inflate rates for AT&T's competitors.[22] In other words, Duke wants to make up for lost revenue from AT&T's competitors by artificially increasing AT&T's rates. This confirms the Commission *should* correct the *Bureau Order* and require Duke to use the same competitively neutral presumptive input (5 attaching entities) to calculate rates for AT&T and for AT&T's competitors on the same poles.

III. The Commission Should Clarify that a New Joint Use Agreement Is Not Required.

The Commission does not have authority to order a wholesale revision of the JUA,[23] and does not have a reason to do so because this case determines the rate for *this JUA*.[24] Instead, the parties need only conform the JUA's rate provision to the Commission's order. Duke confirms that this must be expressly stated, as it announces an intention to exploit the *Bureau Order*'s ambiguity and its superior bargaining power to try to force AT&T to negotiate a new JUA with costlier operational terms to offset the required rate reductions.[25] The Commission should cut off this blatant attempt to evade the Commission's rate reforms. And, to preclude further delay and gamesmanship, the Commission should require a joint report in 30 days confirming Duke's compliance with its order and its payment of the refunds it unlawfully collected, with interest.

The Commission should revise and clarify the *Bureau Order* as requested in AT&T's Application for Review to further its competition and deployment goals.

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[22] Opp'n at 19-20 ("[I]f the AAE still mattered for purposes of calculating the New Telecom Rate, DEF would most certainly use the actual AAE rather than a presumptive value.").

[23] 47 C.F.R. § 1.1407(a)(2).

[24] *Verizon Md. LLC v. The Potomac Edison Co.*, 35 FCC Rcd 13607, 13618 (¶ 28) (2020) (There is "no requirement" to terminate a JUA and enter a new one to obtain just and reasonable rates).

[25] Opp'n at 22 ("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.").

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2021, I caused a copy of the foregoing Reply in Further Support of the Application for Review Filed by BellSouth Telecommunications, LLC d/b/a AT&T Florida to be served on the following (service method indicated):

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