

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

BELLSOUTH)
TELECOMMUNICATIONS, LLC d/b/a)
AT&T Florida,)
)
 Complainant,)
)
v.)
)
DUKE ENERGY FLORIDA, LLC,)
)
 Defendant.)
)
)

Proceeding No.: 20-276
Bureau ID No.: EB-20-MD-003

**DUKE ENERGY FLORIDA, LLC’S INITIAL BRIEF IN RESPONSE TO THE
ENFORCEMENT BUREAU’S MARCH 8, 2021 LETTER**

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April 8, 2021

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Pursuant to the Enforcement Bureau’s March 8, 2021 letter, which was issued pursuant to 47 C.F.R. § 1.732, Duke Energy Florida, LLC (“DEF”) hereby submits this Initial Brief.

ARGUMENT

I. AT&T RECEIVES MANY MATERIAL ADVANTAGES UNDER THE JOINT USE AGREEMENT THAT DEF’S CATV AND CLEC LICENSEES DO NOT ENJOY.

The March 8, 2021 letter states:

To the extent you contend that [AT&T] has advantages or disadvantages as compared with CATV and CLEC companies with licenses to attach to those poles, list each specific advantage or disadvantage and record evidence regarding the specific advantage or disadvantage, including citations to provisions in the parties’ joint use agreement (JUA) and in Duke’s pole attachment agreements with third parties.... In addition, cite to any authorities, including Commission or Bureau orders, that support your position regarding such advantages or disadvantages.

March 8, 2021 Letter at p. 2. As set forth in great detail in DEF’s Answer (filed October 30, 2020),

AT&T most definitely receives significant net benefits under the parties’ joint use agreement (Joint

PUBLIC VERSION

Use Agreement Between Florida Power Corporation and Southern Bell Telephone and Telegraph Company, as amended) (the “JUA) that “materially advantage[] [AT&T] over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.” See 47 C.F.R. § 1.1413(b). The following chart summarizes those benefits and sets forth the net financial value to AT&T of each benefit:

	Advantage of DEF/AT&T JUA	Comparable Pole License Agreement Provision for CLEC/CATV Licensees	Value of Net Material Advantage to AT&T	
			Annual Net Basis	Annual Net Per-Pole Basis
A. Avoided Make-Ready Costs.	As a result of the built-to-suit pole network created pursuant to the JUA, AT&T has avoided the make-ready costs it would have incurred under a pole license agreement.	CLECs and CATVs are required to pay for any make-ready required to accommodate their proposed attachment on a DEF pole.	██████████	██████████
B. Perpetual license.	Even in the event of termination of the JUA, DEF must allow AT&T to maintain its existing attachments made pursuant to the JUA on DEF’s poles.	CATV and CLEC licensees are required to remove their attachments from DEF’s poles upon termination of the pole license agreement.	██████████	██████████

¹ Answer, Ex. E at DEF000215-16, DEF000239 (Metcalf Declaration ¶¶ 28-30, Ex. E-3.1).

² *Id.*

³ *Id.* at DEF000212-13, DEF000235 (Metcalf Declaration ¶¶ 18-21, Ex. E-2).

⁴ *Id.*

<p>C. Avoided Permitting and Inspection Costs.</p>	<p>As a result of the built-to-suit pole network created pursuant to the JUA, AT&T has avoided the permitting and inspection costs it would have incurred under a pole license agreement.</p>	<p>CLECs and CATV licensees are required to pay for all permitting and inspection costs related to their proposed attachments.</p>	<p>██████████</p>	<p>██████████</p>
<p>D. ██████████ of reserved space.</p>	<p>AT&T is allocated ██████████ of space per DEF joint use pole under the JUA.</p>	<p>CATV and CLEC licensees are allocated one foot of space per pole.</p>	<p>██████████</p>	<p>██████████</p>
<p>E. Safety space.</p>	<p>DEF built out its pole network with poles tall enough to include the safety space between DEF and AT&T facilities. AT&T was the original cost causer of that safety space.</p>	<p>Where a DEF pole has no existing attachers, a CATV or CLEC must pay for the incremental cost of the replacement pole necessary to accommodate the proposed attachment, including the incremental cost of the 40-inch safety space.</p>	<p>██████████</p>	<p>██████████</p>
<p>F. Avoided contingency costs.</p>	<p>AT&T has avoided certain contingency costs that it would have incurred absent the JUA’s perpetual license provision, including procuring poles and acquiring land and storage equipment to store the</p>	<p>CATV and CLEC licensees are required to remove their attachments from DEF’s poles upon termination of the pole license agreement.</p>	<p>Not quantified</p>	<p>Not quantified</p>

⁵ *Id.* at DEF000214-15, DEF000240 (Metcalf Decl. ¶¶ 25-27, Ex. E-3.2).

⁶ *Id.*

⁷ *Id.* at DEF000219-20 (Metcalf Declaration ¶ 37).

⁸ *Id.*

⁹ *Id.* at DEF000217-19, DEF000243 (Metcalf Declaration, ¶¶ 31-36, Ex. E-4A).

¹⁰ *Id.*

	poles in inventory in reasonable proximity to the service areas at issue.			
G. Lowest position in communication space.	The JUA reserves to AT&T the lowest position in the communication space on DEF’s poles.	CATV and CLEC licenses must attach above AT&T’s reserved space.	Not quantified	Not quantified

A. AT&T Has Avoided Make-Ready Costs as a Result of the JUA.

Pursuant to the JUA, DEF has built and maintained—and continues to build and maintain—a network of poles that are much taller and stronger than necessary to provide electric service.¹¹ Because AT&T made its attachments on a network of DEF poles that were built to specifically accommodate AT&T, AT&T has avoided significant make-ready costs that it would have otherwise incurred under a pole license agreement.¹² This is especially true in light of the fact that AT&T was almost always the first communications attachment on DEF’s poles (within the parties’ overlapping service territories), and but for the JUA’s requirement of taller joint use poles, AT&T would have been required to change out virtually every DEF pole to which it desired to make attachments.¹³ DEF’s CATV and CLEC licensees, in contrast, take DEF’s poles as they

¹¹ See Answer at ¶ 8, 15, 16; *id.* at A, DEF000131-32 (Freeburn Decl. ¶ 10-11); *id.* at Ex. B, DEF000152-53 (Hatcher Decl. ¶ 6); *id.* at Ex. C, DEF000164-65 (Burlison Decl. ¶¶ 11-12); *id.* at Ex. 1, DEF000246 (JUA, Section 1.1.5) (designating a “Normal Joint Use Pole” that is capable of accommodating both parties’ attachments); *see also id.* at DEF000246 (JUA, Section 1.1.6) (allocating AT&T ████████ of usable space on jointly used poles).

¹² See Answer at ¶¶ 8, 15, 16; *id.* at Ex. A, DEF000131-32, DEF000138 (Freeburn Decl. ¶¶ 10-11, 26); *id.* at Ex. B, DEF000153-54, DEF000155 (Hatcher Decl. ¶¶ 9, 13); *id.* at Ex. C, DEF000164 (Burlison Decl. ¶ 11); *id.* at Ex. E, DEF000214-16, DEP000238 (Metcalf Decl. ¶¶ 25-30 & Ex. E-3).

¹³ See AT&T’s Pole Attachment Complaint, Ex. C at ATT00041 (Peters Aff. ¶ 21) (noting that “in the early days of joint use [i.e., when DEP’s network was initially constructed]...AT&T was the only consistent communications attacher on utility poles at that time”).

find them and, under their pole license agreements, are required to bear the actual cost of any pole replacements or modifications that are necessary to accommodate their attachments.¹⁴ The Commission has previously held that the avoidance of make-ready costs was a “unique benefit” under a joint use agreement that provided “prospective value” to the ILEC. *Verizon Florida LLC v. Florida Power and Light Company*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1148-50 at ¶¶ 21,22 & 23 (Feb. 11, 2015) (“*Verizon Florida Order*”); *see also Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705, 7770-71 at ¶ 128 (Aug. 3, 2018) (“*2018 Order*”) (stating that “similarly situated” presumption can be rebutted by demonstrating ILEC enjoys “material benefits” under joint use agreement, including “lower make-ready costs”); *Verizon Maryland LLC v. The Potomac Edison Company*, Memorandum Opinion and Order, Proceeding No. 19-355, 35 FCC Rcd 13607, 13614-16 at ¶ 20 (Nov. 23, 2020) (“*Verizon Maryland Order*”) (finding ILEC’s avoidance of make-ready costs was a “material advantage” under joint use agreement). After accounting for reciprocal benefits to DEF, the avoidance of make-ready costs under the JUA provides AT&T with an annualized net benefit of [REDACTED].¹⁵

B. Perpetual License.

In the event of termination, Section 16.1 of JUA provides:

¹⁴ *See* Answer at ¶¶ 16, 30; *see also* CATV-1 at DEF000012-13, DEF000013-14 (Sections 3.3, 3.5); CATV-9 at DEF000767-68 (Section 3.06); CATV-12 at DEF001027-28 (Section 3.05); CATV-13 at DEF001048-49 (Section 3.3); CATV-14 at DEF001129-30 (Section 3.3); CLEC-1 at DEF000041-43 (Sections 5.3, 5.4); CLEC-7 at DEF000696-97 (Section 3.05); CLEC-13 at DEF000988-89 (Sections 5.3, 5.4); CLEC-14 at DEF001007-08 (Section 3.06); CLEC-17 at DEF001156-57 (Section 3.06); WIRELESS-2 at DEF000603, DEF000608-10 (Sections 1.18, 5.3, 5.4).

¹⁵ Answer, Ex. E at DEF000215-16, DEF000239 (Metcalf Declaration ¶¶ 28-30, Ex. E-3.1).

...and provided, further, that notwithstanding any such termination, other applicable provisions of this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination.¹⁶

Similarly, Section 11.2 of the JUA provides the following with respect to termination:

...All other terms and provisions of this Agreement shall remain in full force and effect solely and only for the purpose of governing and controlling the rights and obligations of the parties herein with respect to existing joint use poles; except that all pole replacements shall be the obligation of the party owning less than its objective percentage.¹⁷

AT&T, in essence, enjoys a perpetual license on DEF's poles even in the event of termination.¹⁸

In contrast, DEF's standard license agreements require CATVs and CLECs to remove their attachments upon termination:

Upon termination of this Agreement, Licensee shall, within sixty (60) days: (i) remove all of its Attachments from Licensor's Poles; and (ii) advise Licensor of the date on which such Attachments were removed and affected Poles repaired. If any Attachments are not so removed within sixty (60) days following such termination, Licensor shall have the right to: (a) remove Licensee's Attachments without liability, and Licensee shall reimburse Licensor for the associated costs plus an additional 50% of such costs; and (b) seek the payment of holdover fees, on a monthly basis, at the Pole Attachment License Fee rate.¹⁹

But for the perpetual license, AT&T would be required to remove its attachments from DEF's poles in the event of termination. This provides AT&T with a material advantage over its CATV and CLEC competitors. *See Verizon Maryland Order*, 35 FCC Rcd at 13615, ¶ 20 (finding

¹⁶ *Id.* at Ex. 1, DEF000258-59 (JUA, Section 16.1).

¹⁷ *Id.* at DEF000255 (JUA, Section 11.2).

¹⁸ *See Answer* at ¶¶ 11, 15, 27, 38; *id.* at Ex. A, DEP000136 (Freeburn Decl. ¶ 20).

¹⁹ *Answer*, Ex. 7 at DEF000321 (Exemplar CLEC Pole License Agreement, Section 17); *see also* CATV-1 at DEF000011 (Section 1.1) (requiring removal within 120 days of termination of agreement); *accord* CATV-12 at DEF001045 (Section 1.1); CATV-14 at DEF001126 (Section 1.1); CATV-9 at DEF000765, DEF000773 (Sections 2.1, 7.3) (affording DEF discretion to order removal and requiring removal within 120 days of termination of agreement); *accord* CLEC-7 at DEF000694, DEF000702-03 (Sections 2.1, 7.3); CLEC-14 at DEF001005, DEF001013 (Sections 2.1, 7.3); CLEC-17 at DEF001154, DEF001162 (Sections 2.1, 7.3); CLEC-1 at DEF000053 (Section 17) (requiring removal within 60 days of termination of agreement); *accord* CLEC-13 at DEF000998 (Section 17); WIRELESS-2 at DEF000619 (Section 17).

provision that allowed ILEC to remain attached to existing joint use poles following termination of joint use agreement was “material advantage” over other attachers, who “are required to remove all attachments prior to any specified termination date.”); *see also Verizon Florida Order*, 30 FCC Rcd at 1149-50, ¶ 24 (characterizing “access” as a benefit under an ILEC’s joint use agreement). After accounting for reciprocal benefits to DEF, the perpetual license provides AT&T with an annualized net benefit of [REDACTED].²⁰ To quantify this benefit, DEF calculated the costs AT&T would incur to replace the network AT&T currently has in place on the joint use poles owned by DEF, as well as the costs that DEF would incur to replace the network DEF currently has in place on joint use poles owned by AT&T.²¹

C. Avoidance of Permitting and Inspection Costs.

Under the JUA, AT&T, unlike DEF’s CATV and CLEC licensees, does not pay the costs of DEF’s permitting and inspection requirements.²² Instead, DEF absorbs those costs.²³ DEF’s CATV and CLEC licensees, on the other hand, are required to bear the costs of DEF’s permitting and inspection requirements.²⁴ The Commission has previously held that the avoidance of

²⁰ Answer, Ex. E at DEF000212-13 (Metcalf Declaration ¶¶ 18-21, Ex. E-2).

²¹ *See* Answer at ¶ 8; *id.* at Ex. E, DEF000212-13 (Metcalf Declaration ¶ 18-22).

²² *See* Answer at ¶¶ 8, 14, 17; *id.* at Ex. A, DEF000135, DEF000000137-38 (Freeburn Declaration, ¶¶ 18, 24); *id.* at Ex. E, DEF000214-16, DEF000240-41 (Metcalf Declaration ¶¶ 25-30, Ex. E-3.2).

²³ *See* Answer at ¶ 17; *id.* at Ex. A, DEF000135, DEF000138 (Freeburn Decl. ¶¶ 18, 24).

²⁴ *See* Answer at ¶ 17; *id.* at Ex. A, DEF000135, DEF000000137-38 (Freeburn Declaration, ¶¶ 18, 24); *see also* **Permitting:** CATV-1 at DEF000012-13 (Section 3.3); CATV-9 at DEF000765-66 (Section 3.01); CATV-12 at DEF001026 (Section 3.01); CATV-13 at DEF001047 (Section 3.1); CATV-14 at DEF001128 (Section 3.1); CLEC-1 at DEF000041-42 (Sections 5.1, 5.2); CLEC-7 at DEF000694-95 (Section 3.01); CLEC-13 at DEF000987 (Sections 5.1, 5.2); CLEC-14 at DEF001005 (Section 3.01); CLEC-17 at DEF001154-55 (Section 3.01); WIRELESS-2 at DEF000608 (Sections 5.1, 5.2); **Inspections:** CATV-1 at DEF000012-13 (Section 3.3); CATV-9 at DEF000766-67 (Sections 3.04, 3.05); CATV-12 at DEF001027 (Section 3.04); CATV-13 at DEF001048-49 (Section 3.3); CATV-14 at DEF001129-30 (Section 3.3); CLEC-1 at DEF000045-46 (Section 7); CLEC-7 at DEF000695-96 (Section 3.04); CLEC-13 at DEF000990 (Section 7);

permitting and inspection costs was a “unique benefit” under a joint use agreement that provided “prospective value” to the ILEC. *Verizon Florida Order*, 30 FCC Rcd at 1148-49, ¶¶ 21-22; *see also 2018 Order*, 33 FCC Rcd at 7770-71, ¶ 128 (stating that “similarly situated” presumption can be rebutted by demonstrating ILEC enjoys “material benefits” under joint use agreement, including “[no] inspection costs” and “[no] advance approval to make attachments”); *BellSouth Telecommunications d/b/a AT&T Florida v. Florida Power and Light Company*, Memorandum Opinion and Order, Proceeding No. 19-187, 35 FCC Rcd 5321, 5328-29 at ¶ 14 (May 20, 2020) (“*AT&T Florida I Order*”) (finding exemption from permitting and inspection costs under joint use agreement material advantage to ILEC); *Verizon Maryland Order*, 35 FCC Rcd at 13614-16, ¶ 20 (finding ILEC’s avoidance of permitting and inspection costs were “material advantages” under joint use agreement). After accounting for reciprocal benefits to DEF, the avoidance of permitting and inspection costs under the JUA provides AT&T a net annualized benefit of

██████████²⁵

D. Safety Space.

The JUA requires DEF to install and maintain a network of poles that are tall enough to include the safety space between DEF and AT&T’s facilities.²⁶ But for the JUA, DEF would have installed poles that were only tall enough to meet its electric service needs, and AT&T—who was almost always the first communications attachment on DEF’s poles²⁷—would have incurred

CLEC-14 at DEF001006-07 (Sections 3.04, 3.05); CLEC-17 at DEF001155-56 (Sections 3.04, 3.05); WIRELESS-2 DEF000612 (Section 7.1).

²⁵ Answer, Ex. E at DEF000214-16, DEF000240-41 (Metcalf Declaration ¶¶ 25-30, Ex. E-3.2).

²⁶ *See supra* note 11; *see also* Answer at ¶ 25; *id.* at Ex. A, DEF000133-34 (Freeburn Decl. ¶¶ 15-16); *id.* at Ex. B, DEF000152-53, DEF000156-57 (Hatcher Decl. ¶¶ 7, 16); *id.* at Ex. 1, DEF000246 (JUA, Article I, Section 1.1.5) (defining “Normal Joint Use Pole” as a pole of sufficient height to accommodate the required clearance between the communication space and supply space).

²⁷ *See supra* note 13.

significant costs in replacing DEF's poles with poles tall enough to accommodate AT&T's facilities and the required safety space.²⁸ Thus, the JUA greatly reduced AT&T's deployment costs.²⁹ In contrast, if DEF's CATV or CLEC licensees request attachment to a DEF pole that has no other third-party attachments (and therefore, no existing safety space), the CATV or CLEC would be required to pay for the incremental cost of the replacement pole necessary to host the proposed attachment and the required safety space.³⁰ The Commission has recognized that the ability to deploy on built-to-suit pole networks is a material benefit under joint use agreements. *See, e.g., Verizon Florida Order*, 30 FCC Rcd at 1148-49, ¶¶ 21-22 (acknowledging that ILEC benefitted from electric utility's installation of taller joint use poles), 1150 at ¶ 24 (acknowledging that ILEC avoided make-ready costs for "its 67,000 attachments" because electric utility installed taller joint use poles); *Verizon Maryland Order*, 35 FCC Rcd at 13614-15, ¶ 20 (acknowledging that "guaranteed access" provision, which required installation of taller joint use poles, provided ILEC with a "material advantage" over CLEC and CATV attachers). After accounting for reciprocal benefits to DEF, the safety space on DEF's poles provides AT&T with an annualized net benefit of [REDACTED]³¹

²⁸ *See supra* note 26; *see also* Answer, Ex. C at DEF000163-64 (Burlison Decl. ¶¶ 7-10).

²⁹ *See* Answer at ¶¶ 16, 25; *id.* at Ex. A, DEF000131-32, DEF000133-34 (Freeburn Decl. ¶¶ 10-11, 15-16); *id.* at Ex. B, DEF000155-56 (Hatcher Decl. ¶ 13); *id.* at Ex. E, DEF000215-16, DEF000217-19 (Metcalf Decl. ¶¶ 29-30, 31-36).

³⁰ *See* Answer at ¶¶ 16, 30; *see also* CATV-1 at DEF000012-13 (Section 3.3); CATV-9 at DEF000767-68 (Section 3.06); CATV-12 at DEF001027-28 (Section 3.05); CATV-13 at DEF001048-49 (Section 3.3); CATV-14 at DEF001129-30 (Section 3.3); CLEC-1 at DEF000041-43 (Sections 5.2, 5.3); CLEC-7 at DEF000696-97 (Section 3.05); CLEC-13 at DEF000987-89 (Sections 5.2, 5.3); CLEC-14 at DEF001007-08 (Section 3.06); CLEC-17 at DEF001154-55, DEF001156-57 (Sections 3.01, 3.06); WIRELESS-2 at DEF000603, DEF000608-09 (Sections 1.18, 5.2, 5.3).

³¹ *See* Answer, Ex. E. at DEF000217-19, DEF000243 (Metcalf Declaration, ¶¶ 31-36, Ex. E-4A).

AT&T disputes the fact that DEF installed taller poles “just to accommodate AT&T” and argues that DEF constructed its pole network with potential third-party attachers in mind.³² To the contrary, but for the JUA, DEF could never have justified the cost of constructing a network of poles that were taller than necessary for its electric service needs.³³

E. Allocation of [REDACTED] of Usable Space.

Under the JUA, AT&T is allocated [REDACTED] of space per DEF joint use pole.³⁴ But AT&T is not limited to making attachments within this space allocation—the JUA also allows AT&T to make multiple attachments or otherwise occupy space in excess of its allocation without any additional charge.³⁵ This stands in stark contrast to DEF’s CATV and CLEC licensees, which pay a per attachment rate premised upon a single foot of occupancy.³⁶ *See* 47 C.F.R. § 1.1410. DEF’s field data indicates that AT&T is [REDACTED] space allocation under the JUA.³⁷

³² *See* AT&T’s Reply Legal Analysis at p. 13.

³³ Answer, Ex. A at DEF000131-32, DEF000133-34 (Freeburn Decl. ¶¶ 11, 15-16); *id.* at Ex. B, DEF000152-53 (Hatcher Decl. ¶¶ 6-7); *id.* at Ex. C, DEF000162-65 (Burlison Decl. ¶¶ 5-12); *id.* at Ex. D, DEF000175 (Olivier Decl. ¶ 14); *see also* 2011 Order, 26 FCC Rcd at 5302, ¶ 144 n.433 (“[The Commission] agree[s] with Pecaro...that it would typically not be economically rational for utilities to build taller poles solely for the possibility of accommodating attachers and therefore incur unreimbursed capital costs...”).

³⁴ *See* Answer at ¶¶ 8, 12; *id.* at Ex. 1, DEF000246 (JUA, Section 1.1.6(B)).

³⁵ *See* Answer at ¶ 8, 12; *id.* at Ex. 1, DEF000246 (JUA, Section 1.1.6(C)).

³⁶ *See, e.g.*, CATV-1 at DEF000011, DEF000015 (Sections 2.1, 7.1) (defining “attachment” to mean only the “necessary contact(s) on a pole to accommodate a single cable CATV system” and charging rental on a per-attachment basis); CATV-9 at DEF000763, DEF000771 (Sections 1.01, 6.1) (defining “attachment” to mean “a single messenger strand (support wire) system” and charging rental on a per-attachment basis); *accord* CATV-12 at DEF001024, DEF001030 (Sections 1.01, 6.1); CATV-13 at DEF001046, DEF001054 (Sections 2.1, 7.1); CATV-14 at DEF001127, DEF001135 (Sections 2.1, 7.1); CLEC-1 at DEF000029, DEF000036 (Schedule of Fees, Section 1.3); CLEC-7 at DEF000692, DEF000700 (Sections 1.01, 6.1); CLEC-13 at DEF000975, DEF000982 (Schedule of Fees, Section 1.3); CLEC-14 at DEF001003, DEF001011 (Sections 1.01, 6.1); CLEC-17 at DEF001152, DEF001160 (Sections 1.01, 6.1).

³⁷ *See* Answer at ¶ 12; *id.* at Ex. A, DEF000130 (Freeburn Decl. ¶ 8); *see also* DEF’s Supplemental Interrogatory Responses, Ex. 4 at DEF001409 (Survey Results). AT&T has failed to provide any

Though AT&T disputes that its space allocation is a material benefit, Commission precedent has consistently recognized otherwise. *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 Order*, 30 FCC Rcd at 1148-50, ¶¶ 21,22 & 23 (acknowledging four-foot space allocation as benefit under joint use agreement); *AT&T Florida I Order*, 35 FCC Rcd at 5328, ¶ 14 (acknowledging four-foot space allocation as “significant benefit” under joint use agreement); *Verizon Maryland Order*, 35 FCC Rcd at 13615, ¶ 20 (describing ILEC’s space allocation on electric utility’s poles as a “material advantage”).

F. Avoided Contingency Costs.

AT&T has avoided certain contingency costs that it would have incurred in the absence of the JUA’s perpetual license provision.³⁸ As a result of the risk of termination, but for the JUA, AT&T would have incurred costs to be “ready” to build-out, if necessary, its own network of poles (or pursue some alternative means for providing service).³⁹ Such contingency costs would include procuring poles, and potentially acquiring land and storage equipment to store the poles in inventory in reasonable proximity to the service areas at issue.⁴⁰ AT&T has avoided these costs because of the JUA’s perpetual license provision, which allows AT&T to remain attached to DEF’s poles even in the event of termination. CATV and CLEC licensees, on the other hand, are required

data rebutting DEF’s calculation of the amount of space AT&T actually occupies on jointly used poles owned by DEF.

³⁸ See Answer at ¶ 15; *id.* at Ex. E, DEF000211-12, DEF000213-14 (Metcalf Decl. ¶¶ 17, 23-24); *see also id.* at Ex. 1, DEF000258-59 (JUA, Section 16.1).

³⁹ See Answer, Ex. E. at DEF000213-14 (Metcalf Decl. ¶ 23-24).

⁴⁰ See *id.*

to remove their attachments from DEF’s poles upon termination of the pole license agreement.⁴¹ As referenced *supra*, the Commission recently found a perpetual license provision to provide an ILEC with a “material advantage” over its CATV and CLEC competitors. *See Verizon Maryland Order*, 35 FCC Rcd at 13615, ¶ 20.

G. Lowest Position in Communication Space.

AT&T enjoys the right to occupy the lowest position in the communication space on DEF’s joint use poles.⁴² This benefits AT&T through ease of access to its attachments, ability to sag cable, and ability to transfer attachments to new poles for maintenance and upgrade projects faster and more easily than higher-mounted communications attachments.⁴³ CATV and CLEC licensees must either attach above AT&T’s reserved space (which makes their attachments more difficult to access and gives them less ability to sag their cable), or they can attach in AT&T’s space—subject to AT&T’s right to reclaim the space without having to bear the costs of rearrangements or capacity expansion.⁴⁴ Commission precedent recognizes that occupying the lowest position on the pole

⁴¹ *See supra* note 19.

⁴² *See Answer* at ¶¶ 12, 18-19; *id.* at Ex. A, DEF000134 (Freeburn Decl. ¶ 17); *id.* at Ex. 1, DEF000246 (JUA, Section 1.1.16(B)).

⁴³ *See Answer* at ¶ 19; *id.* at Ex. A, DEF000134-35 (Freeburn Declaration, ¶ 17); *id.* at Ex. C, DEF000166 (Burlison Declaration, ¶ 17).

⁴⁴ *See Answer*, Ex. 1 at DEF000258 (JUA, Article XIV, Section 14.5) (“Third party space requirements must be accommodated without permanent encroachment into the standard space allocation of the Licensee; therefore, neither party hereto shall, as Owner, lease to any third party, space on a joint use pole within the allocated standard space of Licensee without adequate provision for subsequent use of such standard space by Licensee without cost to Licensee.”); *see also* CATV-1 at DEF000010-11 (Section 0.2) (allowing denial of attachment request where proposed attachment is not compatible with “existing or committed attachments of others within available space on existing poles”); *accord* CATV-13 at DEF001044; CATV-14 at DEF001125; CATV-9 at DEF000765 (Section 2.1) (allowing denial of attachment request where proposed attachment is not acceptable because of “committed attachments of others”); *accord* CATV-12 at DEF001025 (Section 2.1); CLEC-7 at DEF000694; CLEC-14 at DEF001005 (Section 2.1); CLEC-17 at DEF001154 (Section 2.1); WIRELESS-2 at DEF00636 (Ex. D) (“Antenna locations cannot violate existing joint use allocations or agreements with other joint use parties.”).

provides ILECs with a competitive advantage over CATVs and CLECs. *2018 Order*, 33 FCC Rcd at 7770-71, ¶ 128 (explaining that “similarly situated” presumption can be rebutted by demonstrating “material benefits” under the joint use agreement, such as the right to “preferential location” on poles; *Verizon Florida Order*, 30 FCC Rcd at 1148-50, ¶¶ 21,22 & 23 (joint use agreement’s allocation of lowest four feet of usable space on poles was benefit to ILEC because it “is easier to access than the space used by [the ILEC’s] competitors” and “reduces [the ILEC’s] installation and maintenance costs”); *AT&T Florida I Order*, 35 FCC Rcd at 5328-29, ¶ 14 (guaranteed lowest space on the pole was an advantage because allowed ILEC’s employees to “work in a safer area of the pole,” “identify and access [the ILEC’s] attachments more easily,” and “use less expensive bucket trucks with shorter reach”).

Despite the fact that the Commission has previously held that the right to the lowest position in the communications space is a material advantage for ILECs, AT&T argues that its guaranteed lowest position in the communications space is actually disadvantage.⁴⁵ However, AT&T provides no valuation of that supposed disadvantage—thus failing to meet its burden of proof under the *2011 Order*. See *Verizon Florida Order*, 30 FCC Rcd at 1149-50, ¶ 24 (dismissing complaint because ILEC failed to quantify the benefits it receives under the joint use agreement).

II. IF THE TELECOM RATE APPLIES AT ALL, IT SHOULD BE THE OLD TELECOM RATE, AND IT SHOULD APPLY *ONLY* TO PERIODS GOVERNED BY THE *2018 ORDER*.

AT&T made absolutely no effort whatsoever to carry its burden of proof for periods governed by the *2011 Order*. Neither AT&T’s complaint nor its reply even seem to acknowledge the important distinction between periods governed by the *2011 Order* vs. the *2018 Order*.

⁴⁵ See AT&T’s Pole Attachment Complaint at ¶ 19; *id.* at Ex. C, ATT00041-42 (Peters Aff. ¶¶ 20-23).

Specifically, AT&T failed to quantify any of the benefits it enjoys under the JUA, which is a fatal omission under the *2011 Order*. For example, in the *Verizon Florida* proceedings, the Commission dismissed Verizon's complaint—even in the face of a \$36.22 per pole rate (that was nearly three times the old telecom rate and more than four times the new telecom rate)—because:

...Verizon [] 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 Florida Order, 30 FCC Rcd at 1149-50, ¶ 24 (emphasis added). Given AT&T's abject failure to carry its burden with respect to periods governed by the *2011 Order*, the Commission should not even consider whether or how the telecom rate applies to periods governed by the *2011 Order*.

The March 8, 2021 letter states:

Assuming that the new telecom rate or the pre-existing (old) telecom rate is determined to apply to AT&T's attachments to the Duke poles at issue in this case, the parties shall confer on the proper calculation of the new telecom rate and the pre-existing (old) telecom rate for each of the years at issue and jointly prepare a summary document identifying those input values on which the parties agree....The parties shall submit that summary document with their opening briefs.

With respect to those inputs to the new telecom rate and the pre-existing (old) telecom rate formula that are disputed, explain in detail your contention as to the proper determination of the disputed input, citing all record evidence, including information disclosed in discovery, and all authorities supporting your determination of the value of that input. To the extent the parties continue to dispute

certain inputs your briefs should include a discussion of the topics listed in Appendix A hereto.

March 8, 2021 Letter at p. 2. The summary document referenced in the Commission’s letter is attached hereto as Exhibit A. DEF’s positions with respect to the disputed rate formula inputs, including the specific issue raised in Appendix A of the Commission’s letter, are addressed in detail below, and are also set forth in Exhibit B.

As a preliminary matter, DEF contends that its annual pole cost should not be at issue. The annual adjustment payments AT&T was required to make under the JUA were calculated using DEF’s annual pole cost—i.e., AT&T was required to pay █████ “of the majority pole owner’s annual pole cost.”⁴⁶ In calculating its annual pole cost for each billing year in question, DEF adhered to the Commission’s formula.⁴⁷ Furthermore, per section 11.1 of the JUA (as amended in 1990), DEF sent AT&T its rate calculations and methodology (which included calculations of AT&T’s annual pole cost) each billing year for review and approval. AT&T reviewed and approved DEF’s annual pole cost for each billing year in question.⁴⁸ Therefore, DEF’s annual pole cost is not credibly in dispute—the real dispute is over cost allocation.

A. Carrying Charges.

The parties’ dispute with respect to the carrying charge relates to the A&G and taxes components of the carrying charge. AT&T has stipulated to DEF’s calculation of the other carrying charge components.

⁴⁶ Answer, Ex. 3 at DEF000266 (1990 Amendment, Section 10.4(b)).

⁴⁷ See Answer at ¶ 31; *id.* at Ex. D, DEF000171 (Olivier Decl. ¶¶ 3-5); *id.* at Ex. 3, DEF000266 (1990 Amendment, Section 11.1).

⁴⁸ See Answer at ¶ 31; *id.* at Ex. A, DEF000136-37, DEF000144-48 (Freeburn Decl. ¶ 21, Ex. A-2).

1. Rate of return.

Although the rate of return is no longer in dispute as AT&T has stipulated to DEP's calculation of same, the Bureau specifically asked in the March 8, 2021 letter "[w]hether the state of Florida has prescribed a rate of return for DEF that is applicable to all the years in dispute in this proceeding." March 8, 2021 Letter at p. 4. In 2010, the Florida Public Service Commission ("FPSC") authorized a 7.88% rate of return for DEF.⁴⁹ That 7.88% rate of return is DEF's most recently authorized rate of return. Because the time periods subsequent to 2010 were governed by settlements at the FPSC (with no resulting order containing a rate of return), however, DEF has chosen to use the *lower* rates of return that it reports to the FPSC in its December Earnings Surveillance Reports. The rates of return reflected in the Earnings Surveillance Reports are the actual cost of capital DEF reports to the FPSC and capture investment and cost data that are more temporally relevant to the cost data used in the rate formulas.⁵⁰ The rates of return that DEF reports in its Earnings Surveillance Reports are lower than AT&T's rate of return calculations for DEF.⁵¹ This difference arises out of the FPSC's treatment of ADIT as a "zero-cost item" in DEF's capital structure.⁵² AT&T previously disputed DEF's treatment of ADIT as "costless capital" and argued that it is inconsistent with the FCC's methodology.⁵³ AT&T is wrong for the reasons set forth above.⁵⁴ However, AT&T has now stipulated, for purposes of this proceeding, to the use of

⁴⁹ See *In re: Petition for Increase in Rates by Progress Energy Florida*, Order No. PSC-10- 0131, at p. 172 (Mar. 5, 2010); see also Answer, Ex. D. at DEF000172-73 (Olivier Decl. ¶ 8).

⁵⁰ See Answer, Ex. D at DEF000172-73 (Olivier Decl. ¶ 8).

⁵¹ See AT&T Reply Legal Analysis, Ex. A at ATT00242-43, ATT00262 (Rhinehart Aff. ¶¶ 8-9, Ex. R-6).

⁵² See Answer, Ex. D at DEF000172-73 (Olivier Decl. ¶ 8).

⁵³ See AT&T Reply Legal Analysis, Ex. A at ATT00242-43 (Rhinehart Aff. ¶¶ 8-9).

⁵⁴ See *supra* Section II.A.; see also *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387, 4393 ¶ 52 (Jul.

DEF's approach to ADIT (i.e., treating ADIT as a zero-cost item in DEF's capital structure). *See* Exhibit A.

2. O&M, Depreciation, A&G, and Taxes.

AT&T has stipulated to DEP's calculation of the O&M and depreciation carrying charge components, and they are thus no longer in dispute. As illustrated in Exhibit B hereto, the parties continue to dispute the A&G and taxes components of the carrying charge. DEF is unclear as to why AT&T's calculation of A&G diverges from DEF's. The parties' taxes elements of the carrying charge differ because AT&T includes income taxes along with other taxes in its calculation of the tax rate component of the carrying charge rate.⁵⁵ DEF's calculation simply grosses up the equity component of DEF's weighted average cost of capital ("WACC") by the statutory tax rate, thereby arriving at a clear and accurate income tax component of the carrying charge.⁵⁶

B. Space Allocation Factor.

Both parties' calculations utilize the Commission's presumptions regarding: (1) the average feet of unusable space per pole; and (2) average pole height.⁵⁷ *See* 47 C.F.R. § 1.1410. The two inputs with respect to the space factor that are contested are: (1) the average amount of usable space occupied by AT&T's attachments; and (2) the average number of attaching entities.

23, 1987); *TeleCable of Piedmont, Inc., et al. v. Duke Power Company*, Hearing Designation Order, 10 FCC Rcd 10898, Attachment A at n.* (Jun. 15, 1995).

⁵⁵ *See* Answer, Ex. D at DEF000174 (Olivier Decl. ¶ 12).

⁵⁶ *See id.*

⁵⁷ *See* AT&T's Pole Attachment Complaint at ¶ 31; AT&T's Reply Legal Analysis, Ex. A at ATT00259 (Rhinehart Aff. Ex. R-5).

1. Average feet of usable space occupied.

Based on evidence submitted by DEF, AT&T occupies [REDACTED] of space per DEF pole on average.⁵⁸ This is a combination of the [REDACTED] of space AT&T actually occupies on average (based on survey data from 941 DEF poles to which AT&T is attached), plus 40” (3.33 feet) of safety space.⁵⁹ AT&T claims that it only occupies one foot of space per DEF pole on average, but AT&T has not produced any data in support of its claim or to contradict the data submitted by DEF and, instead, relies upon the Commission’s presumption.⁶⁰

a. Actual Space Occupied

The JUA allocated [REDACTED] of space to AT&T.⁶¹ Make-ready surveys performed on 941 DEF poles to which AT&T is attached have revealed that AT&T actually occupies, on average, at least [REDACTED] of usable space.⁶²

The Enforcement Bureau’s March 8, 2021 letter asks: “Whether the pole surveys DEF produced in discovery provide statistically valid samples of data regarding pole height, attachment height, and midspan height.” March 8, 2021 Letter at p. 4. As an initial matter, DEF is only offering the data for the limited purpose of establishing the average height of AT&T’s highest attachment on each DEF pole that AT&T occupies. This average attachment height of [REDACTED], when paired with the Commission’s presumption that the lowest point of attachment on a pole is 18 feet, means that AT&T, either through multiple attachments and/or through heavy attachments

⁵⁸ See Answer at ¶ 12; *id.* at Ex. A, DEF000130 (Freeburn Decl. ¶ 8); DEF’s Supplemental Interrogatory Responses, Ex. 4 at DEF001409 (Survey Results).

⁵⁹ See Answer at ¶ 12.

⁶⁰ See AT&T’s Pole Attachment Complaint at ¶ 25; AT&T’s Reply Legal Analysis at pp. 11, 19 (arguing that “[n]ew telecom rates for AT&T must be calculated—as they are for AT&T’s competitors—based on the Commission’s presumptive 1-foot input for pole space occupied”).

⁶¹ See Answer, Ex. 1 at DEF000246 (JUA, Section 1.1.6.).

⁶² See Answer at ¶ 12; *id.* at Ex. A, DEF000130, DEF000132 (Freeburn Decl. ¶ 8, 12); DEF’s Supplemental Interrogatory Responses, Ex. 4 at DEF001409 (Survey Results).

that require more space due to mid-span sag, occupy ████████ of space.⁶³ This data corroborates, and is corroborated by, the ████████ space allocation within the JUA. The geographic overlay of the data points within this sample are distributed throughout DEF's service area and were selected by third parties (entities seeking to make attachment to a pole), which contributes to the randomness of the sample. The data points were not selected by DEF, which eliminates the possibility of data manipulation. This data, if it incorrectly expresses AT&T's average attachment height at all, would likely understate AT&T's actual utilization of DEF's poles. The sample of 941 poles would skew toward areas where there is more competition for space (given that each of these poles was surveyed/measured pursuant to a third-party attachment request). This means that space utilization is likely more efficient and more compressed on this sample than on average. In short, this data is generous to AT&T.

Though AT&T disputes that it occupies, on average, ████████ of space on DEF's poles, AT&T has not presented any data to rebut the findings of DEF's make-ready surveys. AT&T has also failed to produce any data to support its claim that it only occupies one foot of space on DEF's poles. Instead, AT&T merely argues that the rebuttable one-foot presumptive space occupied input should be applied to its attachments because it is applied to CATV and CLEC attachments.⁶⁴ However, as set forth in DEF's answer, AT&T's attachments are not analogous to CATV and CLEC attachments. AT&T's attachments are among the "largest" and "heaviest" on DEF's joint use poles and generally have more sag than CATV and CLEC attachments (which is corroborated by the mid-span sag data in the above referenced pole surveys).⁶⁵ Because DEF's space occupied

⁶³ See Answer at ¶ 12; *id.* at Ex. A, DEF000130, DEF000132 (Freeburn Decl. ¶¶ 8, 12); DEF's Supplemental Interrogatory Responses, Ex. 4 at DEF001409 (Survey Results).

⁶⁴ See AT&T's Reply Legal Analysis at pp. 11, 19.

⁶⁵ See Answer, Ex. A at DEF000132-33 (Freeburn Decl. ¶¶ 13-14).

input is supported by actual data, the Commission should adopt [REDACTED] as the average useable space actually occupied by AT&T's attachments. *See AT&T Florida II Order*, 2021 FCC LEXIS 124, *20-21, ¶ 18 (finding that electric utility rebutted the space occupied presumption by providing survey results showing ILEC occupied more than one foot of space).

b. Safety Space.

If the Commission replaces the JUA's cost sharing structure with one of its rate formulas, then the 40" (3.33 feet) of safety space on jointly used poles owned by DEF should be assigned to AT&T.⁶⁶ As explained in DEF's answer, DEF should not be required to bear the cost of the safety space on its own poles because: (1) from a cost-of-service ratemaking perspective, there is no rational justification for requiring DEF and its ratepayers to bear this cost;⁶⁷ (2) the Commission's decision to not allocate any portion of the safety space to CATVs and CLECs is predicated on the fact that ILECs and electric utilities share the cost of safety space under joint use agreements;⁶⁸ and (3) the authority relied upon by AT&T in arguing that DEF should bear this cost is factually distinguishable from the facts at issue in this proceeding.⁶⁹ For all the reasons set forth in DEF's answer, DEF should not be forced to bear the cost of the safety space on its own poles; AT&T—the cost-causer of the safety space on DEF's poles—should bear that cost (and vice versa).⁷⁰

⁶⁶ AT&T does not dispute that the safety space is typically 40" (3.33 feet). *See AT&T's Pole Attachment Complaint* at ¶ 25.

⁶⁷ *See Answer* at ¶ 25; *id.* at Ex. A, DEF000133-34 (Freeburn Decl. ¶¶ 15-16); *id.* at Ex. B, DEF000152-53, DEF000156-57 (Hatcher Decl. ¶¶ 7, 16); *id.* at Ex. C, DEF000163-65 (Burlison Decl. ¶¶ 7-13); *id.* at Ex. D, DEF000175 (Olivier Decl. ¶ 14); *id.* at Ex. E, DEF000217-18 (Metcalf Decl. ¶ 32).

⁶⁸ *See Answer* at ¶ 25; *id.* at Ex. A, DEF000133-34 (Freeburn Decl. ¶¶ 15-16); *id.* at Ex. B, DEF000152-53 (Hatcher Decl. ¶ 7); *id.* at Ex. C, DEF000163-65 (Burlison Decl. ¶¶ 7-13).

⁶⁹ *See Answer* at ¶ 25; *id.* at Ex. A, DEP000252-53 (Freeburn Decl. ¶ 18); *id.* at Ex. B, DEP000285 (Hatcher Decl. ¶ 9); *id.* at Ex. C, DEP000297 (Burlison Decl. ¶¶ 8-10).

⁷⁰ *See Answer* at ¶ 25.

2. The average number of attaching entities is [REDACTED].

The average number of attaching entities (including DEF) on jointly used poles owned by DEF is [REDACTED].⁷¹ This average is based on data collected by DEF's contractor during a 2017 audit of all DEF poles, and the [REDACTED] average applies only to those poles to which AT&T is attached.⁷² In other words, this is not a system average based on statistical sampling; it is the actual average number of attaching entities based on an audit of all DEF poles to which AT&T is attached.

AT&T claims that the average number of attaching entities on DEF poles is 5.⁷³ AT&T relies solely on the Commission's presumptive input for average number of attaching entities in urbanized areas.⁷⁴ AT&T has not offered any data, analysis or argument to discredit the results of DEF's 2017 audit. *See* 47 C.F.R. § 1.1409(d)(3) (requiring an attaching entity, when rebutting a utility's calculation of average number of attaching entities, to submit information demonstrating why the utility's calculation is incorrect); *Verizon Maryland Order*, 35 FCC Rcd at 13625, ¶ 37 (accepting electric utility's calculation of average number of attachers that was lower than the Commission's presumptive input and derived from statistical sampling); *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Memorandum Opinion and Order, Proceeding No. 19-187, 2021 FCC LEXIS 124, at * 20, ¶ 18 (Jan. 14, 2021) ("*AT&T Florida II Order*") (accepting electric utility's calculation of average number of attaching entities, which was based on surveys of all joint use poles owned by the

⁷¹ *See* Answer at ¶ 22; *id.* at Ex. A, DEF000139 (Freeburn Decl. ¶ 28); DEF's Supplemental Interrogatory Responses, Ex. 5 at DEF001411 (VentureSum AAE Findings).

⁷² *See* Answer, Ex. A at DEF000139 (Freeburn Decl. ¶ 28); DEF's Supplemental Interrogatory Responses, Ex. 5 at DEF001411 (VentureSum AAE Findings).

⁷³ *See* AT&T's Pole Attachment Complaint at ¶ 31; AT&T's Reply to DEF's Answer at ¶ 22; AT&T's Reply Legal Analysis, Ex. A at ATT00245 (Rhinehart Aff. ¶ 12).

⁷⁴ *See* AT&T's Pole Attachment Complaint at ¶ 31; *id.* at Ex. A, ATT00004 (Rhinehart Aff. ¶ 6); AT&T's Reply Legal Analysis, Ex. A at ATT00243 (Rhinehart Aff. ¶ 10).

electric utility).

C. The Old Telecom Rate Is Applicable Here.

DEF has demonstrated that AT&T enjoys numerous net benefits under the JUA that provide AT&T with material advantages over its CATV and CLEC competitors. Moreover, DEF has presented “clear and convincing” evidence quantifying the immense value the JUA provides to AT&T.⁷⁵ See 47 C.F.R. § 1.1413(b). AT&T, on the other hand, has not only failed to rebut DEF’s evidence with its own data, but AT&T has also failed to provide any data at all to meet its burden of proof under the *2011 Order* that it is “similarly situated” to other telecommunications attachers. Accordingly, AT&T is not entitled to a refund for any payment period governed by the *2011 Order*, and to the extent it AT&T is entitled to any relief under the *2018 Order*, such relief should be calculated using the old telecom rate formula.

If the Commission somehow determines that AT&T is entitled to the new telecom rate (a determination that would not be supported by the record in these proceedings), then the Commission should adopt DEF’s methodology for calculating the new telecom rate for AT&T’s attachments.⁷⁶ Specifically, the Commission should multiply the one-foot new telecom rate by the number of feet of useable space occupied by AT&T’s attachments. This methodology ensures that application of the new telecom rate to AT&T’s attachments would not discriminate against CATVs.⁷⁷ See *Implementation of Section 224 of the Act; A National Broadband Act for Our Future*, Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 30 FCC Rcd 13731, 13738 at ¶ 16 (Nov. 24, 2015) (“[The Commission] take[s] this step...to bring cable and telecom rates for pole attachments into parity at the cable-rate level.”); see also *2011 Order*, 26

⁷⁵ See generally, Answer, Ex. E at DEF000202-43 (Metcalf Declaration).

⁷⁶ See Answer at ¶ 12.

⁷⁷ See Answer at ¶ 12 n.34.

FCC Rcd at 5305, ¶ 151 (noting that the new telecom rate formula would “generally recover a portion of the pole costs that is equal to the portion of costs recovered in the cable rate” and further noting that “this approach will significantly reduce the marketplace distortions...that rose from disparate rates”).

CONCLUSION

For those reasons set forth above and in DEF’s Answer, the Commission should deny all relief sought by AT&T.⁷⁸ AT&T has failed to meet its burden of proof under the *2011 Order* with respect to periods governed by the *2011 Order*. With respect to the period covered by the *2018 Order*, AT&T failed to even voice an objection to the cost-sharing methodology in the JUA until May 22, 2019. Further, as illustrated by the undisputed evidence submitted by DEF, the rates charged by DEF under the JUA are just, reasonable, and non-discriminatory in light of the material benefits AT&T receives under the JUA. If the Commission unwinds the cost-sharing provisions of the JUA at all, any alternative rates that the Commission sets should be consistent with the rates set forth in paragraphs 37 or 38 of DEF’s Answer.

Respectfully submitted this 8th day of April, 2021.

s/Eric B. Langley

Eric B. Langley
Counsel for Defendant
Duke Energy Florida, LLC

⁷⁸ To the extent the Commission wishes for DEF to provide attestation regarding any of the additional points addressed in this brief in response to the Commission’s inquiries, DEF is happy to provide same.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, April 8, 2021, a true and correct copy of Duke Energy Florida, LLC's Initial Brief was filed with the Commission via ECFS and was served on the following (service method indicated):

Robert Vitanza Gary Phillips David Lawson AT&T SERVICES, INC. 1120 20th Street NW, Suite 1000 Washington, DC 20036 (by U.S. Mail)	Marlene H. Dortch, Secretary Federal Communications Commission 445 12th Street, SW Washington, DC 20554 (by FedEx Overnight and ECFS)
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EXHIBIT A**UNDISPUTED OR STIPULATED TELECOM RATE INPUTS**

Net Cost of a Bare Pole Components		
Input	Year	Amount
Total number of poles	2015	997,001
	2016	1,004,863
	2017	1,012,804
	2018	1,014,830
	2019	1,102,223
	2020	1,204,011
FERC Account 364	2015	\$623,277,137
	2016	\$648,517,991
	2017	\$689,852,847
	2018	\$706,142,884
	2019	\$750,580,260
	2020	\$837,220,681
Depreciation Related to FERC Account 364	2015	\$374,851,860
	2016	\$395,564,450
	2017	\$414,417,570
	2018	\$433,518,640
	2019	\$450,354,740
	2020	\$461,721,720
ADIT Related to FERC Account 364	2015	\$0
	2016	\$0
	2017	\$0
	2018	\$0
	2019	\$0
	2020	\$0
Net Cost of a Bare Pole	2015	\$211.80
	2016	\$213.97
	2017	\$231.16
	2018	\$228.34
	2019	\$231.52
	2020	\$265.09

Carrying Charge Components		
O&M	2015	6.44%
	2016	6.68%
	2017	5.99%
	2018	5.94%

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	2019	5.21%
	2020	5.83%
Rate of Return	2015	7.02%
	2016	6.90%
	2017	6.65%
	2018	6.68%
	2019	6.54%
	2020	6.27%
Depreciation	2015	10.54%
	2016	10.77%
	2017	10.52%
	2018	10.88%
	2019	10.50%
	2020	9.36%

Depreciation Component of Carrying Charge: Distribution Plant Depreciation Rate	
Years	Distribution Plant Depreciation Rate
2015-2020	4.20%

Tax Component of Carrying Charge*	
*Although the parties do not agree to the calculation of the tax component of the carrying charge, they stipulate to the Electric Plant Depreciation Reserve that is an input into the calculation of that component.	
	Electric Plant Depreciation Reserve
2015	\$5,138,064,049
2016	\$5,337,009,605
2017	\$5,241,868,347
2018	\$5,576,853,114
2019	\$5,435,146,000
2020	\$5,538,522,239

A&G Component of Carrying Charge*	
*Although the parties do not agree to the calculation of the A&G component of the carrying charge, they stipulate to the General and Administrative Expense that is an input into the calculation of that component.	
	General and Administrative Expense
2015	Not agreed
2016	\$242,876,193
2017	\$257,542,292
2018	\$217,890,718
2019	\$386,505,823
2020	\$392,183,259

EXHIBIT B**DISPUTED TELECOM RATE INPUTS**

Carrying Charge Inputs			
Input	Year	DEF's Position⁷⁹	AT&T's Position⁸⁰
A&G	2015	2.95%	3.31%
	2016	2.66%	3.23%
	2017	2.67%	3.05%
	2018	2.08%	2.08%
	2019	3.11%	3.38%
	2020	2.78%	2.99%
Taxes	2015	5.83%	9.43%
	2016	5.76%	8.78%
	2017	5.41%	7.48%
	2018	3.89%	6.21%
	2019	3.63%	4.14%
	2020	3.31%	4.02%

Space Allocation Factor	
Input	Feet
Space Actually Occupied by AT&T	
Total Space Occupied by AT&T*	
Average Number of Attaching Entities	
Average feet of unusable space per pole**	24
Average feet of useable space per pole**	13.5
Average pole height**	37.5
<p>* Space Actually Occupied by AT&T [REDACTED] plus 40" (3.33 feet) of safety space on DEF's poles.</p> <p>**AT&T is apparently now taking the position that these Commission presumptions are in dispute. However, AT&T relied upon these presumptions in the filings it has submitted throughout this proceeding, and has submitted no data to rebut these presumptions.</p>	

⁷⁹ Answer, Ex. D at DEF000178, DEF000180, DEF000182, DEF000184, DEF000186, DEF000188 (Olivier Decl. Ex. D-1).

⁸⁰ AT&T's Reply Legal Analysis, Ex. A at ATT00259 (Rhinehart Aff. Ex. R-5).

APPENDIX A
CONFIDENTIAL LICENSE AGREEMENT DESIGNATIONS⁸¹

Agreement	Bates Number Range
CATV-1*	DEF000010-DEF000027
CATV-2	DEF000345-DEF000364
CATV-3	DEF000365-DEF000395
CATV-4	DEF000490-DEF000515
CATV-5	DEF000516-DEF000541
CATV-6	DEF000542-DEF000565
CATV-7	DEF000566-DEF000593
CATV-8	DEF000641-DEF000663
CATV-9*	DEF000763-DEF000789
CATV-10	DEF000857-DEF000876
CATV-11	DEF000877-DEF000901
CATV-12*	DEF001024-DEF001042
CATV-13*	DEF001043-DEF001072
CATV-14*	DEF001124-DEF001151
CATV-15	DEF001198-DEF001221
CLEC-1*	DEF000028-DEF000073
CLEC-2	DEF000296-DEF000341
CLEC-3	DEF000396-DEF000437
CLEC-4	DEF000438-DEF000460
CLEC-5	DEF000461-DEF000489
CLEC-6	DEF000664-DEF000691
CLEC-7*	DEF000692-DEF000716
CLEC-8	DEF000717-DEF000740
CLEC-9	DEF000741-DEF000762
CLEC-10	DEF000790-DEF000810
CLEC-11	DEF000811-DEF000856
CLEC-12	DEF000945-DEF000973
CLEC-13*	DEF000974-DEF001002
CLEC-14*	DEF001003-DEF001023
CLEC-15	DEF001073-DEF001099
CLEC-16	DEF001100-DEF001123
CLEC-17*	DEF001152-DEF001177
CLEC-18	DEF001178-DEF001197
CLEC-19	DEF001222-DEF001250
CLEC-20	DEF001297-DEF001323

⁸¹ The agreements bearing an asterisk were referenced in DEF's initial brief. These agreements were selected based on attachment count. The CATV agreements represent 93% of CATV attachments on DEF poles. The CLEC agreements represent 65% of CLEC attachments on DEF poles. And the Wireless agreement represents 72% of wireless attachments on DEF poles.

PUBLIC VERSION

CLEC-21	DEF001324-DEF001391
WIRELESS-1	DEF000074-DEF000120
WIRELESS-2*	DEF000594-DEF000640
WIRELESS-3	DEF000902-DEF000944
WIRELESS-4	DEF001251-DEF001296