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

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

To: The Enforcement Bureau

DUKE ENERGY FLORIDA, LLC'S PETITION FOR RECONSIDERATION

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SUMMARY OF THE ARGUMENT

The Bureau misapplied the standard of proof for the period governed by the 2011 Order. In its first order after the effective date of the 2011 Order, the Commission dismissed an ILEC's complaint that a $36.22 joint use agreement rate was unjust or unreasonable because the ILEC failed to produce evidence that the monetary value of its advantages under the joint use agreement were less than the difference between $36.22 and the old telecom rate. Here, the Bureau correctly found that AT&T receives net material advantages under the joint use agreement *and* that AT&T failed to present evidence regarding the monetary value of those advantages. These two findings alone are fatal to AT&T's claim for relief under the 2011 Order. The Bureau also inappropriately applied the standard applicable to "new" agreements for the period governed by the 2011 Order, even though the Bureau correctly found that the agreement at issue here was an "existing" or "historical" agreement. The Bureau should correct its error and find that AT&T is not entitled to relief for the period governed by the 2011 Order.

The Bureau also incorrectly rejected evidence presented by DEF regarding the value of the net material advantages to AT&T under the joint use agreement. For example, although the Bureau found that the contractual right to remain attached post-termination was a material advantage to AT&T, the Bureau nonetheless found that DEF's valuation was "speculative and lacking support" because it assumed that, in the absence of this right, the parties would be required to remove their facilities from each other's poles. The Bureau's rejection of DEF's evidence simply supposed, without explanation or alternative, that such a result would never come to pass. The Bureau also incorrectly found that DEF did not submit evidence of the costs it incurred on AT&T's behalf for inspection and engineering work, even though the unrebutted testimony and documentary evidence demonstrates otherwise. The Bureau should correct these errors and account for these net benefits and costs through additional space allocations to AT&T under the old telecom rate formula.

The Bureau also ignored the record evidence in this case and seemed to find, as a matter of law, that the communication workers safety zone (a/k/a "safety space") on DEF's poles was "usable and used by" DEF. There is no basis in the record for this finding. The uncontroverted evidence is that DEF does not need and does not use the safety space on its own poles. DEF built safety space into its network of poles specifically because of the joint use agreement. This space, which has an ongoing cost, is not needed for the provision of electric service. The Bureau's decision to exclude the safety space from AT&T's space allocation—and its refusal to otherwise allocate it through the Commission's formulas—has the effect of shifting the entire cost of the safety space to DEF and its ratepayers. The Bureau should correct this error by either allocating the safety space to AT&T or, at a minimum, allocating a pro rata share of the space to AT&T.

AT&T first sought to renegotiate the joint use agreement rates on May 22, 2019. The primary reasons this dispute became a complaint were: (1) AT&T's insistence on the "one foot" new telecom rate, despite its advantages under the joint use agreement; and (2) AT&T's insistence on massive refunds for periods that were both prior to its first request to renegotiate *and* governed by the 2011 Order. Though the Bureau's August 27, 2021 order has cleared the first hurdle for the parties, the Bureau can and should clear the second through proper application of the standard of proof under the 2011 Order.

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To: The Enforcement Bureau

PETITION FOR RECONSIDERATION

Pursuant to Section 1.106 of the Commission's rules,[1] Duke Energy Florida, LLC ("DEF") hereby petitions the Enforcement Bureau to reconsider certain portions of its August 27, 2021 Memorandum Opinion and Order in the above-captioned proceedings (the "Order") and to either vacate the order or issue a new order consistent with DEF's requests herein.

ARGUMENT

I. The Bureau Should Reconsider Its Finding that AT&T Is Entitled to Relief Under the 2011 Order.

The Bureau correctly acknowledged that AT&T enjoys material benefits under the joint use agreement between the parties (the "JUA") as compared to competitive local exchange carriers ("CLECs") and cable television systems ("CATVs") on the same poles.[2] The Bureau also

[1] 47 C.F.R. § 1.106.

[2] *See, e.g.,* Order at ¶¶ 22, 33, 39.

correctly found that AT&T did not provide "a credible valuation of the advantages that AT&T received under the JUA."[3] Nevertheless, the Bureau found that "AT&T has shown that the material advantages it receives under the JUA do not justify the JUA's rates…."[4] Based on this finding, the Bureau determined that AT&T should have been charged no more than the Old Telecom Rate during the payment periods governed by the 2011 Order.[5] This finding (a) is irreconcilable with the 2011 Order and Commission authority regarding the burden of proof under the 2011 Order; (b) applies the legal standard for "new" agreements, rather than "historical" agreements; and (c) ignores the fact that AT&T never even attempted to terminate the JUA and obtain a new arrangement. Accordingly, on reconsideration, the Bureau should find that AT&T failed to demonstrate it is entitled to relief under the 2011 Order.

A. The Bureau Erred in Finding that AT&T Satisfied Its Burden of Proof under the 2011 Order.

The JUA at issue here constitutes an "existing" or "historical joint use agreement" under the 2011 Order.[6] Furthermore, the Bureau determined that the JUA provides AT&T with benefits that give AT&T a competitive advantage over CLECs and CATV attachers on the same poles.[7] Therefore, under the 2011 Order, AT&T bears the burden of demonstrating that the "monetary value" of the benefits under the JUA does not justify the difference between the "rate" AT&T paid under the JUA and the rate AT&T would have paid under the Old Telecom Rate formula.[8] In the

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[3] *Id*. at ¶ 45.

[4] *Id.* at ¶ 40.

[5] *Id.* at ¶ 45; *see also Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240 (Apr. 7, 2011) (the "*2011 Order*").

[6] *See* Order at ¶¶ 9, 34 n.114; *see also* 2011 Order, 26 FCC Rcd at 5334-37, ¶¶ 216-17.

[7] *See* Order at ¶¶ 22-33, 39.

[8] *See* 2011 Order, 26 FCC Rcd at 5333-37, ¶¶ 214-19; *Verizon Fla. LLC v. Fla. Power and Light Co.*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1149-50 at ¶ 23-24 (Feb. 11, 2015) (the "*Verizon Florida Decision*").

first case decided by the Commission after the effective date of the 2011 Order, the Commission rejected an ILEC's complaint that a $36.22 rate was unjust and unreasonable even though it exceeded the Old Telecom Rate by nearly 300%. The Commission held:

> [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…. Absent such evidence, we are unable to determine whether the Agreement Rates are just and reasonable.** Verizon's raw comparison of the Agreement Rates to the Old and New Telecom Rates is not sufficient to show that the Agreement Rates are unjust.[9]

As the Bureau expressly acknowledged, AT&T failed to produce any evidence showing that the "monetary value" of the benefits it enjoys "is less than the difference" between the "rate" it pays under the joint use agreement and the rate it would have paid under the Old Telecom Rate formula. "Absent such evidence," there was no way for the Bureau to determine whether the "rate" under the joint use agreement was "just and reasonable" for the period governed by the 2011 Order.

The Bureau failed to address the *Verizon Florida Decision* in its analysis of whether AT&T had satisfied its burden of proof under the 2011 Order. The *Verizon Florida Decision* has never been overruled by the Commission and was the sole guidepost for disputes governed by the 2011 Order involving "existing" or "historical" joint use agreements prior to the effective date of the 2018 Order.[10] Furthermore, there are no obvious grounds upon which the *Verizon Florida Decision* is distinguishable from the facts in this proceeding. Like the JUA between AT&T and

[9] *Verizon Florida Decision*, 30 FCC Rcd at 1149-50 at ¶ 24 (emphasis added).

[10] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Development 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 (Aug. 3, 2018) (the "*2018 Order*").

DEF, the joint use agreement at issue in the *Verizon Florida Decision*: (a) qualified as an "existing" or "historical joint use agreement" under the 2011 Order; (b) provided the ILEC with material benefits that gave it a competitive advantage over other attaching entities; and (c) calculated the "rate" by allocating an express percentage of pole costs to the ILEC (50% in the *Verizon Florida Decision* and [redacted] in the case at bar).[11]

Perhaps because the order does not address the *Verizon Florida Decision*, the Bureau determined that AT&T met its burden of proof solely by pointing to the allocation of annual pole costs under the JUA and arguing that it was not "proportional."[12] This is not the correct legal standard.[13] As clearly set forth in the *Verizon Florida Decision*, AT&T bears the burden of proving that the "rate" it pays is not justified by the "monetary value" of the competitive advantages it enjoys under the JUA. Moreover, this "proportionality" standard was not applied in the *Verizon Florida Decision*—even though the joint use agreement in that proceeding allocated a higher percentage of the annual pole costs to the ILEC and even though the rate at issue in the *Verizon Florida Decision* was significantly higher than the rate at issue here.

B. The Bureau Erred by Applying the Legal Standard Applicable to "New Agreements" to the Parties' "Historical Joint Use Agreement."

For the period governed by the 2011 Order, there are only two types of joint use agreements: "existing" (a/k/a "historical") and "new." Each is governed by a different standard.

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[11] *See Verizon Florida Decision*, 30 FCC Rcd at 1143, ¶ 10 ("[T]he Agreement provides that each party pays fifty percent of the annual cost of owning and maintaining joint use poles."), 1149, ¶ 23 ("The agreement here is not a new agreement. It is 'an historical joint use agreement'….").

[12] Order at ¶ 40.

[13] It is unclear how "proportionality" seeped into the analysis of an ILEC's burden of proof under the 2011 Order. The concept of "proportionality" is only mentioned once within the 2011 Order: "[W]e would be skeptical of a complaint by an [ILEC] seeking a proportionately lower rate to attach to an electric utility's poles than the rate the [ILEC] is charging the electric utility to attach to its poles." 2011 Order, 26 FCC Rcd at 5337, ¶ 218. The Commission's invocation of "proportionality" had nothing to do with an ILEC's burden of proof under the 2011 Order.

As the Bureau correctly noted, the JUA at issue here is not a "new" agreement, but instead an "existing" or "historical" agreement.[14] Though the Old Telecom Rate is a "reference point" with respect to periods governed by the 2011 Order, it is **only** a "reference point" for "new" agreements. The Old Telecom Rate is neither a "reference point" nor otherwise relevant with respect to "existing" or "historical" agreements. In the *Verizon Florida Decision*, the Commission stated:

> In support of applying the Old Telecom Rate, Verizon cites the *Order*'s statement that the Commission would consider the Old Telecom Rate "as a reference point" when determining a just and reasonable attachment rate for a "*new agreement*" between an incumbent LEC and a utility. The agreement at issue here is not a new agreement. It is "an historical joint use agreement," which the Commission repeatedly distinguished from "new agreements."[15]

Given this, and as set forth above in Section I.A. *supra*, the Commission held in the *Verizon Florida Decision* that it was the ILEC's burden to demonstrate that the "monetary value of [the advantages under the Agreement] is less than the difference between the Agreement Rates and the New or Old Telecom Rates over time."[16] AT&T made no such showing, here.[17]

Despite the clear burden of proof articulated in the *Verizon Florida Decision* under the 2011 Order (a burden that likely explains the timing for AT&T's complaint against DEF), and despite the Bureau's acknowledgement that AT&T has not met this burden, it appears the Bureau erroneously grafted the Old Telecom Rate as a "reference point" for "existing" or "historical" agreements. In finding that "AT&T is entitled to a rate for the period prior to July 1, 2019 that does not exceed the Old Telecom Rate," the Bureau actually cites to paragraph 218 of the 2011 Order, which specifically—and only—addresses "new" agreements.[18]

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[14] *See* Order at ¶ 34 n.114.
[15] *Verizon Florida Decision*, 30 FCC Rcd at 1149, ¶ 23 (italics in original).
[16] *See id.* at 1149, ¶ 24.
[17] *See* Order at ¶ 45 (noting that AT&T had not "provided a credible valuation of the advantages that AT&T receives under the JUA").
[18] *See id.* at ¶ 45 & n.164 (citing 2011 Order, 26 FCC Rcd at 5337, ¶ 218).

In addition to the sharp distinction drawn by the Commission between "new" agreements on the one hand, and "existing" or "historical" agreements on the other hand, the 2011 Order also plainly advised that it was "unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable."[19] This guidance, along with the fact that the Old Telecom Rate is a "reference point" only for "new" agreements, explains why the Commission rejected an ILEC's complaint in the *Verizon Florida Decision* that a $36.22 rate was unlawful even though it exceeded the Old Telecom Rate by almost 300%.[20]

C. The Bureau Should Reconsider Its Finding that AT&T "Genuinely Lacked the Ability to Terminate the JUA and Obtain a New Arrangement" During the Period Governed by the 2011 Order.

In the 2011 Order, the Commission "question[ed] the need to second guess" "historical joint use agreements" and stated that it was "unlikely to find the rates, terms and conditions" in such agreements unjust or unreasonable.[21] Yet, the Commission created a narrow avenue for reviewing "historical joint use agreements" where an ILEC could "demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement."[22] The Bureau, here, found that AT&T "demonstrated that it 'genuinely lacks the ability to terminate the JUA and obtain a new arrangement.'"[23] The Bureau should reconsider this finding with respect to the period governed by the 2011 Order because it glosses-over the threshold question of whether AT&T even attempted "to terminate an existing agreement and obtain a new arrangement" during the period

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[19] *See* 2011 Order, 26 FCC Rcd at 5335, ¶ 216.

[20] In the only other decision prior to the effective date of the 2018 Order, *Verizon Virginia, LLC v. Virginia Electric and Power Co.*, Order, Proceeding No. 15-190, 32 FCC Rcd 3750, 3756 at ¶ 12 (May 1, 2017), the Commission relied upon "unique circumstances presented here" to conclude that the joint use agreement at issue was a "new" agreement for purposes of finding the joint use agreement rate to be unjust and unreasonable.

[21] 2011 Order, 26 FCC Rcd at 5335, ¶ 216.

[22] *Id.* at 5335-36, ¶ 216.

[23] *See* Order at ¶ 35.

governed by the 2011 Order. Based on the undisputed evidence in the record, the answer to this threshold question is "no." AT&T did not even request renegotiation of the JUA rates until May 22, 2019—after the conclusion of the period governed by the 2011 Order.

Moreover, the record demonstrates that AT&T never sought to "obtain a new arrangement" under the guidance of the 2011 Order or the standard articulated in the *Verizon Florida Decision*. AT&T has maintained throughout this dispute that it was entitled to the New Telecom Rate for purposes of calculating refunds.[24] But AT&T was never entitled to the New Telecom Rate under the 2011 Order because (a) the joint use agreement JUA was entered into before the 2011 Order and is thus an "existing" or "historical" agreement, and (b) the 2011 Order makes clear that the Commission would only consider applying the New Telecom Rate to "new" joint use agreements.[25] In essence, AT&T waited until after the effective date of the 2018 Order to ask about renegotiating rates, then pretended as if the same standard applied on both a backward-looking and forward-looking basis.

Further, the Bureau's finding that AT&T lacked the ability to terminate and obtain a new arrangement during the period governed by the 2011 Order relies upon the fact that "the protracted negotiations between the parties have failed to produce a mutually agreeable, just and reasonable rate."[26] Of course, the "protracted negotiations" occurred entirely **after** the conclusion of the period governed by the 2011 Order and involved AT&T's repeated demand (as reflected in its complaint) for the New Telecom Rate on both a forward-looking and backward-looking basis. In

[24] *See, e.g.*, AT&T's Complaint at ¶¶ 31-33; AT&T's Reply at ¶ 8, 13, 21, 28, 31.
[25] *See* 2011 Order, 26 FCC Rcd at 5336, ¶ 217.
[26] Order at ¶ 35. Here, the Bureau relies on AT&T's *inability* to terminate the joint use agreement as grounds for reviewing the joint use agreement under the 2011 Order. However, in determining whether the joint use agreement "renewed" following the effective date of the 2018 Order, the Bureau emphasized that the agreement *could be terminated* by the mutual agreement of the parties. *See id.* at ¶ 18 n. 61. The Bureau's equivocation on this issue is patently arbitrary.

essence, the Bureau's finding merely imagines what might have happened during the period governed by the 2011 Order based entirely on facts that occurred after the effective date of the 2018 Order. Had AT&T requested renegotiation in 2015, for example, based on the correct applicable standard, the result might have been very different. There is no rational basis for determining otherwise.

II. The Bureau Should Reconsider Its Finding that the JUA "Renewed" on July 1, 2019 and Every Six Months Thereafter With Respect to Existing Attachments.

The Bureau found that the "JUA created a series of six-month contracts that have automatically renewed twice yearly since 1979."[27] Based on this finding, the Bureau ultimately determined that the JUA renewed for purposes of the 2018 Order on July 1, 2019.[28] The Bureau should reconsider its finding with respect to existing attachments for at least two reasons. First, the Bureau failed to substantively address DEF's argument that there can be no "renewal" when there is no right of termination.[29] Reading a "renewal" provision into a JUA that provides no right of termination (or "non-renewal") is paradoxical. Instead of addressing this paradox, the Bureau broadly referenced the 2018 Order and the *Verizon Maryland Decision* as justifying its finding, even though neither of those decisions address DEF's specific argument.[30] Second, the Bureau relied solely on the *Verizon Maryland Decision* to reject DEF's argument that "renewal" requires some voluntary action by the parties.[31] However, the fact the Commission incorrectly decided this issue in the *Verizon Maryland Decision* does not mean the Bureau should repeat the error, here.

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[27] *Id.* at ¶ 20.
[28] *See id.* at ¶ 16.
[29] *See* DEF's Answer at ¶¶ 3, 11, 21, 38.
[30] *See* Order at ¶ 18.
[31] *See id.* at ¶ 19.

III. The Bureau Should Reconsider Its Decision to Exclude the Communications Worker Safety Zone from AT&T's Space Allocation.

The Bureau, relying solely on distinguishable precedent and without considering DEF's unrefuted evidence, refused to allocate any portion of the communications worker safety zone (a/k/a "safety space") to AT&T because: "AT&T's attachments do not occupy the communications safety space and the Commission has long held that the communications safety space is for the benefit of the electric utility, not attachers."[32] There are at least three problems with the Bureau's findings.

First, the Bureau ignored the Commission's foundational "cost causation" principles.[33] DEF presented substantial witness testimony establishing that: (a) DEF does not need and does not use safety space on its own poles; (b) the safety space serves no purpose in the provision of electric service; and (c) but for the JUA, DEF would not have built safety space into its pole network in its overlapping service territory with AT&T.[34] Second, the Bureau relies upon its mistaken understanding that "usable space" on a pole "excludes the safety space."[35] Commission precedent makes clear, though, that the "usable space" on a pole *includes* the 3.33 feet of safety space, which means that DEF ends up bearing the cost of this space unless it is allocated to AT&T

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[32] *Id.* at ¶ 49 (citations omitted).

[33] *See, e.g.,* 2011 Order, 26 FCC Rcd at 5301, ¶ 143 ("Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer—the cost causer—pays a rate that covers this cost.").

[34] *See* DEF's Answer at ¶¶ 12, 12 n.34, 25; *see also id.* at Exh. A, DEF000133-34 (Decl. of Gilbert Scott Freeburn, Oct. 30, 2020 ("Freeburn Decl.") ¶¶ 15-16); *id.* at Exh. B, DEF000152-53, DEF000156-57 (Decl. of David Hatcher, Oct. 29, 2020 ("Hatcher Decl.") ¶¶ 7, 16); *id.* at Exh. C, DEF000163-64 (Decl. of Steven D. Burlison, P.E., Oct. 28, 2020 ("Burlison Decl.") ¶¶ 7-10); *id.* at Exh. D, DEF000175 (Decl. of Marcia Olivier, Oct. 29, 2020 ("Olivier Decl.") ¶ 14); *id.* at Exh. E, DEF000217, DEF000219 (Decl. of Kenneth P. Metcalfe, CPA, CVA, Oct. 30, 2020 ("Metcalfe Decl.") ¶¶ 31-32, 36).

[35] Order at ¶ 49 n.176 ("The Old Telecom Rate formula…allocates the cost of usable space on a pole based on the space the [ILEC] actually occupies. **The usable space excludes the safety space**, which is not occupied by any attacher.") (emphasis added).

and/or another attaching entity.[36] Third, the authority the Bureau relies upon is distinguishable from the facts of this dispute.[37] Specifically, *all* of the Bureau's cited authority turns, in whole or in part, on the Commission's previous finding that the "safety space is usable and used by the electric utility."[38] However, DEF presented evidence demonstrating that it does not need and does not use the safety space on its own poles.[39] AT&T presented no contrary evidence. Instead, AT&T relied solely on old precedent and argued that DEF "occupies [redacted] of space under the FCC's rate assumptions, which includes 3.33 feet of safety space that is 'usable and used by the electric utility' but not expressly assigned to Duke Energy Florida under the JUA."[40] Whether space is "usable and used by" DEF is an inherently factual inquiry.

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[36] *See, e.g., Amendment of the Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, CS Docket No. 97-98, CS Docket No. 97-151, 16 FCC Rcd 12103, 12130 at ¶ 51 (May 25, 2001) ("2001 Reconsideration Order") ("No new arguments or evidence was presented in the filings and based on our previous reasoning, that the space is usable and used by the electric utility, we reject arguments to reduce the presumptive usable space of 13.5 feet by 40 inches.").

[37] *See* Order at ¶ 49 n.174 (citing *FPL I Decision*, 35 FCC Rcd at 5330, ¶ 16; *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-98, 15 FCC Rcd 6453, 6467 at ¶¶ 21-22 (Apr. 3, 2000) ("2000 Report and Order"); 2001 Reconsideration Order, 16 FCC Rcd at 12130, ¶ 51; *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, FCC Docket No. 78-144, 72 F.C.C.2d 59, 69-71 at ¶¶ 22-25 (May 23, 1979) ("Second Report and Order on Pole Attachments")).

[38] *See FPL I Decision*, 35 FCC Rcd at 5330, ¶ 16 ("The [safety] space is usable and used by the electric utilities.") (quotation marks and citation omitted); 2000 Report and Order, 15 FCC Rcd at 6467, ¶ 22 ("The [safety] space is usable and is used by the electric utilities."); 2001 Reconsideration Order, 16 FCC Rcd at 12130, ¶ 51 ("No new arguments or evidence was presented in the filings and based on our previous reasoning, that the [safety] space is usable and used by the electric utility, we reject arguments to reduce the presumptive usable space of 13.5 feet by 40 inches."); Second Report and Order on Pole Attachments, 72 F.C.C.2d at 71, ¶ 24 ("Thirdly, we note the common practice of electric utility companies to make resourceful use of this [safety] space by mounting street light support brackets, step-down distribution transformers, and grounded, shielded power conductors therein.").

[39] *See supra* note 34.

[40] AT&T's Complaint at ¶ 25; *see also* AT&T's Reply at ¶¶ 5, 12, 25.

The Bureau's finding has the effect of allocating the entire cost of the safety space to DEF and its electric ratepayers. As explained in DEF's unrebutted witness testimony: "No sound ratemaking rationale would support allocating such a cost to DEF and its electric ratepayers."[41] If the Bureau does not allocate the 40" of safety space to AT&T, it should either: (1) allocate a [redacted] pro rata share of the safety space to AT&T as additional usable space occupied;[42] or (2) add the 40" (3.33') of safety space to the unusable space for purposes of calculating the Old Telecom Rate.[43]

IV. The Bureau Should Reconsider Its Finding that AT&T's Attachments Presumptively Occupy 1-Foot of Space on DEF's Poles.

The Bureau found that "[b]ecause Duke has not provided reliable evidence rebutting the one-foot presumption, we agree with AT&T that the appropriate input for space occupied by AT&T is one-foot."[44] In making this determination, the Bureau focused solely on the statistical validity of DEF's make-ready survey data (showing that AT&T actually occupies at least [redacted] of space on DEF poles).[45] The Bureau's space occupied analysis completely ignores the undisputed fact that AT&T is allocated [redacted] of usable space under the JUA.[46] In fact, despite

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[41] *See* DEF's Answer at Exh. D, DEF000175 (Olivier Decl. ¶ 14).

[42] When the 40" of safety space is divided by [redacted] (which is the average number of attaching entities, excluding DEF), it yields [redacted]. And if the Bureau is of the view that AT&T should pay no more for the safety space than CATV and CLEC attachers, then the most equitable solution is that each attaching entity other than DEF is allocated a pro rata share of the safety space as usable space occupied.

[43] Including the safety space in the unusable space is the least equitable alternative solution in that it results in DEF bearing more than [redacted] of the cost of space it does not need and does not use in the provision of electric service. Including the safety space within the unusable space means (a) that only 2/3 of the space is allocated through the Old Telecom Rate formulas (in other words, only 2.22' of the 3.33' is allocated, leaving DEF with 1.11' at the start), and (b) that the remaining 2.22' is allocated equally among all attaching entities (including DEF), which means DEF ends-up bearing an additional [redacted] (2.22'/[redacted] = [redacted]).

[44] Order at ¶ 47.

[45] *See id.* at ¶ 50 (rejecting DEF's space occupied input of [redacted] as statistically invalid).

[46] *See* DEF's Answer at ¶¶ 8, 12, 15, 22, 25, 31; *id.* at Exh. 1, DEF000246 (JUA, Art. I, § 1.1.6(B)).

finding that AT&T's space allocation was a material benefit, the Bureau failed to account for this "competitive advantage" at any stage of its analysis.[47] On reconsideration, the Bureau should account for this material benefit by adopting the [redacted] space allocation under the JUA as the space occupied input under the Old Telecom Rate formula.[48]

V. The Bureau Should Reconsider Its Dismissal of DEF's Valuation of Certain Benefits of the JUA.

A. The Bureau Should Reconsider DEF's Valuation of AT&T's Right to Remain Attached to DEF Poles Following Termination of the JUA.

The Bureau correctly found, consistent with prior Commission precedent, that AT&T's right to remain attached to DEF poles even after termination of the JUA is a material advantage over CATVs and CLECs attached to the same pole.[49] DEF submitted a detailed valuation of this contractual right through the declaration of Kenneth P. Metcalfe, a Certified Public Accountant and a Certified Valuation Analyst. Mr. Metcalfe testified that AT&T enjoys an annualized net benefit of [redacted] per pole, which exceeds AT&T's current rate under the JUA by more than

[47] *See* Order at ¶ 26 (finding AT&T's space allocation to be a material advantage when analyzing whether AT&T is entitled to New Telecom Rate under 2018 Order); *but see id.* at ¶ 44 (finding AT&T's space allocation to be of "limited value" when analyzing whether the "rate" charged under the joint use agreement is reasonable); *id.* at ¶¶ 47-50 (omitting the allocation of [redacted] of space to AT&T from its space occupied analysis).

[48] While the Bureau found DEF's make-ready survey data to be unreliable, this evidence nonetheless reveals that AT&T actually occupies more than 1-foot of space on DEF poles. Furthermore, the make-ready survey data more likely than not *understates* the space AT&T actually occupies on DEF poles because the sampled poles were surveyed/measured pursuant to third-party attachment requests and thus were skewed towards areas where there is more competition for space—i.e., areas where space utilization on poles is likely more efficient and compressed than on average. *See* DEF's Initial Brief in Response to the Enforcement Bureau's March 8, 2021 Letter at 20 (filed Apr. 8, 2021).

[49] *See* Order at ¶¶ 27-28; *see also Verizon Maryland Decision*, 35 FCC Rcd at 13614-15, ¶ 20 (finding that right to remain attached to existing joint use poles following termination was among the "material advantages over competitive LEC and cable attachers on the same poles").

[redacted].[50]

AT&T never offered a valuation of its own. Instead, AT&T—even after the *Verizon Maryland Decision*—continued to deny that this right provided a material advantage over DEF's CATV and CLEC licensees.[51] Nonetheless, in a footnote, the Bureau rejects Mr. Metcalfe's valuation, stating: "Because Duke once again assumes that AT&T would incur the costs of a duplicate network, plus other costs, in arriving at this figure, we find that Duke's analysis is speculative and lacking support."[52] But neither AT&T nor the Bureau identified what would happen without a contractual right to remain attached. Instead, the Bureau ignored the consequences of post-termination removal by stating: "The Commission has never condoned valuing an alleged advantage by assuming that, without the JUA, an incumbent LEC would have built a duplicate pole network."[53] There are numerous problems with this scant analysis.

As support for this proposition, the Bureau cites to its own decision in the *AT&T Florida v. FPL* case, which in turn relies upon a Congressional finding supporting the original enactment of Section 224—which applied only to CATVs.[54] Telephone companies like AT&T, in contrast to CATVs, have always had—and still have—the ability to build pole networks, and there has been no showing otherwise in this case. In fact, it is not uncommon for there to be redundant pole lines on opposite sides of the same road—one owned by the telephone company and the other owned by the electric utility. Thus, the Bureau's notion that "this could never happen" is simply incorrect.

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[50] *See* DEF's Answer, Exh. D at DEF000212-13, DEF000235 (Metcalfe Decl. ¶¶ 18-20, Exh. E-2).

[51] *See* AT&T's Reply at ¶ 8; AT&T's Reply Legal Analysis at 15-16; AT&T's Reply Supplemental Brief at 8-10.

[52] Order at ¶ 43 n.157.

[53] *See id.* at ¶ 42.

[54] *See id.* at ¶ 42 n.152 (citing *FPL I Decision*, 35 FCC Rcd at 5330, ¶ 15 (citing S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977 Senate Report), reprinted in 1978 U.S.C.C.A.N. 109)).

Further, it does not matter whether the Commission has ever "condoned" valuing the right to remain attached after termination based on the need to construct a new network. If the consequence of termination in the absence of such a provision is removal of facilities, then the only viable method of valuing the right is the next best alternative to deployment for both parties.

The Bureau's error in rejecting Mr. Metcalfe's valuation is compounded by two additional facts. First, the Bureau acknowledged that the right to remain attached post-termination was, indeed, a material advantage over CATVs and CLECs attached to the same poles. If it is, in fact, a material advantage, then it is capable of valuation, and AT&T proffered no alternative to the method of valuation identified by DEF. Second, though rejecting the valuation as "speculative and lacking support" when it comes to valuing AT&T's net benefits under the JUA, the Bureau actually relied upon the valuation for purposes of determining "the disproportionate financial burden AT&T would bear if the parties extracted themselves from the JUA" and for purposes of determining "the superiority of Duke's bargaining position."[55] Accepting the validity of the valuation for one purpose but rejecting it for another is arbitrary and capricious decision-making.[56]

B. The Bureau Should Reconsider Its Findings Regarding DEF's Deployment of Taller and Stronger Poles than Necessary for its Own Use in Order to Accommodate AT&T.

DEF submitted evidence that it built, and continues to build, a network of poles taller and stronger than necessary to accommodate AT&T. The Bureau rejected this evidence, saying that it "lacks persuasive support" and that DEF provided "no explanation as to the basis" of DEF's

[55] *Id.* at ¶ 37 & n.135 (as modified by the Commission's September 10, 2021 Erratum) (citing Mr. Metcalfe's valuation of the right to remain attached post-termination).

[56] *See, e.g., Sierra Club v. EPA*, 884 F.3d 1185, 1195 (D.C. Cir. 2018) (finding that it was arbitrary and capricious for agency to view data as unreliable for one purpose and to rely on the same data for another purpose).

statements that it "erected taller and stronger poles specifically to accommodate AT&T."[57] However, Scott Freeburn, Joint Use Manager for Duke Energy Corporation, clearly explained that DEF built taller and stronger poles than needed by DEF in order to accommodate AT&T specifically **because of the JUA:**

> [B]ecause of the Joint Use Agreement, DEF constructed its pole infrastructure to be of sufficient height and strength to accommodate AT&T's facilities.
> …
> For example, the Joint Use Agreement contemplates a 40-foot joint use pole to accommodate electric and telephone facilities, plus the required separation space. If DEF had constructed its network in the absence of the Joint Use Agreement, DEF would have built a network only to suit its own service needs; thus, the pole network would have been built with shorter poles. Given that AT&T's allocated space is [redacted] and the typical separation space is 40" (3.33 feet), and given that wood poles come in 5 foot increments, this mean DEF, because of the Joint Use Agreement, was on average installing poles that were 5-10 feet taller than necessary to provide electric service.[58]

The Bureau also completely ignored the sworn testimony of Steven D. Burlison, a nearly 40-year veteran electrical engineer with DEF and its predecessors, who explained in detail how the JUA caused DEF to build a network of poles taller and stronger than necessary for its own use in order to accommodate AT&T.[59] Mr. Burlison even submitted a diagram indicating that—even currently—DEF builds poles 10 feet taller where AT&T is attached or will be attaching.[60]

Though AT&T submitted no evidence to refute the evidence submitted by DEF, the Bureau nonetheless stated:

> …Duke's claims appear to be controverted by evidence suggesting that Duke may have had a number of reasons—apart from the JUA—to build taller and stronger joint use poles, including the fact that competitive LECs and cable companies also

[57] Order at ¶ 43 & n.155 (emphasis added).

[58] DEF's Answer at Exh. A, DEF000131-32 (Freeburn Decl. ¶¶ 10-11); *see also id.* at Exh. B, DEF000153 (Hatcher Decl. ¶ 7) ("Though DEF's pole utilization needs have increased over time, DEF has always needed to set a pole 5-10 feet taller than necessary for electric service in order to provide AT&T's reserved space [redacted] and the safety space (3.33 feet).").

[59] *See id.* at Exh. C, DEF000164-66, DEF000168 (Burlison Decl. ¶¶ 11-16, Exh. C-1).

[60] *See id.* at Exh. C, DEF000168 (Burlison Decl. Exh. C-1).

have required space on Duke's joint use poles for decades.[61]

But rather than citing to any such "evidence," the Bureau goes on to reference previous Commission decisions stating that by 1996, cable and CLEC attachments were so common that Congress granted CATVs and CLECs a mandatory right of access.[62] However, the Commission specifically acknowledged in the 2011 Order 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…."[63] Consistent with the foregoing, DEF's Scott Freeburn explicitly testified:

> DEF does not build or replace its distribution poles, in the normal course, in anticipation of non-ILEC third party attachers like CATVs and CLECs because, to do so would be speculative (and there is little to gain financially given the regulatory limitations on the rental rates that can be charged to non-ILEC third parties like CATVs and CLECs). If space is not available, the third-party pays the entire cost necessary to create additional space, whether through makeready or a pole change-out.[64]

Moreover, it is not as if the Bureau rejected the testimony of DEF's witnesses in favor of more persuasive testimony by AT&T witnesses. Instead, in rejecting DEF's testimony, the Commission cites to DEF's Answer at Exhibit 6.[65] However, that document is an AT&T operations manual, and the text quoted by the Bureau is referring to the replacement of **poles already in joint use**, rather than the setting of new joint use poles.[66] The Bureau also cites to a provision of the JUA stating that AT&T could attach to 35-foot DEF poles—as if this somehow

[61] Order at ¶ 43.
[62] *See id.* at ¶43 & n.156.
[63] 2011 Order, 26 FCC Rcd at 5302, ¶ 144 n.433 (internal citations omitted).
[64] DEF's Answer at Exh. A, DEF000130-31 (Freeburn Decl. ¶ 9); *see also id.* at Exh. B, DEF000152 (Hatcher Decl. ¶ 6).
[65] Order at ¶ 43 n.156.
[66] *See* Answer at Exh. 6, DEF000292 (AT&T's Internal Division of Cost Circular).

indicates that 35-foot poles were not set specifically to accommodate AT&T.[67] However, the Bureau's rationale glosses over the very next section of the JUA, which specifies that DEF's space allocation is [redacted] *less* on a 35-foot pole than on a 40-foot pole while AT&T's space allocation remains unchanged.[68] In other words, a 35-foot joint use pole *still* accounted for AT&T's [redacted] space allocation and *still* provided the safety space necessitated by AT&T's attachments, which means the pole was *still* 5-10 feet taller than necessary for DEF's electric service needs.

The Bureau's decision to disregard DEF's evidence is also inconsistent with the *Verizon Florida Decision*, where the Commission stated:

> To accommodate the four feet of space allotted to Verizon, Florida Power installed taller poles at increased cost.
> …
> 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. . .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.[69]

C. The Bureau Should Reconsider DEF's Explanation and Valuation of Inspection and Engineering Costs Incurred by DEF on AT&T's Behalf.

The Bureau also ignored Kenneth Metcalfe's valuation of the benefits AT&T receives under the JUA through avoided inspection and engineering work performed by DEF on AT&T's behalf. The Bureau wrote: "Because Duke fails to identify the inspections or engineering work that it purportedly performs on AT&T's behalf under the JUA, let alone the avoided cost savings to AT&T, we do not find that the JUA benefits AT&T with regard to avoided inspection and engineering costs."[70] This statement is at odds with the Bureau's finding in paragraph 29 of the

[67] Order at ¶ 43 n.156 (citing JUA, Art. I, Section 1.1.5(B)).
[68] *See* Answer at Exh. 1, DEF000246 (JUA, Art. I, Section 1.1.6(A)-(B).
[69] *Verizon Florida Decision*, 30 FCC Rcd at 1148, ¶ 21 & 1150, ¶ 24.
[70] Order at ¶ 32.

Order that one of the benefits of the JUA is that "AT&T does not pay any fees in connection with Duke's permitting costs. Its competitors must pay permitting fees." In its Answer, DEF provided both an explanation of the engineering and inspection work avoided by AT&T, and a valuation of the benefit of those avoided costs to AT&T. As stated by DEF witness Scott Freeburn:

> When AT&T submits a permit application, DEF performs the same pre-construction and post-construction inspections as it performs for CATV and CLEC permit applications. The difference is that AT&T (unlike CATVs and CLECs) does not get charged for this work. The current permitting, engineering and inspection costs for CATV and CLEC licensees in DEF's service area are set forth in Exhibit A-1 attached hereto.[71]

Exhibit A-1 to Mr. Freeburn's declaration provided a list of the inspection and engineering costs avoided by AT&T and paid by DEF's CLEC and CATV licensees, including, for example, a pre-attachment engineering fee, an engineering pole inspection, a post-attachment and construction inspection fee, and a structural analysis fee.[72] Mr. Metcalfe provided a valuation of the benefit of the avoided inspection and engineering costs to AT&T, determining that after accounting for reciprocal benefits to DEF, "AT&T's annualized net benefit is [redacted], or [redacted] per pole."[73]

D. In Light of the Above, the Bureau Should Reconsider Its Findings Regarding the Rates AT&T Should Pay to DEF Under the JUA.

With respect to the time period governed by the 2011 Order, once the Bureau actually accounts for the value of the net benefits to AT&T, the rate AT&T should pay for periods governed by the 2011 Order should *exceed* the Old Telecom Rate. Even considering only the valuation of

[71] DEF's Answer at Exh. A, DEF000135 (Freeburn Decl. ¶ 18).

[72] *See id.* at DEF000142 (Freeburn Decl. Exh. A-1). The Bureau cites to Exhibit A-1 of Mr. Freeburn's declaration in paragraph 29 of the Order, wherein the Bureau found the fact that AT&T does not pay any fees in connection with Duke's permitting costs is a material benefit of the JUA.

[73] *See id.* at Exh. D, DEF000214-15, DEF000238 (Metcalfe Decl. ¶¶ 26-27, Exh. E-3).

the three benefits above, the rates paid by AT&T under the JUA are more than justified.[74] With respect to the time period governed by the 2018 Order, assuming *arguendo* that imposition of the Old Telecom Rate as a "hard cap" is valid here, the value of the benefits discussed *supra* should be accounted for by the Bureau through additional allocation of space to AT&T. For example, the Bureau should, either (a) include the 5-10 feet of additional space DEF built into the network specifically because of the JUA, or (b) at the least, include the [redacted] of space allocated to AT&T under the JUA as space occupied by AT&T.

VI. The Bureau Should Reconsider the Legitimacy of the Old Telecom Rate as a "Hard Cap" Given the Unrefuted Valuation Evidence in This Case.

The Bureau applied the Old Telecom Rate as a "hard cap" for the period governed by the 2018 Order.[75] However, in light of the benefits provided to AT&T under the JUA, and the corresponding **cost** to DEF of providing those benefits, the Bureau's imposition of the Old Telecom Rate as a hard cap violates the Pole Attachments Act. As stated by the United Supreme Court: "The Pole Attachments Act…provides that the minimum reasonable rate is equal to 'the additional costs of providing pole attachments….'"[76] Further, imposition of the Old Telecom Rate

[74] Of course, as set forth above, it is AT&T's burden to prove—with specific and credible valuation evidence—that the joint use agreement rates are not merited by the net benefits under the agreement. The burden is not DEF's.

[75] Order at ¶ 21 ("…AT&T is entitled to a rate, as of July 1, 2019, that does not exceed the Old Telecom Rate."); *see also* 2018 Order, 33 FCC Rcd at 7771, ¶ 129.

[76] *FCC v. Fla. Power Corp.*, 480 U.S. 245, 253 (1987) (citing 47 U.S.C. § 224(d)(1)). Moreover, the FCC has repeatedly acknowledged incremental cost serves as the "floor" for pole attachment rates. *See, e.g.,* 2011 Order, 26 FCC Rcd at 5300-01, ¶ 142-43; *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 30 FCC Rcd 13731, 13736-37 at ¶¶ 11-12 (Nov. 24, 2015) (acknowledging that "incremental costs" serve as the "low end" for rates governed by § 224(e)(2) and (3)); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-245, GN Docket No. 09-51, 25 FCC Rcd 11864, 11919-20 at ¶¶ 133-34 (May 20, 2010); *see also Am. Elec. Power Serv. Corp.*, 708 F.3d 183, 189 (D.C. Cir. 2013) (acknowledging that the telecom rate in §224(e) is subject to the lower bound defined in § 224(d)(1)).

as a hard cap here violates the Fifth Amendment, pursuant to which "regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible" only if "the rates set are not confiscatory."[77] Here, the testimony of Kenneth Metcalfe makes clear that the Old Telecom Rate does not allow DEF to recoup its actual costs associated with the JUA. This can be illustrated considering two of the benefits the Bureau has acknowledged that AT&T receives under the JUA.

First, the Bureau acknowledges that AT&T's "ability to add more attachments up to [redacted] (or more if it is available), without additional expense, is an advantage accorded AT&T but not its competitors."[78] The [redacted] of space reserved to AT&T under the JUA comes at a cost to DEF. Kenneth Metcalfe presented uncontroverted evidence that the annualized net benefit per pole to AT&T of DEF's allocation of [redacted] of space per pole (and after taking into account DEF's allocation of space on AT&T's poles) is [redacted] per pole.[79] Mr. Metcalfe also made clear that this benefit corresponded directly to an actual cost, stating that the annualized net benefit per pole was "[e]qual to AT&T's **cost** less Duke Energy Florida's **cost**."[80] Second, the Bureau found that avoided permitting costs are a benefit to AT&T under the JUA.[81] Kenneth Metcalfe valued the net benefit to AT&T of those avoided permitting and inspection costs at [redacted] per pole per year.[82] AT&T avoids these permitting and inspection costs because DEF **absorbs** them (i.e., they are not just a benefit to AT&T, but a cost directly absorbed by DEF), as attested by DEF's

[77] *FCC v. Fla. Power Corp.*, 480 U.S. at 253 (internal citations omitted).
[78] Order at ¶ 26.
[79] *See* DEF's Answer at Exh. E, DEF000219-20 (Metcalfe Decl. ¶37); *see also* DEF's Supplemental Production at DEF001412 (Metcalfe Decl. Exh. E-4B).
[80] DEF's Supplemental Production at DEF001412 (Metcalfe Decl. Exh. E-4B) (emphasis added).
[81] Order at ¶ 29.
[82] *See* DEF's Answer at Exh. E, DEF000240 (Metcalfe Decl. Exh. E-3.2).

witnesses.[83] [redacted] providing [redacted] of reserved space to AT&T, plus the cost to DEF of absorbing permitting and inspection costs caused by AT&T, is [redacted] per pole per year. That [redacted] is not accounted for through the Bureau's application of the Old Telecom Rate, which captures neither the cost to DEF of the AT&T permitting and inspection fees that DEF absorbs, nor the cost to DEF of the [redacted] of space allocated to AT&T under the JUA.

Application of the Old Telecom Rate is also confiscatory here, if it is true, as the Commission alleges, that the safety space cannot be considered in calculating the Old Telecom Rate. If the safety space is not: (1) allocated to AT&T as space occupied, or (2) allocated pro rata amongst all communications attachers, or (3) at a bare minimum, included as part of the unusable space, then the effect is that DEF bears the entire cost of the safety space. However, DEF neither needs nor uses the safety space, as set forth in Section III *supra*.

VII. The Bureau Should Reconsider Its Finding that AT&T Is Entitled to Refunds for Payment Periods Preceding Notice of the Dispute.

Rule 1.1407(a)(3) states that the Commission may "Order a refund, or payment, **if appropriate**."[84] The Bureau failed to examine whether refunds are "appropriate" for periods prior to good faith notice of a dispute, either generally or with specific reference to the facts of this case.[85] As stated in DEF's Answer:

> Despite its rights under the law since July 12, 2011, AT&T first challenged the

[83] *See id*. at ¶ 8; *id.* at Exh. A, DEF000135-36, DEF000137-38 (Freeburn Decl. ¶¶ 18, 24).

[84] 47 C.F.R. § 1.1407(a)(3) (emphasis added).

[85] With respect to whether refunds are ever appropriate for periods that precede good faith notice of a dispute, DEF incorporates by reference herein the Petition for Declaratory Ruling and the Reply Comments filed by the Edison Electric Institute in W.C. Docket No 17-84. *See generally,* Petition for Declaratory Ruling of the Electric Edison Institute, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Apr. 20, 2021) (the "EEI Petition"); Reply Comments of the Edison Electric Institute in Support of Its Petition for Declaratory Ruling, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Sep. 10, 2021) ("EEI's Reply Comments").

> cost sharing methodology in the existing joint use agreement on May 22, 2019. Further, AT&T expressly affirmed the correctness of both the rate methodology and the rate itself each year through 2018. Per Section 11.1 of the joint use agreement (as amended in 1990), DEF sends the rate calculations and methodology to AT&T each year for "review and acceptance." After review and approval, AT&T sent its "Form 6407" to DEF indicating its agreement with the calculations. Then, after receiving the "Form 6407" from AT&T, DEF sent the invoice for annual rentals.[86]

It was not "appropriate" for the Commission to grant refunds for periods prior to AT&T's notice to DEF of a dispute, especially where AT&T was actively certifying to DEF during that same period that it had reviewed and accepted the annual invoices.

Rather than engaging in the required analysis under Rule 1.1407 of whether granting a refund was "appropriate," the Bureau erroneously reduced DEF's notice argument to a waiver and estoppel argument, and asserted that DEF failed to make the showing of prejudice required in association with those defenses.[87] Even assuming DEF was required to show prejudice or harm, such a showing is easily discernible here for at least three reasons other than the [redacted] of dollars of refunds awarded by the Bureau. First, DEF has been prejudiced because it had no opportunity prior to May 22, 2019, when AT&T first provided notice of a dispute, to evaluate AT&T's claim and determine whether DEF believed it appropriate to negotiate new joint use rates. Second, any new rates negotiated between DEF and AT&T during the period between 2011 and 2019 would have been negotiated under the standard articulated in the 2011 Order and the *Verizon Florida Decision* rather than the *ex post facto* standard applied by the Bureau here. Third, if AT&T had provided notice of a rate dispute, and the parties had reached a negotiated solution, DEF would

[86] DEF's Answer at ¶ 23 (internal citations omitted); *see also id.* at Exh. A, DEF000136-37 (Freeburn Decl. ¶ 21) (describing AT&T's Form 6407 certification process).
[87] Order at ¶ 62.

not be liable for the interest accrued on any refund.[88] Further, as explained in the Duke Energy Letter in Support of EEI's Petition, DEF has been prejudiced by AT&T's failure to provide notice prior to May 22, 2019, because under United States General Accounting Principles, DEF has been unable to reserve for the contingent liability of refunds prior to that date.[89]

VIII. The Bureau Should Reconsider Its Finding that AT&T Is Entitled to Recover Refunds Consistent with Florida's 5-Year Limitations Period for Breach of Contract Actions.

The Bureau should reconsider its finding "that the applicable statute of limitations under Commission Rule 1.1407(a)(3) is Florida's five-year limitations period for an 'action on a contract,'"[90] and should instead borrow the two-year limitations period from 47 U.S.C. § 415(b). As explained in more detail in EEI's Petition for Declaratory Ruling, the Bureau should not apply variable state law limitations periods to pole attachment complaints against electric utilities.[91] First, doing so discriminates against electric utility pole owners vis-à-vis ILECs, which are protected by the two-year statute of limitations set forth in 47 U.S.C. § 415(b).[92] Second, application of state law breach of contract limitations periods to pole attachment complaints creates a highly-variable patchwork of limitations periods based on the arbitrary factor of geography, which is antithetical to Congress' intent that the Commission develop a uniform body of law applicable to the states within its jurisdiction.[93] Third, the Bureau's decision to apply the "borrowing doctrine" to determine the "applicable statute of limitations" under Rule 1.1407

[88] *Id.* at ¶ 65(c) ("…AT&T is entitled to a refund and interest extending for a period of five years prior to the filing of the Complaint…").
[89] *See* Duke Energy Letter in Support of EEI Petition at 5-6 (filed Aug. 23, 2021).
[90] Order at ¶ 64.
[91] *See generally,* EEI Petition.
[92] *See id.* at 6-8.
[93] *See id.*; *see also* EEI Reply Comments at 21-22 (arguing that the Commission should adopt a uniform limitations period for all claims arising under the same federal law).

conflicts with the Commission's recent decision in *Sandwich Isles*.[94] The Bureau attempted to distinguish *Sandwich Isles* on the grounds that it "addressed (and rejected) the *direct* application of section 1658(a) to an agency proceeding—not application of a statute of limitations under a borrowing rule like the one federal courts use to adjudicate a claim under a federal statute with no limitations period."[95] However, the point of *Sandwich Isles* is that limitations periods for "civil actions" are not suitable for application in agency proceedings.[96] That is nevertheless exactly what the Bureau has done by "borrowing" Florida's five-year limitations period for civil actions here.

IX. The Bureau Should Reconsider and Vacate the Order Given the Imminence of Reverse Preemption by the Florida Public Service Commission.

On June 29, 2021, several months after briefing closed in this proceeding, the Governor of Florida signed Senate Bill 1944 into law.[97] Senate Bill 1944 directs the Florida Public Service Commission ("FPSC") to assume jurisdiction over pole attachments by no later than January 1, 2022.[98] On August 17, 2021, the FPSC published a draft rule, then held a workshop regarding the draft rule on September 1, 2021.[99] On September 14, 2021, stakeholders submitted written comments on the FPSC's draft rule. The rule will be adopted, and the Commission will be notified, sometime within the next 3 months and 4 days. At that point, the Commission will have no

[94] *See* EEI Petition at 10-11.

[95] *See* Order at ¶ 59.

[96] *See In re Sandwich Isles Comms., Inc.*, Order on Reconsideration, WC Docket No. 10-90, 2019 FCC LEXIS 41, at *161-170, ¶¶ 131-37 (Jan. 3, 2019) (rejecting application of limitations period governing "civil action" and noting problems with the judiciary's "borrowing doctrine"); *see also* EEI's Reply Comments at 30-32.

[97] *See* Fla. SB 1944 (2021); https://www.flsenate.gov/Session/Bill/2021/1944; *see also* 47 C.F.R. § 1.106(c) (allowing presentation of new facts or arguments where circumstances have changed).

[98] *See* Fla. SB 1944, § 3 (2021) (codified at Fla. Stat. §366.04(8)(G)).

[99] *See Proposed Adoption of Rules 25-18.010, F.A.C., Pole Attachment Complaints*, Docket No. 20210137-PU, Notice of Development of Rulemaking (Aug. 17, 2021); *Proposed Adoption of Rule 25-18.010, F.A.C., Pole Attachment Complaints*, Docket No. 20210137-PU, Transcript of Staff Rule Development Workshop (Sep. 7, 2021).

jurisdiction over this matter.

Given the imminence of reverse preemption by the FPSC, the Bureau should vacate its Order and allow the FPSC to resolve this dispute. Because the Bureau's Order will shift significant costs onto electric ratepayers—costs that are irrelevant to the provision of electric service (like the safety space)—it should be the FPSC, not the Commission, that passes final judgment on the merits of this dispute. Further, unlike the Bureau, the FPSC will have jurisdiction over the "rates" DEF pays to AT&T under the JUA and otherwise be in a position to provide contractual relief to DEF.[100]

X. The Bureau Should Reconsider and Vacate Its Order for Lack of Jurisdiction Over the Rates, Terms and Conditions for AT&T's Attachments on DEF's Poles.

The Commission does not have jurisdiction to regulate the rates, terms and conditions of AT&T's attachments to DEF's poles under Section 224. Section 224 was never intended to provide ILECs like AT&T with rights as "attachers"—it was intended to regulate ILECs as pole owners, as recognized by the Commission itself until 2011. The awkward, unjust and incomplete result reached by the Bureau in this case further demonstrates that exercising jurisdiction over ILEC attachments on electric utility poles was never a good idea, even if it was lawful (which it was not). DEF adopts and incorporates the investor-owned electric utility industry's prior arguments on this point.

CONCLUSION

For the reasons set forth above, as well as the reasons previously stated in DEF's answer, declarations, documentary evidence and briefing, DEF respectfully petitions the Bureau to reconsider the portions of its August 27, 2021 Order described herein.

[100] *See* Fla. Stat. § 366.04(8)(A) (providing FPSC with jurisdiction over rates of "pole attachments"); Fla. Stat. § 366.02(7) (defining "pole attachments" to include attachments by electric utilities and ILECs).

Dated: September 27, 2021

Respectfully submitted,

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RULE 1.721(m) VERIFICATION

I, Eric B. Langley, as signatory to this submission, hereby verify that I have read DEF's Petition for Reconsideration of the Bureau's August 27, 2021 Memorandum Opinion and Order and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

/s/ Eric B. Langley
Eric B. Langley

CERTIFICATE OF SERVICE

I hereby certify that on this day, September 27, 2021, a true and correct copy of Duke Energy Florida, LLC's Petition for Reconsideration was filed with the Commission via ECFS and was served on the following (service method indicated):

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