Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

BELLSOUTH TELECOMMUNICATIONS, LLC, d/b/a AT&T Florida,	)	
Complainant,	)	Proceeding No. 19-187 Bureau ID No. EB-19-MD-006
v.	)	Proceeding No. 20-214 Bureau ID No. EB-20-MD-002
FLORIDA POWER & LIGHT COMPANY,	)	
Respondent.	)	

RESPONDENT FLORIDA POWER & LIGHT COMPANY'S OPPOSITION TO THE APPLICATION FOR REVIEW OF BELLSOUTH TELECOMMUNICATIONS, LLC, D/B/A AT&T FLORIDA

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I. INTRODUCTION AND SUMMARY

Bell South Telecommunications, LLC, d/b/a AT&T Florida ("AT&T") took several calculated risks with both the Commission and Florida Power & Light Company ("FPL) in this matter. First, AT&T willfully withheld all payment due to FPL on both the 2017 and 2018 Invoices until it filed its First Complaint at the FCC. As the Enforcement Bureau stated: AT&T knowingly took a risk that FPL might terminate its rights to attach pursuant to the plain language of the JUA. It is not the Commission's job to protect private litigants from risks they knowingly undertake.[1]

Second, AT&T failed to address squarely the justness and reasonableness of the Joint Use Agreement's ("JUA") Payment Default and Notice of Termination Provisions in its First Complaint. It did this despite the underlying facts and language of those provisions being inextricably linked to the issues in the First Complaint, despite FPL arguing the facts and language of those provisions in its Answer, despite FPL asserting those clauses as an affirmative defense, and despite AT&T having told a federal court in Florida for several years that it could not decide a contract dispute involving those provisions because the underlying issues were before the FCC and the FCC must decide them first.

Indeed, as recently as October 12, 2021, AT&T told the United States District Court in Florida that the Commission must decide the issues in the First Complaint before the Court can decide the parties' contract dispute: More specifically, AT&T stated:

> The FCC has special competence with respect to this dispute and should complete its work before this Court devotes further resources to issues that could be render[ed] meaningless by the FCC's decision. . . . and the stay cannot prejudice FPL because FPL's

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[1] *BellSouth Telecomms., LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, Memorandum Opinion and Order, DA 21-1002, 2021 FCC LEXIS 3069, at *20, ¶ 23 (Aug. 16, 2021) ("*Terms and Conditions Order*").

> claims depend on the lawfulness of pole attachment rental invoices that the FCC found are unlawful.[2]

Thus, AT&T has simultaneously been telling the Commission that the contract terms were not implicated by the First Complaint while telling a federal judge that she cannot decide those issues because they are inextricably linked to the First Complaint.

Third, AT&T purposely chose not to present any evidence in its Reply to FPL's Answer to the First Complaint to overcome FPL's data and statistically reliable survey as to the calculation of the Old Telecom Rate formula. FPL's submissions and expert testimony stood uncontradicted.

The Commission should decide this matter informed by AT&T's calculated gambles. The Enforcement Bureau's four underlying orders[3] should be upheld. The Orders are based on substantial evidence, reflect rational decision-making, and are neither arbitrary nor capricious. Taken together, the Orders properly reached the following conclusions:

- The framework of the *2011 Pole Attachment Order* and not the *2018 Third Report and Order* applied to the parties' JUA because it was not a "new or newly renewed" agreement.
- The JUA provides AT&T at least six net material competitive advantages that put AT&T at a comparative advantage to a CLEC or cable attacher with a standard pole attachment license.

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[2] *See* Updated Court Pleadings, Proceeding No. 19-187, Ex. 2 (AT&T's Opposition to FPL's Motion to Strike) at ATT01610 (Oct. 25, 2021) (internal citations and quotations omitted).

[3] *BellSouth Telecomms., LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, Memorandum Opinion and Order, 35 FCC Rcd. 5321 (May 20, 2020) ("*May 2020 Order*"); *BellSouth Telecomms., LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, Memorandum Opinion and Order, 36 FCC Rcd. 253 (Jan. 14, 2021) ("*Jan. 2021 Order*"); *BellSouth Telecomms., LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, Memorandum Opinion and Order, DA-21-1004, 2021 FCC LEXIS 3086 (Aug. 16, 2021) ("*Aug. 2021 Rate Order*"); *Terms and Conditions Order*, 2021 FCC LEXIS 3069.

- AT&T failed to carry its burden under the *2011 Pole Attachment Order* to show that it was entitled to a rate lower than the Old Telecom Rate.
- FPL's clear and unopposed evidence and statistically reliable survey established the proper Old Telecom formula inputs for space occupied, average number of attachers, and rate of return.
- Count I of AT&T's Second Complaint must be dismissed with prejudice, both for violating the Commission's procedural rules–which AT&T's Application ignores–and the doctrine against claim-splitting. As the Bureau highlighted: "AT&T here has done everything the doctrine against claim splitting prohibits, [and] . . . it did so with unabashed opportunism, filing a split-claim follow-on suit soon after reading a footnote in the [Bureau] Order and while Complaint I remains pending."[4]

The Commission should affirm the Enforcement Bureau's Orders on both complaints.

II. ARGUMENT

A. The Enforcement Bureau Properly Decided the Rate Orders

The Enforcement Bureau properly decided the three rate orders. Each decision was supported by substantial evidence, rationally decided and not arbitrary or capricious.[5] The Commission should affirm them in their entirety.

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[4] *Terms and Conditions Order*, 2021 FCC LEXIS 3069, ¶ 23, n. 50 (citing Brief in Support of Answer of Fla. Power & Light Co., Proceeding No. 20-214, Bureau ID No. EB-EB-20-MD-002 (filed Oct. 21, 2020) at 1, 13–21).

[5] While the Commission's rules do not set forth an express standard of review in considering an application of review of an Enforcement Bureau decision promulgated pursuant to its delegated authority, the Commission has applied an arbitrary and capricious, rational basis, and substantial evidence standard in assessing an application for review of a bureau decision in a pole attachment proceeding. *See Ala. Cable Telecomms. Assoc. v. Ala. Power Co.*, 16 FCC Rcd. 12209, 12237–41, ¶¶ 62–70 (2001) (finding that the Cable Services Bureau's use of historical cost methodology in its decision was not arbitrary capricious because it "had a rational basis, amply supported by record evidence").

1. The *2018 Third Report and Order*'s Presumption is Not Applicable to AT&T's First Complaint

The Enforcement Bureau correctly determined that the *2018 Third Report and Order's* presumption that an ILEC is entitled to the new telecom rate did not apply to AT&T's claims under the JUA for 2014–2018. The evidence and Commission precedent support this conclusion.[6]

In announcing the Commission's new presumption, the *2018 Third Report and Order* expressly stated the "presumption will only apply, as it relates to existing contracts, upon renewal of those agreements."[7] The Commission explained: "A new or newly-renewed pole attachment agreement is one entered into, renewed, or in evergreen status after the effective date of this Order [March 11, 2019], and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status."[8]

The JUA clearly is not a "new or newly-renewed pole attachment agreement" as defined by the *2018 Third Report and Order*. The parties did not renew, extend or place the JUA into evergreen status after March 11, 2019. Rather, as the May 2020 Order correctly noted, FPL's March 25, 2019 Notice of Termination "purport[ed] to terminate" the JUA 14 days after the *2018 Third Report and Order* went into effect.[9] AT&T offers no evidence to the contrary.[10]

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[6] *See, e.g., August 2021 Rate Order*, 2021 FCC LEXIS 3086, at *2–3, ¶ 2.

[7] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd. 7705, 7770, ¶ 127 (2018) ("*2018 Third Report and Order*").

[8] *2018 Third Report and Order*, 33 FCC Rcd. at 7770, ¶ 127, n.475.

[9] *BellSouth Telecomms., LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, Memorandum Opinion and Order, 35 FCC Rcd. 5321, 5326, ¶ 10, n.32 (2020) ("*May 2020 Order*").

[10] AT&T incorrectly asserts that "FPL placed the JUA in 'evergreen status' after the presumption took effect." Appl. for Review at 4 (citing *Complaint I*, Ex. 23 (Notice of Termination) at ATT00250). To support this assertion, AT&T selectively quotes to the March 25, 2019 Notice of Termination as though FPL only terminated AT&T's rights related to the further granting of joint use poles. In actuality, in the March 25, 2019 Notice of Termination, FPL "invoke[d] its rights pursuant to Section 12.3 of the [JUA] to terminate AT&T's rights to attach to FPL-owned poles" and demanded that "all of AT&T's attachments must be removed from FPL-owned poles." Pole

AT&T relies on the Commission's decision in *Verizon Md. LLC v. The Potomac Edison Co.*[11] to argue that the JUA was newly-renewed after the effective date of the *2018 Third Report and Order*.[12] However, AT&T ignores the *Potomac Edison Order*'s finding that the agreement was newly-renewed because neither party terminated the agreement after the prior term ended and the language automatically renewed the agreement annually *unless terminated*.[13] Again, FPL terminated the JUA here two weeks after the effective date of the *2018 Third Report and Order*.[14]

Attachment Complaint, Proceeding No. 19-187 (filed July 1, 2019) ("*Complaint I*"), Ex. 23 (Notice of Termination) at ATT00250. Accordingly, the JUA is not in evergreen status, but is terminated as to AT&T.

[11] 35 FCC Rcd. 13607 (2020) ("*Potomac Edison Order*").

[12] Appl. for Review of BellSouth Telecomms., LLC d/b/a AT&T Fla. at 4 (Sept. 15, 2021) ("Appl. for Review").

[13] *Potomac Edison Order*, 35 FCC Rcd. at 13612–13, ¶ 15 ("Here, the nearly four-year initial term of the JUA expired on January 1, 1963, and the JUA continued indefinitely after that date under JUA Article XXI, which states that the JUA 'shall continue in force thereafter until terminated by either party . . . upon one year's notice.'").

[14] Furthermore, AT&T is attempting to apply the *2018 Third Report and Order* retroactively by challenging rates that preceded its effective date. "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Recognizing that retroactive application is disfavored—if not unconstitutional—the Commission fashioned the *2018 Third Report and Order* to explicitly state that the new pole attachment presumption should be applied only to "pole attachment contracts entered into or renewed after [March 11, 2019]." 47 C.F.R. § 1.1413(b). Moreover, the Bureau recently determined that "the remedies available under the [*2018 Third Report and Order*] do not apply retroactively and are only available after the effective date of th[e] order[]." *Potomac Edison Order*, 35 FCC Rcd. at 13628, ¶ 47. The rules adopted by the Commission in the *2018 Third Report and Order* cannot apply retroactively to a timeframe in which FPL had neither "actual notice of the rules [nor] guidance relating to them during the relevant timeframe." *Id.* at 13628, ¶ 47, n.166.

2. The Joint Use Agreement Provides AT&T Net Material Advantages

The Bureau applied the correct standard under the *2011 Order* in finding that the JUA provides AT&T advantages over competitive LEC ("CLEC") and cable ("CATV") attachers (*i.e.*, net material advantages). The Commission should adopt the Bureau's conclusion.

AT&T's argument that the May 2020 Order erred by not expressly using the words "net" and "material" and "competitive" and "advantage", in that order, overlooks the language employed in the May 2020 Order. For example, the Bureau, at the outset, found that "AT&T receives significant benefits under the JUA *not afforded competitive LECs and cable attachers*, and that it therefore is entitled to the Old Telecom Rate, and not the New Telecom Rate."[15] The Enforcement Bureau further "conclude[d] that the JUA provides AT&T advantages *over* competitive LEC and cable attachers."[16] Accordingly, the Bureau's May 2020 Order describes the advantages AT&T enjoys that are not accorded to CLEC and CATV attachers, also known as *net advantages*.

Additionally, the Bureau's express findings of net material benefits afforded to AT&T should be affirmed because they are supported by both the record and Commission precedent. The material benefits that the Bureau found AT&T receives compared to CLEC and CATV attachers are expressly enumerated in the *2018 Third Report and Order*:

> Such material benefits may include "[p]aying significantly lower make-ready costs; [n]o advance approval to make attachments; [n]o post-attachment inspection costs; [r]ights-of-way often obtained by electric company; [g]uaranteed space on the pole; [p]referential location on pole; [n]o relocation and rearrangement costs; and [n]umerous additional rights such as approving and denying pole access collecting attachment rents and input on where new poles are placed."[17]

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[15] *May 2020 Order*, 35 FCC Rcd. at 5328, ¶ 14 (emphasis added).

[16] *Id.* at 5329 ¶ 15 (emphasis added).

[17] *2018 Third Report and Order*, 33 FCC Rcd. at 7771, ¶ 128 (quoting *In the Matter of Implementation of Section 224 of the Act A National Broadband Plan for Our Future*, Report and

As a result, the Commission should disregard AT&T's contention that the identified advantages "are not categorized as material or competitive, and they are not *net* advantages, as the Commission requires."[18] As explained below, each of the Bureau's listed advantages is a *net material competitive advantage* for AT&T.

Guaranteed space on the pole – Consistent with its prior decisions, the Bureau correctly found that AT&T receives a net material advantage because the "JUA reserves four feet of space on FPL's poles to AT&T."[19] AT&T, however, argues in its Application for Review that statutory access to FPL's poles granted to AT&T's competitors is broader and permanently guaranteed. To the contrary, statutory access to FPL's poles is limited because FPL can deny access to cable companies and CLECs "where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes."[20] These limitations are not contained in the JUA.

Additionally, AT&T argues that it no longer has guaranteed access to FPL's poles because FPL terminated AT&T's access/right. AT&T, however, ignores the fact that the pertinent period

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Order and Order on Reconsideration, 26 FCC Rcd. 5240, 5335, n.654 (Apr. 7, 2011) ("*2011 Pole Attachment Order*")).

[18] Appl. for Review at 5.

[19] *May 2020 Rate Order*, 35 FCC Rcd. at 5328, ¶ 14 (citing *Complaint I*, Ex. 1 (JUA) at ATT00112, Article I § 1.1.7(B)); *see also BellSouth Telecomms., LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina v. Duke Energy Progress, LLC*, Memorandum Opinion and Order, DA 21-1174, 2021 FCC LEXIS 3566, at *24–28, ¶¶ 17–19 (2021) ("*Duke Energy Progress Order*"); *BellSouth Telecoms., LLC d/b/a AT&T Florida v. Duke Energy Fla., LLC*, Memorandum Opinion and Order, DA 21-1008, 2021 FCC LEXIS 3240, at *32–43, ¶¶ 23–25 (2021) ("*Duke Energy Fla. Order*"); *Potomac Edison Order*, 35 FCC Rcd. at 13615, ¶ 20 (finding that Verizon received the material advantage of guaranteed access to Potomac Edison's poles under their joint use agreement).

[20] 47 C.F.R. § 1.1403(a); *see also Potomac Edison Order*, 35 FCC Rcd. at 13615, ¶ 20 (finding that Verizon's competitors are not materially advantaged because they can be denied access to Potomac Edison's poles under 47 C.F.R. § 1.1403(a)).

for calculation of the Old Telecom Rate for purposes of AT&T's refund is July 1, 2014 to December 31, 2018, *prior to termination*.

Four feet of reserved space – The Commission should affirm the Bureau's determination that AT&T's four feet of reserved space under the JUA provides AT&T a net material advantage over CLEC and CATV attachers.[21] AT&T's argument that reservation of space on FPL's poles cannot materially or competitively advantage AT&T is supported by neither the record nor Commission precedent. AT&T first argues that the reservation of excess space is "unlawful, unenforceable, and unobserved."[22] AT&T, however, mistakenly relies on the 1996 *Local Competition Order* to support its contention. The provision of the 1996 *Local Competition Order* AT&T cites applies to pole owners reserving space on their own poles for their own telecommunications needs.[23] It does not prohibit reservation of space for AT&T.

While AT&T correctly notes that other attachers may use the space reserved for AT&T, it fails to mention that if AT&T needs the excess space and it is occupied, FPL must expand capacity *at no cost to AT&T under the JUA*.[24] Therefore, AT&T always has four feet of reserved space, even if it is temporarily occupied by another attacher. Such a benefit is not afforded to AT&T's CLEC or CATV competitors.[25] It is telling that prior to challenging the rates in the First

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[21] *May 2020 Order*, 35 FCC Rcd. at 5328, ¶ 14 (citing *Complaint I*, Ex. 1 (JUA) at ATT00112, Art. I § 1.1.7(B)).

[22] Appl. for Review at 7 (citing *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 16079, ¶ 1170 (1996) ("*1996 Local Competition Order*").

[23] *1996 Local Competition Order*, 11 FCC Rcd. at 16079, ¶ 1170 ("Allowing the pole or conduit owner to favor itself or its affiliate with respect to the provision of telecommunications or video services would nullify, to a great extent, the nondiscrimination that Congress required.").

[24] FPL Answer, Proceeding No. 19-187 (filed Sept. 16, 2019) ("*Answer I*"), Ex. A (Kennedy Decl.) at FPL00007, ¶ 11; *Complaint I*, Ex. 1 (JUA) at ATT00127, § 14.5.

[25] *Duke Energy Fla. Order*, 2021 FCC LEXIS 3240, at *41, ¶ 26 ("Even if we accept AT&T's contention that it currently uses only one foot, the ability to add more attachments up to three feet

Complaint, there is no record evidence that AT&T did not want the benefit of the reserved space, complained about the reserved space, or sought an amendment to the JUA to reduce the amount of reserved space.

No advance approval to make attachments – The May 2020 Order correctly determined that AT&T receives a net material advantage relative to CLEC and CATV attachers because "AT&T is not required to obtain advance approval through FPL's permitting process before attaching to FPL poles; competitors undergo an expensive and time-consuming permitting process."[26] AT&T, however, argues that it is subject to excessive delays with limited remedies in making attachments, while its competitors are statutorily guaranteed timely access to FPL's poles.[27] This argument ignores the time and money AT&T saves as compared to CLEC and CATV attachers. Because AT&T makes approximately 3,000 new attachments annually, AT&T saves considerable time and expense under the JUA.[28] On the other hand, AT&T's competitors must perform and complete numerous time-consuming tasks to finalize a permit application to attach to FPL's poles and also must pay an application fee to FPL that is not required by AT&T.

No post-attachment inspection requirement – The *May 2020 Order* correctly found that the JUA does not subject AT&T to a post-attachment inspection by FPL, unlike AT&T's competitors.[29] Additionally, AT&T is not required to do its own post-attachment inspection,[30] and

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(or more if it is available), without additional expense, is an advantage accorded AT&T but not its competitors.").

[26] *May 2020 Order*, 35 FCC Rcd. at 5328, ¶ 14 (citing *Complaint I*, Ex. 1 (JUA) at ATT00111, § 1.1.6, ATT00130, Ex. A).

[27] Appl. for Review at 9.

[28] *Answer I*, Ex. A (Kennedy Decl.) at FPL00010–11, ¶ 16; *see also id.* at FPL00006, ¶ 10.

[29] *May 2020 Order*, 35 FCC Rcd. at 5328, ¶ 14 (citing *Answer I*, Ex. A (Kennedy Decl.) at FPL00010, ¶¶ 15–16).

[30] *Answer I*, Ex. A (Kennedy Decl.) at FPL00010, ¶ 15.

AT&T presented evidence that it only conducts random inspections.[31] Therefore, AT&T avoids paying a post-attachment inspection fee.[32]

Preferential location on pole – The Enforcement Bureau did not err in concluding that AT&T's preferential pole location was a net material advantage when it found that "AT&T has the right to the lowest spot on the pole, so that its employees work in a safer area of the pole, can identify and access AT&T attachments more easily and use less expensive bucket trucks with shorter reach."[33] This determination is consistent with its prior decisions finding the lowest position on the pole provides a net material advantage for incumbent LECs not afforded to CLEC and CATV attachers.[34] The lowest position on the pole is a preferred space for attachers because it grants them easy and unencumbered access to the pole and no need to wait for other attachers to do make-ready work.[35]

Payment in arrears – The Bureau did not err in finding that AT&T received a net material benefit over CLEC and CATV attachers under the JUA's provision allowing AT&T to pay its joint

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[31] Reply, Proceeding No. 19-187, Ex. C (Peters Aff.) at ATT00970, ¶ 17.

[32] *See Potomac Edison Order*, 35 FCC Rcd. at 13616, ¶ 20 (finding that Verizon received a net material advantage over competitors because it did not have to pay any fees for post-attachment inspections).

[33] *May 2020 Order*, 35 FCC Rcd. at 5329, ¶ 14 (citing *Complaint I*, Ex. 1 (JUA) at ATT00112, Article I § 1.1.7; *Answer I*, Ex. A (Kennedy Decl.) at FPL00010, ¶ 13).

[34] *Duke Energy Fla. Order*, 2021 FCC LEXIS 3240, at *51, ¶ 31 (finding that the "significant competitive benefits to AT&T resulting from its lowest position on the pole outweigh the alleged disadvantages identified by AT&T"); *Duke Energy Progress Order*, 2021 FCC LEXIS 3566, at *49, ¶ 33 (finding that the "significant competitive benefits to AT&T resulting from its lowest position with respect to 'existing' attachments outweigh the alleged disadvantages identified by AT&T); *Verizon Fla. LLC v. Fla. Power and Light Co.*, Memorandum Opinion and Order, 30 FCC Rcd. 1140, 1148, ¶ 21 (2015) ("*Verizon v. FPL Order*").

[35] *See Duke Energy Fla. Order*, 2021 FCC LEXIS 3240, at *51, ¶ 31; *Duke Energy Progress Order*, 2021 FCC LEXIS 3566, at *49, ¶ 33.

use fees in arrears annually.[36] As the May 2020 Order correctly points out, "[i]f AT&T paid the same rate as its competitors, its rates would, in effect, be lower because of the time value of money."[37] Because AT&T pays in arrears on a yearly basis, AT&T has the benefit of holding onto substantial amounts of money for many months while other telecom providers pay their attachment fees in advance. This results in annual cumulative and per pole advantages to AT&T.[38]

3. FPL Does Not Have the Burden to Quantify the Value of the Net Material Competitive Advantages

FPL need not quantify the difference between the Old Telecom Rate and New Telecom Rate where the Commission determines that the incumbent LEC receives net material advantages as compared to CLEC and CATV attachers. Because the Bureau correctly determined that AT&T received net material advantages not afforded to CLEC and CATV attachers, the Commission has found it "reasonable to look to the [Old Telecom Rate] as a reference point."[39] The Bureau's decision in the May 2020 Order follows this guidance, and is consistent with numerous Commission decisions determining that the Old Telecom Rate shall apply "where the rate in a JUA is found to be unjust and unreasonable under the *2011 Order*, and the incumbent LEC has failed to show that it is similarly situated to cable or telecommunications attachers."[40]

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[36] *May 2020 Order*, 35 FCC Rcd. at 5329, ¶ 14.

[37] *Id.* at 5329, ¶ 14, n.61.

[38] *See* FPL Brief, Proceeding No. 19-187, at 54; *Answer I*, Ex. A (Kennedy Decl.) at FPL00008, ¶ 12.

[39] *2011 Pole Attachment Order*, 26 FCC Rcd. at 5337, ¶ 218.

[40] *Potomac Edison Order*, 35 FCC Rcd. at 13619, ¶ 30, n.91; *see also 2011 Pole Attachment Order*, 26 FCC Rcd. at 5336, ¶¶ 217–18; *Verizon v. FPL Order*, 30 FCC Rcd. at 1148, ¶ 21 ("[B]ecause Verizon has received, and continues to receive, unique benefits under the Agreement, we find that Verizon is not similarly situated to competitive LECs and therefore is not entitled to pay the New Telecom Rate.").

AT&T, however, asks the Commission to ignore its clear precedent and require FPL to justify "[a]ny upward variation from the new telecom rate . . . based on relevant costs."[41] AT&T's contention incorrectly assumes that it is entitled to the New Telecom Rate, regardless of whether the JUA "includes provisions that materially advantage [AT&T] *vis-a-vis* a telecommunications carrier or cable operator."[42] AT&T's self-assumed entitlement ignores repeated Commission findings that "because [an incumbent LEC] has received, and continues to receive, unique benefits under the Agreement, [an incumbent LEC] is not similarly situated to competitive LECs and therefore is not entitled to pay the New Telecom Rate."[43]

Moreover, AT&T mistakenly claims that the burden is on FPL to quantify the differences between the Old Telecom Rate and the New Telecom Rate. *First*, AT&T mistakenly relies on two prior Commission decisions to argue that "the *Rate Orders* should have placed the burden on FPL to 'justify "the rate . . . alleged in the complaint not to be just and reasonable."'"[44] The decisions AT&T cites, however, rely on and quote to a prior version of the Commission's procedural rules. Specifically, the decisions were rendered under a prior version of 47 C.F.R. § 1.1407(a) that pertained to responses and replies to pole attachment complaints and required "[t]he response to set forth the justification for the rate, term, or condition alleged in the complaint not to be just and reasonable."[45] This prior version of 47 C.F.R. § 1.1407, and the requirement contained therein,

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[41] Appl. for Review at 12.

[42] *2011 Pole Attachment Order*, 26 FCC Rcd. at 5336, ¶ 218.

[43] *Verizon v. FPL Order*, 30 FCC Rcd. at 1148, ¶ 21.

[44] Appl. for Review at 12 (quoting *Heritage Cablevision Assocs. v. Tex. Utils. Elec. Co.*, 6 FCC Rcd. 7099, 7105, ¶ 29 (1991)); *see also Verizon Va., LLC v. Va. Elec. and Power Co. d/b/a Dominion Va. Power*, 32 FCC Rcd. 3750, 3759, ¶ 20 (2017) ("*Verizon v. Dominion*").

[45] 47 C.F.R. § 1.1407(a) (1990); *see Verizon v. Dominion*, 32 FCC Rcd. at 3759, ¶ 20 (stating that 47 C.F.R. § 1.1407(a) (1990) "require[s] the respondent to 'set forth justification for the rate, term or condition alleged in the complaint not to be just and reasonable.'"); *Heritage Cablevision*

was removed by the Commission when it streamlined and consolidated the procedural rules governing formal complaints and pole attachment complaints.[46] The requirement that "[t]he response should set forth justification for the rate, term, or condition alleged in the complaint not to be just and reasonable" is no longer found in the Commission's rules. AT&T's argument that FPL justify and quantify the net material advantages is, therefore, unsupported.

Second, under the *2011 Pole Attachment Order*, AT&T bears the burden of demonstrating that the rate it pays is not justified by the monetary value of the competitive advantages it receives under the JUA. This is consistent with the Commission's decision in *Verizon Fla. LLC v. Fla. Power and Light Co.*, in which the Commission makes abundantly clear that the complainant has the burden to quantify the relative value of its advantages.[47] The Commission based its decision to dismiss Verizon's pole attachment complaint against FPL, in large part, on Verizon's failure to produce evidence quantifying the monetary value of the net material advantages:

> [W]e 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,

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Assocs. v. Tex. Utils. Elec. Co., 6 FCC Rcd. at 7105, ¶ 29, n.41 (quoting the 1990 version of 47 C.F.R. § 1.1407(a)).

[46] *See Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Report and Order, 33 FCC Rcd. 7178, 7209–11, app. (2018) (removing prior version of Section 1.1407 from the Commission's Procedural Rules and redesignating prior version of Section 1.1410 as Section 1.1407).

[47] 30 FCC Rcd. 1140, 1149, ¶ 23 (2015) (finding that "Verizon has not demonstrated that it should be required to pay no more than the Old Telecom Rate").

> 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.[48]

In sum, the Commission should disregard AT&T's request that the Commission ignore its clear precedent and require FPL to quantify the benefits AT&T receives.

4. The Bureau Properly Determined the Old Telecom Rate Inputs

The Enforcement Bureau did not err in determining that FPL rebutted the space factor and number of attachers presumptions with "probative direct evidence."[49] As the January 2021 Order correctly notes, the Commission has established rebuttable presumptions related to the average number of attachers and space occupied.[50] Specifically, the January 2021 Order points to Commission precedent providing that the presumptions may be rebutted by "probative direct evidence."[51] The Bureau correctly notes, however, that "[w]here the number of poles is too large, and/or complete inspection impractical, [the Commission] found that a statistically sound survey could be substituted."[52] "We expect that in virtually all circumstances a utility will submit either its actual number of poles or a statistically valid study which provides an acceptable pole count."[53]

The Enforcement Bureau's reliance on FPL's survey to rebut the presumption of average number of attachers and space occupied was justified. AT&T offered no evidence responding to

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[48] *Verizon v. FPL Order*, 30 FCC Rcd. at 1149–50, ¶ 24 (emphasis added).

[49] *Jan. 2021 Order*, 36 FCC Rcd. at 259–60, ¶ 18–21.

[50] *Id.* at 259, ¶ 17.

[51] *Id.* at 259, ¶ 18.

[52] *Id.* at 259, ¶ 17 (quoting *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, 12135, ¶ 63 (2001)).

[53] *Cap. Cities Cable, Inc. v. Mountain States Tel. & Tel. Co.*, 1984 FCC LEXIS 2443, at *32, ¶ 30, n.22 (1984).

or contradicting FPL's expert testimony regarding the "statistically sound survey."[54] The Bureau recently relied on a similar statistically sound survey to determine various inputs in calculating the old telecom rate.[55]

Moreover, the Bureau did not err in finding that FPL's 2019 survey was a statistically sound survey because it was random.[56] The Commission has held that "[a] basic tenet of statistical sampling is that the sample should be randomly selected to ensure confidence that the sample is reliably representative of the population measured."[57] In further support of its reliance on the survey, the Bureau notes that "AT&T has approved all of the survey results at issue."[58]

In addition, the Bureau relied on clear Commission precedent to adopt the default rate of return element of the carrying charge rate. The Commission has determined that the applicable

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[54] *Jan. 2021 Order*, 36 FCC Rcd. at 260, ¶ 20.

[55] *Compare Potomac Edison Order*, 35 FCC Rcd. at 13622–23, ¶ 35 (concluding that Potomac Edison's survey was "direct probative evidence regarding the inputs into the Old Telecom Rate formula"), *with Duke Energy Fla. Order*, 2021 FCC LEXIS 3240, at *87, ¶ 50 (finding that Duke's make-ready survey was not a "statistically sound survey" because it did not represent a random sample of Duke poles with AT&T attachments), *and Duke Energy Progress Order*, 2021 FCC LEXIS 3566, at *87–88, ¶ 51 (finding that "the survey Duke relies on here does not provide a representative, random sample of Duke poles with AT&T attachments distributed throughout the Duke territory with AT&T attachments").

[56] *Answer I*, Ex. F (Davis Decl.) at FPL00264–65, ¶ 9 (explaining the method for randomly selecting the survey poles); *see also Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices*, 18 FCC Rcd 13284, 13288, ¶ 10 (2003) ("Statistical sampling is a way of estimating the unknown characteristics of an entire population by examining a random sample that is representative of the population."); *Application of Bellsouth Corporation, Bellsouth Telecommunications, Inc., and Bellsouth Long Distance, Inc., For Provision of In-Region, Interlata Services In Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20625–26, ¶ 35 (1998) (concluding that a study was "fundamentally flawed and that it cannot be relied upon" because "the sample group was not randomly selected").

[57] *Duke Energy Fla. Order*, 2021 FCC LEXIS 3240, at *87, ¶ 50 (citations omitted).

[58] *Jan. 2021 Order*, 36 FCC Rcd. at 259, ¶ 18 (citing *Answer I*, Ex. E (Murphy Decl.) at FPL00167, ¶ 5).

rate of return for calculating the carrying charge rate shall be "the rate of return authorized by the state for intrastate services of the utility, *when available*."[59] The Commission, however, will use the annual rate of return for the interstate access services of LECs "in those instances when a state has not prescribed a rate of return for a utility covering the period of time in which rates were in dispute."[60] As the Bureau correctly found in its January 2021 Order, Florida has not established a rate of return for FPL.[61] The proper rate was therefore the default rate.

B. The Bureau Correctly Held that AT&T Waived its Section 224 Argument with Respect to the JUA Payment Default Clause and FPL's Termination Notice

1. Background Relevant to AT&T's Two Complaints Regarding the JUA

On March 5, 2018, FPL delivered its invoice in arrears to AT&T that exceeded $9.2 million for the 2017 pole rental year, which ended December 31, 2017.[62] In August 2018, FPL notified AT&T it was in default under the JUA for its failure to make any payment for the 2017 pole rental year.[63] On March 25, 2019, because AT&T had still not made any payment for use of FPL's poles for the 2017 calendar year, FPL sent AT&T a Notice of Termination letter stating that, pursuant to the JUA's Payment Default Clause, it was immediately terminating AT&T's right to attach to FPL's existing poles and, pursuant to a separate JUA clause, was terminating AT&T's right to attach to new FPL poles effective August 26, 2019.[64] On July 1, 2019, AT&T filed its First Complaint with the Commission, alleging that the attachment rate under the JUA was unjust and

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[59] *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd. 6453, 6491, ¶ 76 (2000) (emphasis added) ("*Fee Order*").

[60] *Id.*

[61] *Jan. 2021 Order*, 35 FCC Rcd. at 260–61, ¶ 23 (citing *Answer I*, Ex. A (Kennedy Decl.) at FPL00017, ¶ 31 and Ex. D (Deaton Decl.) at FPL00156, ¶ 10).

[62] *Terms and Conditions Order*, 2021 FCC LEXIS 3069, at *4, ¶ 4.

[63] *Id.* at *4, ¶ 6.

[64] *Id.* at *5, ¶ 6.

unreasonable and sought a reduced rate under the 2011 and 2018 Pole Attachment Orders. On the same day, AT&T delivered two checks to FPL for almost $22 million dollars, which represented the principal amount due for the 2017 and 2018 calendar years.[65] In its Answer to the First Complaint, FPL argued that it had lawfully terminated AT&T's right to attach to FPL's existing poles effective March 25, 2019 via the Notice of Termination.[66]

On May 20, 2020, the Bureau issued an Order that held, in relevant part, FPL's Notice of Termination purported to end AT&T's right to attach to existing FPL poles on March 25, 2019, and AT&T admitted that the Notice terminated its right to attach to new FPL poles.[67] The Bureau further held "[t]he validity of the Notice of Termination insofar as it applies to existing joint use poles is squarely before the district court and is purely a matter of state contract law, as AT&T does not argue that the [Payment Default Clause] is unjust or unreasonable under Section 224 of the Act."[68]

On July 6, 2020, just over a year after filing its First Complaint, AT&T filed its Second Complaint challenging the Payment Default Clause – which FPL had invoked on March 25, 2019 – alleging the Notice of Termination was unjust and unreasonable under 47 U.S.C. § 224(b)(1).[69] AT&T asked "the Commission to declare unjust and unreasonable two pole attachment terms and conditions that [FPL] has imposed in response to, and as retaliation for, Complainant [AT&T's] challenge of FPL's unlawful rental rates."[70]

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[65] *Id.* at *5, ¶ 7. FPL's invoice for the 2018 calendar year exceeded $10.5 million and was already five months delinquent when AT&T delivered the check.

[66] *Id.*

[67] *Id.* at *6, ¶ 9.

[68] *Id.* at *6–7, ¶ 9.

[69] *Id.* at ¶ 11.

[70] Pole Attachment Complaint, Proceeding No. 20-214 (filed July 6, 2020) at 1 ("*Complaint II*").

This timeline of events makes it impossible for FPL's actions to be "in response to, and as retaliation for" the First Complaint because FPL invoked the Default Clause in August 2018 because of AT&T's non-payment, and on March 25, 2019, FPL invoked the Termination Clause.[71] AT&T filed its First Complaint on July 1, 2019.[72] For the two independent reasons described below, the Bureau's Order is proper, and AT&T cannot bring its Second Complaint to make a new legal argument based on the same facts in the First Complaint.

2. The Bureau Correctly Dismissed AT&T's Challenge to the Payment Default Clause and Termination Notice in the Second Complaint Because AT&T Waived the Argument Under the Commission's Rules

In the Terms and Conditions Order, the Bureau correctly found that "AT&T improperly brought its challenge to the Payment Default Clause in the Second Complaint."[73] The Payment Default Clause and Notice of Termination were an integral part of the first Complaint, but AT&T never raised a Section 224 argument as to these clauses. As the Bureau held, "[i]n the First Complaint, in which AT&T alleged that the JUA rate was unjust and unreasonable under Section

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[71] *Terms and Conditions Order*, 2021 FCC LEXIS 3069, at *4–5, ¶ 6; Moreover, FPL presented evidence demonstrating that its termination of the JUA was not in retaliation of AT&T's challenge to the rental rates. Specifically, the Declaration of Michael Jarro describes the three main factors FPL considered in terminating the JUA as to AT&T: (i) AT&T's delays, non-disclosures, and non-payment of $20 million; (ii) AT&T's failure to maintain and replace its deteriorated poles pursuant to the JUA; and (iii) AT&T's failure to timely transfers its facilities to FPL's new, hardened poles. FPL Answer, Proceeding No. 20-214 ("*Answer II*"), Ex. A (Jarro Decl.) at FPL00003–19, ¶¶ 7–46. FPL's decision to terminate, therefore, was based on AT&T's history of being a poor joint use partner and its refusal to correct its contractual failures. "If AT&T would have been open and direct about what it wanted when FPL first issued its 2017 Invoice, paid at least what it thought was due, and discussed reasonable measures to address the important issues regarding pole maintenance and untimely transfers, FPL would have never issued the termination letter." *Id.* at FPL00009–19, ¶ 46. Therefore, "FPL's decision to exercise termination rights . . . was not based on the fact that AT&T disputed the rate as suggested by AT&T but rather its total failure to meaningfully start the process of addressing each of the important issues outlined in FPL's Notice of Default." *Id.*

[72] *Terms and Conditions Order*, 2021 FCC LEXIS 3069, at *5, ¶ 7.

[73] *Id.* at *10, ¶ 13.

224(b)(1), AT&T argued that it was not in default under the Payment Default Clause and that the Notice of Termination was therefore ineffective."[74] AT&T put the two JUA provisions directly at issue, but failed to argue that the either the Payment Default Clause or Notice of Termination were "ineffective" because they were unjust and unreasonable terms under Section 224.

In addition to AT&T raising the clauses in its First Complaint, FPL argued in its Answer that it needed to address any and all arguments with regard to those clauses:

> In its Answer, FPL argued that AT&T was indeed in default under the Payment Default Clause, that the Notice of Termination ended AT&T's right to attach to existing poles on March 25, 2019, and that AT&T's claim for a lower rate after that date was therefore moot. FPL's Answer clearly demanded AT&T to raise any and all defenses that it had to those claims. But in its Reply, AT&T made no mention of its current view that the Payment Default Clause and Notice of Termination are not just and reasonable.[75]

The Bureau, therefore, correctly held that "AT&T's decision not to bring its challenge to the Payment Default Clause earlier contravenes the Commission's rules governing complaints filed under Section 224. The Commission has explained that the "parties' initial pleadings should contain *every* allegation, fact, argument, affidavit, and supporting paper that the parties can muster at that time."[76]

AT&T argues the "*Terms and Condition Order* does not address the unreasonableness of FPL's ongoing effort to force AT&T to remove its facilities from over 425,000 poles for an alleged late payment of the very rents the Enforcement Bureau declared to be unlawful, and instead leaves

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[74] *Id.* at *10–11, ¶ 14 (citing *Complaint I* at 6–7, ¶ 12, at 10, ¶ 17, and at 16–17, ¶¶ 26–27).

[75] *Id.* at *12, ¶ 15.

[76] *Id.* at *13, ¶ 17 (quoting *In the Matter of Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers*, Order on Reconsideration, 16 FCC Rcd 5681, 5695, ¶ 32 (2001) ("*2001 Formal Complaint Rules Order*")).

it to a Federal District Court to decide whether the JUA permits such an extraordinary demand."[77] There is a reason the Terms and Conditions Order did not address this argument: it goes to the merits, *vel non*, of the Second Complaint. The Bureau correctly never reached the merits because AT&T failed to follow the procedural rules and failed to put the reasonableness of these clauses before the Bureau.[78]

AT&T repeatedly cites to Section 224(b)(1) arguing that the "Commission '*shall hear and resolve* complaints concerning [pole attachment] rates, terms, and conditions' to 'provide that such rates, terms, and conditions are just and reasonable.'"[79] This argument also fails. The Commission shall hear and resolve complaints, but only those that are properly before it. AT&T cannot read the statute in a vacuum while ignoring the regulations that govern formal complaints before the Commission. The word "shall" does not mean deficient complaints must be adjudicated.

AT&T complains that the Bureau made an "ad hoc procedural ruling."[80] But the law expressly provides for the Bureau's ruling. 47 U.S.C. § 154(j) states in part that the Commission has "broad discretion to prescribe rules for specific investigations and to make ad hoc procedural rulings in specific instances."[81] AT&T's citation to *F.C.C. v. Schreiber*, 381 U.S. 279, 291 (1965)

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[77] Appl. for Review at 1.

[78] Commission Rule 1.721(b) provides in part "[a]ll matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity." Rule 1.721(i) provides in part that "[s]pecific reference shall be made to any tariff or contract provision relied on in support of a claim or defense." Rule 1.728(a) states that the reply "shall contain statements of relevant, material facts and legal arguments that respond to the factual allegations and legal arguments made by the defendant."

[79] Appl. for Review at 2.

[80] *Id.* at 20.

[81] *See Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 73 (D.C. Cir. 2019) (upholding Commission's refusal to supplement the record or modify protective orders, citing and quoting 47 U.S.C. § 154(j)).

is misleading and unavailing because that case does not stand for the proposition that "a procedural ruling *must* be consistent with the governing statute."[82] Rather, it concerns judicial review of *agency rulemaking*. The court stated, "[t]hus, in providing for judicial review of administrative procedural rule-making, Congress has not empowered district courts to substitute their judgment for that of the agency. Instead, it has limited judicial responsibility to insuring consistency with governing statutes and the demands of the Constitution."[83]

Clearly, this is not an administrative procedural rule-making matter, and AT&T's argument is inapposite.[84] AT&T failed to raise a Section 224 argument with respect to the Payment Default and Notice of Termination clauses in its First Complaint and the Bureau appropriately held that it waived that argument and cannot bring a Second Complaint to cure the waiver.

Finally, AT&T argues that at the time it filed its First Complaint, the issue concerning the termination clause had been mooted by its July 1, 2019 payment of the severely delinquent principal amount due.[85] In support of this argument, AT&T contends that, based upon FPL's termination letter dated March 25, 2019, a deal with FPL had been struck that if AT&T made payment of the principal amount due ***by the end of the mediation process***, the termination issue

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[82] *Id.* at 20.

[83] *FCC v. Schreiber*, 381 U.S. 279, 289 (1965); *see also U.S. Intern Trade Comm'n v. Tenneco W.*, 822 F.2d 73, 76 (D.C. Cir. 1987) ("In *Schreiber*, the Supreme Court held that '[t]he question for decision was whether the exercise of discretion by the Commission was within permissible limits, not whether the District Judge's substituted judgment was reasonable.'"); *see also U.S. Dep't of Educ. v. Nat'l Collegiate Athletic Ass'n*, No. 106CV-01333-JDT-TAB, 2006 WL 3198822, at *9 (S.D. Ind. Sept. 8, 2006) ("[Congress] has limited judicial responsibility [when reviewing agency action] to insuring consistency with governing statutes and the demands of the Constitution."), *aff'd sub nom.* 481 F.3d 936 (7th Cir. 2007).

[84] *See F.T.C. v. Johns-Manville Corp.*, No. 79-F-643, 1979 WL 1673, at *7 (D. Colo. Aug. 28, 1979) ("What the FTC overlooks, in relying on *Schreiber*, is the fact that the element crucial to the holding in that case is the conclusion that the agency there had actually engaged in an exercise of its rule making powers.").

[85] Appl. for Review at 21.

would be resolved.[86] There is, however, nothing in FPL's termination letter suggesting that a subsequent payment equal to the severely delinquent principal amount due would cure the default.[87] Rather, the formal notice to AT&T stated the termination was ***effective immediately***.[88] As a courtesy, the termination letter indicated that FPL would not take any immediate adverse action in light of the pending mediation and if the dispute was not resolved by the close of the mediation process, FPL demanded that AT&T facilities be removed from all FPL poles.[89] In May 2019, the mediation process ended unsuccessfully with no issues resolved, which resulted in FPL seeking enforcement of the termination by filing a civil complaint in state Court on July 1, 2019. At the time AT&T filed its First Complaint, there were no facts in the record that would have lulled AT&T into believing the termination issue had been resolved by its delivery of the severely delinquent outstanding principal amount post termination and post the unsuccessful mediation where no agreements were reached between the parties. Rather, it was apparent to AT&T that the termination of the JUA (and any and all arguments regarding the termination) was a live contemporaneous dispute that should have been presented in its First Complaint.

3. AT&T's Violation of the Doctrine Against Claim Splitting Provides a Second Independent Basis for the Validity of the Bureau's Decision

The Bureau correctly held that AT&T violated the doctrine against claim splitting when it filed the Second Complaint, and the Commission should not revisit this holding. As the Bureau appropriately stated:

> A party splits its claims when it files two separate complaints and a valid, final decision on the first complaint would extinguish the second complaint under claim preclusion. The doctrine enables the

[86] *Id.*; *see also* FPL's Notice of Termination (Mar. 25, 2019), attached hereto as Exhibit A.

[87] *See generally* Ex. A (Notice of Termination).

[88] *Id.* at 1.

[89] *Id.* at 2.

> tribunal to manage its docket to avoid prejudice to the parties and waste of tribunal resources. In this case, the prejudice to FPL would be considerable. Moreover, permitting Count I to proceed would waste the Commission's resources.[90]

This is consistent with the Bureau's holding regarding waiver. Because "AT&T failed to challenge a contract provision that was the subject of a contemporaneous dispute with FPL . . . the resources of the Commission and FPL have been wasted."[91]

As explained in Section II.B.1, above, AT&T's argument that it "expressly challenged FPL actions that occurred *after* the rate complaint was filed" is factually incorrect because its First Complaint challenged FPL's exercise of the Payment Default Clause and the Notice of Termination, including the right to attach to FPL's poles, which FPL terminated in a March 25, 2019 letter. AT&T also avers it could not have added the "new" Section 224 claim by mentioning it in its Reply brief. That argument fails because AT&T's First Complaint made claims regarding the JUA and "FPL's Answer clearly demanded AT&T to raise any and all defenses that it had to those claims."[92] Therefore, AT&T was required to file a reply that contained "statements of relevant, material facts and legal arguments that ***respond to the factual allegations and legal arguments made by the defendant***."[93] As the Bureau correctly held, "[h]ere, AT&T failed to challenge a contract provision that was the subject of a contemporaneous dispute with FPL, that was clearly relevant to the issues raised in the First Complaint, and that FPL raised as a defense in

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[90] *Terms and Conditions Order*, 2021 FCC LEXIS 3069, at *17–18, ¶ 22 (internal citations omitted).

[91] *Id.* at *17, ¶ 21.

[92] *Id.* at *14, ¶ 15.

[93] *Id.* at *15, ¶ 19 (citing 47 C.F.R. § 1.728(a)) (emphasis added).

its Answer to the First Complaint."[94] All related arguments should have been, but were not, included in the First Complaint.

The Bureau properly distinguished AT&T's reliance on *Horia v. Nationwide Credit & Collection, Inc.* because that case did not involve a contract and involved two separate transactions.[95] There is only one contract and one transaction at issue here.[96] The fact that there is one contract also defeats AT&T's argument that this is a new "issue" and that a litigant wishing "to introduce [a] new issue[] in a pole attachment proceeding" may file a separate complaint.[97] There is but one issue. Similarly, this is not a situation where AT&T has "[t]wo or more grounds of complaint involving substantially the same facts."[98] AT&T admitted "[t]his Complaint involves some of the same facts as in the parties' pending pole attachment rate complaint proceeding." As the Bureau correctly found, "the operative facts underlying the two complaints are identical."[99]

AT&T argues that the Terms and Conditions Order "forces parties to bundle all potential claims to avoid losing any. This will needlessly cut short negotiations on claims that may still be capable of settlement, embroil the FCC in disputes it may never need to decide, and complicate and lengthen complaint proceedings—all contrary to Commission intent."[100] AT&T had two

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[94] *Id.* at *17, ¶ 21.

[95] *Id.* at *20, ¶ 23, n.57 (discussing *Horia v. Nationwide Credit & Collection, Inc.*, 944 F.3d 970, 974 (7th Cir. 2019)).

[96] *See Dorsey v. Jacobson Holman, PLLC*, 476 F. App'x 861, 863 (D.C. Cir. 2012) ("[A] plaintiff has no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant.") (quoting *Zerilli v. Evening News Ass'n*, 628 F.2d 217, 222 (D.C. Cir. 1980)).

[97] Appl. for Review at 22 (internal quotations and citations omitted).

[98] 47 C.F.R. § 1.725(b).

[99] *Terms and Conditions Order*, 2021 FCC LEXIS 3069, at *19 ¶ 23 (citing Restatement (Second) of Judgments § 24, cmt. c).

[100] Appl. for Review at 23.

chances to make this argument. First, it should have pled all of its Section 224 claims regarding the JUA in its First Complaint.[101] Second, even though it did not, it should still have responded to FPL's Answer and Affirmative Defenses requiring it to assert all "legal arguments that respond to the factual allegations and legal arguments made by the defendant."[102] It is ironic that AT&T argues putting all claims in one proceeding would complicate and lengthen complaint proceedings, as that is precisely what AT&T did by improperly filing the Second Complaint.

III. CONCLUSION

Wherefore, for the foregoing reasons, FPL requests that the Commission deny AT&T's Application for Review and affirm the decisions of the Enforcement Bureau in all respects.

Respectfully submitted,

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[101] *See 2001 Formal Complaint Rules Order*, 16 FCC Rcd. at 5695, ¶ 32; 47 C.F.R. § 1.721(b).

[102] 47 C.F.R. § 1.728(a).

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2021, I caused a copy of the foregoing Florida Power & Light Company's Opposition to the Application for Review of AT&T to be served on the following by hand delivery, U.S. mail or electronic mail (as indicated):

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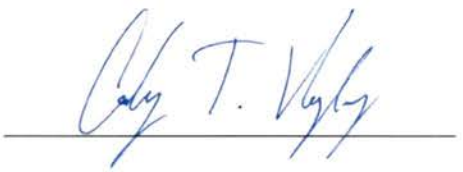

RULE 1.721(M) VERIFICATION

I, Cody T. Murphey, as signatory to this submission, hereby verify that I have read this Opposition to AT&T'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 that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

Cody T. Murphey

Exhibit A

From: Jarro, Michael
Sent: Monday, March 25, 2019 3:53 PM
To: 'dm6516@att.com' <dm6516@att.com>
Subject: AT&T Notice of Termination - March 2019

Diane,

Please see attached letter which also is being sent to AT&T via UPS overnight delivery.

Thanks,

MichaelJarro
Vice President,
Transmission and Substation
(561) 904-3751 tel
(305) 345-7160 mobile

15430 Endeavor Drive, Jupiter FL 33478

FPL.

March 25, 2019

Via Overnight Delivery

AT&T Florida
Attention: General Counsel – Florida
150 W. Flagler Street, Suite 1910
Miami, FL 33130

AT&T South Legal Department
Attention: Chief Rights-of-Way Counsel
675 W. Peachtree St., Suite 4300
Atlanta, GA 30375-0001

Subject: FPL's Notice of Terminating AT&T's Rights to Attach to all FPL Poles

Re: Joint Use Agreement dated January 1, 1975, between Florida Power & Light Company ("**FPL**") and BellSouth Telecommunications, LLC dba AT&T Florida ("**AT&T**"); Amendment to Joint Use Agreement effective June 1, 2007 (hereinafter collectively referred to as the "**Agreement**")

To Whom it May Concern:

This letter is being delivered to you in accordance with Articles XII and XVI of the Agreement. Effective immediately, AT&T's right to attach to FPL's utility poles is terminated.

During 2017 and 2018 and continuing through the present, AT&T has been attached to more than 420,000 FPL poles. On March 5, 2018, FPL sent an invoice to AT&T in the amount of $9,244,141.74 for AT&T's attachments to FPL poles ***during the 2017 calendar year***. Payment on that invoice was due by April 4, 2018. Despite FPL's repeated requests for payment, AT&T has not made any payment to date on a substantial indebtedness that is over a year old. Yet AT&T has continued to occupy and use FPL's poles to conduct AT&T's business.

On August 31, 2018, FPL sent AT&T a formal written notice identifying three separate defaults which included the failure to pay FPL's invoice for the 2017 calendar year ("**Notice**"). AT&T failed to take any action to cure any of the three defaults within 60 days of the Notice, which resulted in a suspension of AT&T's rights under Section 12.1 of the Agreement. More than 200 days have elapsed since the start of that suspension and, despite FPL's repeated efforts to resolve this matter, AT&T still has made no payment and has applied little to no effort toward curing the other two defaults identified in the Notice. At the same time, AT&T continues to occupy and use FPL's poles to conduct AT&T business.

On February 1, 2019, FPL issued its invoice to AT&T in the amount of $10,532,283.79 for AT&T's attachments to FPL poles during the 2018 calendar year. Payment on that invoice was due by March 3, 2019. With respect to that invoice, FPL has received neither payment nor any communication from AT&T regarding its inability to pay; yet AT&T has continued to use FPL's poles to conduct AT&T business.

To date, AT&T's total outstanding balance amounts to more than $20 million with interest. Interest charges are accruing daily. AT&T has given no indication that it intends to pay the amounts it owes under the Agreement.

FPL.

In contrast to AT&T's default, throughout the entire 44 years that the Agreement has been in place, FPL has timely compensated AT&T for the FPL attachments on AT&T-owned poles. We would observe further that, among the many telecommunications and cable companies who attach to FPL poles, AT&T is the only company on notice from FPL for delinquency in payments and default of its contractual requirements. AT&T's unwillingness to meet its long-standing obligations or to request a payment plan, if one is needed, adversely affects all FPL customers. As you know, the payments from AT&T and others who attach to FPL's poles serve to offset the costs of FPL's infrastructure reflected in FPL's rates. Thus, AT&T's $20 million indebtedness falls on the shoulders of FPL customers who are bearing the costs of poles used by AT&T, with no offset from AT&T for the value associated with AT&T's usage as prescribed by the Agreement. We cannot allow this to continue.

As a consequence of AT&T's continuing defaults identified in the Notice and failure to cure its default of the payment obligation within 60 days of the suspension, FPL hereby invokes its rights pursuant to Section 12.3 of the Agreement to terminate AT&T's rights to attach to FPL-owned poles. Accordingly, all of AT&T's existing attachments must be removed from FPL-owned poles and no new attachments to FPL-owned poles are permitted.

Finally, pursuant to Article XVI of the Agreement, FPL hereby provides notice that it is terminating all rights related to the further granting of joint use of poles, to the extent any rights of AT&T might survive the termination effectuated pursuant to Section 12.3. As provided in Article XVI, this additional termination will be effective in 6 months from the date of this letter, i.e., August 26, 2019.

In light of the upcoming mediation scheduled for May 1, 2019, FPL will not take any immediate adverse action or require AT&T to begin removing its facilities. In the event the pending disputes are not resolved at the close of the mediation process, FPL demands that AT&T promptly provide a written plan to expeditiously remove its facilities from all FPL poles. As a consequence of the termination of AT&T's attachment rights, until ATT's facilities are removed, it is obligated to continue to pay FPL for its unauthorized attachments and may be responsible for other compensation and damages arising from AT&T's failure to remove its facilities.

Sincerely,

Michael Jarro
Vice President,
Transmission and Substations

cc: Diane Miller (via email dm6516@att.com)

Enclosures:
Joint Use Invoice for 2017 Calendar Year
Joint Use Invoice for 2018 Calendar Year