Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, LLC	)	Proceeding No. 19-187
d/b/a AT&T Florida,	)	Bureau ID No. EB-19-MD-006
Complainant,	)	
	)	
v.	)	
	)	
Florida Power and Light Company,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 2020 **Released: May 20, 2020**

By the Chief, Enforcement Bureau:

1. In the 2011 *Pole Attachment Order*,[1] the Commission recognized the importance of reviewing the agreements under which incumbent local exchange carriers (LECs) attach their facilities to electric utility poles to ensure that their rates, terms, and conditions are "just and reasonable" within the meaning of section 224 of the Communications Act of 1934, as amended (Act).[2] We now grant in part an amended complaint filed by BellSouth Telecommunications, LLC d/b/a AT&T Florida (AT&T), an incumbent LEC in Florida, against Florida Power and Light Company (FPL), an electric utility, alleging that the rate it pays to attach its facilities to FPL's utility poles is excessive.[3] For the reasons discussed below, we address AT&T's claims through the end of the 2018 calendar year and find that, for that period, the rate AT&T paid to attach to FPL's poles was unjust and unreasonable under the *Pole Attachment Order*.

I. BACKGROUND

A. Legal Background

2. Section 224(b)(1) of the Act requires the Commission to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[4] Sections 224(d) and (e), respectively, establish one formula to calculate the maximum attachment rate to be paid by "a cable system solely to provide cable service" and a separate method to calculate the maximum rate to be paid by competitive LECs.[5]

[1] *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (*Pole Attachment Order* or *Order*), *aff'd, Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 1183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013).

[2] 47 U.S.C. § 224(b)(1).

[3] Amended Pole Attachment Complaint, Proceeding No. 19-187 (filed July 12, 2019) (Amended Complaint).

[4] 47 U.S.C. § 224(b)(1).

[5] *See* 47 U.S.C. § 224(d), (e).

3. In the *Pole Attachment Order*, the Commission reinterpreted the formula for calculating the section 224(e) competitive LEC attachment rate. The resulting rate (New Telecom Rate) is lower than the competitive LEC rate that applied under earlier Commission orders (Old Telecom Rate) and more closely approximates the cable system rate (Cable Rate).[6] The Commission also concluded that section 224 authorized it to regulate the rates, terms, and conditions of incumbent LEC pole attachments. The Commission explained that, while in the past, incumbent LECs had been able to negotiate just and reasonable attachment agreements because they owned roughly as many poles as the electric utilities, incumbent LEC pole ownership had declined over time and "may have left incumbent LECs in an inferior bargaining position."[7] Moreover, the record before the Commission indicated that incumbent LEC attachment rates were, on aggregate, significantly higher than cable and competitive LEC rates, so that incumbent LECs were at a competitive disadvantage, particularly with respect to broadband and other "new service" offerings. Therefore, the Commission determined that oversight of incumbent LEC attachment rates would promote broadband deployment, because "the rates charged for pole access are likely to affect deployment decisions for all telecommunications carriers, including incumbent LECs."[8]

4. Having found that section 224(b) authorized it to regulate incumbent LEC pole attachment rates, terms, and conditions, the Commission "recognized the need to exercise that authority in a manner that accounts for the potential differences between incumbent LECs and [competitive LEC] or cable operator attachers."[9] The Commission noted that incumbent LECs frequently obtained access to electric utility poles through joint use agreements, which differ from cable and competitive LEC attachment agreements in that they are typically "structured as cost-sharing arrangements" and provide the incumbent LECs advantages not found in competitive LEC and cable company agreements.[10] Moreover, these "long-standing agreements generally were entered into at a time when incumbent LECs concede they were in a more balanced negotiating position," because they owned nearly as many poles as utilities.[11] Nevertheless, the Commission concluded that it could review the rates, terms, and conditions of these "existing" joint use agreements—that is, agreements entered into before the *Order*—if the incumbent LEC could demonstrate that it was unable to obtain a "new arrangement":

> The record also indicates … that both incumbent LECs and other utilities have the ability to terminate existing agreements and seek new arrangements, and that, at times, each type of entity has sought to do so. To the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement, the Commission can consider that as appropriate in a complaint proceeding.[12]

---

[6] *See Pole Attachment Order*, 26 FCC Rcd at 5244, para. 8. The Commission took further steps in 2015 to harmonize the Old Telecom Rate and the Cable Rate. *See Implementation of Section 224 of the Act*, Order on Reconsideration, 30 FCC Rcd 13731 (2015); *Erratum*, FCC 15-151 (Feb. 8, 2016).

[7] *Pole Attachment Order*, 26 FCC Rcd at 5327, para. 199.

[8] *Pole Attachment Order*, 26 FCC Rcd at 5330, para. 208. *See id*. at 5241, para. 1 (revising the pole attachment rules will "promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers . . .").

[9] *Pole Attachment Order*, 26 FCC Rcd at 5333, para. 214. The Commission did not establish a specific rate formula for incumbent LEC attachers, choosing instead to provide "guidance" for resolution of incumbent LEC complaints "on a case-by-case basis." *Id.* at 5334, para. 216.

[10] *Pole Attachment Order*, 26 FCC Rcd at 5334, para. 216 & n.651.

[11] *Pole Attachment Order*, 26 FCC Rcd at 5334, para. 216.

[12] *Pole Attachment Order*, 26 FCC Rcd at 5334, para. 216.

Different considerations applied to incumbent LEC attachment agreements executed after the *Pole Attachment Order*. If an incumbent LEC could show that its "new" agreement was "comparable to," or did not "provide a material advantage [over]" competitive LEC or cable company attachment agreements with the same electric utility, then "competitive neutrality counsels in favor of affording the incumbent LEC the same rate as the comparable attacher."[13] Where, however, the new agreement materially advantaged the incumbent LEC in relation to competitive LEC or cable attachers, the Commission found it "reasonable to look to the [Old Telecom Rate] as a reference point in complaint proceedings."[14]

B. Factual Background

5. AT&T and Florida Power entered into an agreement for the joint use of each other's poles (JUA) in 1975.[15] The parties amended the JUA in 2007 to provide a dispute resolution process that includes upper management escalation and, if necessary, non-binding mediation.[16] The JUA does not have a fixed term. Article XVI (entitled "Term of Agreement") states in relevant part:

> Subject to the provisions of Articles XI and XII herein, the provisions of this Agreement, insofar as the same may relate to the further granting of joint use of poles hereunder, may be terminated by either party upon six (6) months' notice . . . provided . . . 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 termination.[17]

6. The JUA provides that each party pays the other a per pole attachment rate, with one per pole rate for wood poles, and a separate, premium per pole rate for concrete poles. For the years 2014 to 2018, FPL charged AT&T a premium for concrete poles of approximately ${[ ]}[18] per pole:[19]

[13] *Pole Attachment Order*, 26 FCC Rcd at 5336, para. 217.

[14] *Pole Attachment Order*, 26 FCC Rcd 5336, para. 218. The Commission subsequently established a rebuttable presumption, effective March 11, 2019, that an incumbent LEC that is a party to new or "newly-renewed" joint use agreement is "similarly situated" to competitive LEC attachers and therefore entitled to the same rate (i.e., the New Telecom Rate), reasoning that "applying the presumption in these circumstances will promote broadband deployment." *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Development*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (*Third Report and Order*) at 7769, para. 126.

[15] *See* Amended Complaint, Exh. 1 (JUA) at ATT00110.

[16] *See* Amended Complaint, Exh. 1 (JUA) at ATT000135-139.

[17] Amended Complaint, Exh. 1 (JUA) at ATT00128, Article XVI.

[18] Material set off by double brackets {[ ]} is confidential and redacted from the public version of this document.

[19] *See* Amended Complaint, Exh. B (Miller Aff.) at 4, para. 9. AT&T apparently owns no concrete joint use poles. *Id*. We cite data for the 2014 to 2018 rental years only because it is illustrative and make no finding as to the appropriate statute of limitations.

Rental year	2014	2015	2016	2017	2018
Rate per wood pole/number of wood poles to which AT&T attached	${[ ]} 358,680	${[ ]} 360,693	${[ ]} 364,279	${[ ]} 366,434	${[ ]} 366,924
Rate per concrete pole/ number of concrete poles to which AT&T attached	${[ ]} 30,438	${[ ]} 35,695	${[ ]} 43,380	${[ ]} 47,421	${[ ]} 53,990

As a result, the weighted average of the wood and concrete per pole rates that FPL charged AT&T, based on the number of each type of FPL pole to which AT&T attached, and the per pole rate that AT&T charged FPL, for the 2014 to 2018 rental years are as follows:[20]

Rental year	2014	2015	2016	2017	2018
AT&T paid FPL (per pole)	${[ ]}	${[ ]}	${[ ]}	${[	${[ ]}
FPL paid AT&T (per pole)	${[ ]}	${[ ]}	${[	${[ ]}	${[ ]}

7. FPL charged competitive LECs and cable companies, respectively, the New Telecom and Cable Rates for the 2014 to 2018 rental years, as follows:[21]

Rental year	2014	2015	2016	2017	2018
Competitive LEC rate (per pole)	${]}	${	${[ ]}	${]}	${[ ]}
Cable company rate (per pole)	${]}	${]}	${]}	${[}	${]}

8. On March 5, 2018, FPL submitted an invoice for approximately ${[ ]} to AT&T for the 2017 rental year, which ended on December 31, 2017.[22] AT&T refused to pay, asserting that it

[20] *See* Amended Complaint Exh. B (Miller Aff.) at 4, para. 9.

[21] *See* Florida Power and Light Company's Responses to AT&T's First Set of Interrogatories, Proceeding No. 19-187 (filed Aug. 21, 2019) at 10, 12. FPL states that it charges the New Telecom Rate or Cable Rate {[ ]}. *Id.* AT&T's calculation of the New Telecom Rate for FPL's poles results in per pole amounts that are {[ ]}. *See* Amended Complaint at 7, para. 13.

[22] *See* Amended Answer of Florida Power and Light Company, Proceeding No. 19-187 (filed Mar. 6, 2020) (Answer), Brief (Br.) at 1.

was entitled to a lower rate under the *Pole Attachment Order*.[23] FPL initiated the JUA's dispute resolution process, and the parties participated in an executive-level meeting on December 7, 2018.[24] The parties were unable to resolve their dispute, and, on March 25, 2019, FPL sent AT&T a letter (the Termination Notice) stating that, pursuant to Articles XII and XVI of the JUA, it was terminating (a) AT&T's right to attach to FPL's poles "effective immediately," and (b) AT&T's "rights related to the further granting of joint use of poles" effective August 26, 2019.[25] The parties completed the Amendment's dispute resolution process by participating in a one-day mediation on May 1, 2019.[26]

9. On July 1, 2019, the day it filed its complaint here, AT&T paid the 2017 invoice.[27] Also on July 1, FPL filed a complaint in Florida state court asserting, among other things, that it rightfully terminated AT&T's right to attach to its poles and asking the court to declare AT&T a trespasser on the poles.[28] AT&T removed the case to the United States District Court for the Southern District of Florida, which stayed the case under the doctrine of primary jurisdiction pending a ruling by the Commission on AT&T's Complaint.[29]

II. DISCUSSION

10. We find that AT&T has established that it is unable to terminate the JUA and establish a new arrangement with FPL, so that its rate is subject to review under the *Pole Attachment Order*. We further find that the JUA rate is unreasonable, particularly when compared with the rate FPL charges competitive LECs and cable companies to attach to the same poles, and that AT&T is entitled to a rate approximating the Old Telecom Rate.[30] We limit this order to the period ending December 31, 2018, which is the end of the 2018 pole rental year under the JUA, because we believe its guidance will enable AT&T and FPL to settle this case. Because AT&T and FPL are attached to each other's poles, their relationship is more complex than the relationship between an electric utility and cable company or

[23] *See, e.g.*, Amended Complaint Exh. 10, ATT00186-87 (email from D. Miller, AT&T, to M. Jarro, FPL, sent Dec. 6, 2018 10:13am). AT&T also refused to pay the invoice for the 2018 calendar year. *See* Answer Br. at 2.

[24] *See* Amended Complaint Exh. A (Rhinehart Aff.) at 2, para. 4.

[25] *See* Amended Complaint Exh. 23, ATT00249 (Letter from Michael Jarro, FPL, to General Counsel, AT&T, dated Mar. 25, 2019). Article XII of the JUA states, "If the default giving rise to a suspension of rights involves the failure to meet a money payment obligation hereunder, and such suspension shall continue for a period of sixty (60) days, then the party not in default may forthwith terminate the rights of the other party to attach to the poles involved in the default." Amended Complaint Exh. 1 (JUA) at ATT00125, Art. XII, § 12.3.

[26] *See* Amended Complaint Exh. A (Rhinehart Aff.) at 2, para. 4.

[27] *See* Pole Attachment Complaint, Proceeding No. 19-187 (filed July 1, 2019) (Complaint); Answer Br. at 2. AT&T also paid the principal amount of the 2018 invoice on July 1. Answer Br. at 2. AT&T argues that it paid the 2017 and 2018 invoices before July 1 since it its check arrived at FPL's office on June 28, a Saturday. *See* AT&T's Reply to FPL's Amended Answer (Reply), Proceeding No. 19-187 (filed Mar. 30, 2020) at 19.

[28] *See* Answer at 3, para. 6.

[29] *See Florida Power and Light Company v. BellSouth Telecommunications, LLC d/b/a AT&T Florida*, Case No. 9:19-CV-81403 (Reinhart), Order Adopting in Part Magistrate's Report and Recommendation, Granting in Part and Denying in Part Defendant's Motion to Dismiss, and Staying Case (S.D. Fla. Mar. 21, 2020), *found at* ATT01196-01206.

[30] *See* Amended Complaint Exh. 1 (JUA) at ATT00123, § 10.9.

competitive LEC, and involves an interlocking set of reciprocal rights and responsibilities.[31] Informed by this order, the parties will be well positioned to resolve the many disputes arising from AT&T's claims.[32]

A. AT&T is entitled to relief under the *Pole Attachment Order*.

11. We first conclude that AT&T's attachment rates are subject to review under the *Pole Attachment Order*. In the *Order*, the Commission found that it could examine the rates, terms, and conditions of "existing" joint use agreements such as AT&T's if the incumbent LEC could demonstrate that it "genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement."[33] AT&T makes such a showing. First, the JUA has no fixed term and may not be terminated with respect to existing joint use poles without the consent of both parties. Article XVI of the JUA states that, even if the agreement is terminated as to "the further granting of joint use of poles," other provisions of the agreement "shall remain in full force in effect with respect to all poles jointly used by the parties."[34] As a result, AT&T may not unilaterally terminate the JUA or simply wait for it to expire in order to "obtain a different arrangement." Nor is AT&T able to obtain a lower rate without FPL's concurrence, because the JUA states that, unless both parties agree, the rates for joint use poles "shall remain in full force and effect."[35] Further, AT&T owns fewer joint use poles than FPL, which "may have left [it] in an inferior bargaining position."[36] Finally, AT&T's attempt to negotiate a new rate with FPL before filing its Complaint demonstrates that AT&T genuinely lacks the ability to obtain a new arrangement. Beginning in 2018, AT&T argued in correspondence with FPL that it was entitled to a lower rate under the *Pole Attachment Order* and engaged in the JUA Amendment's dispute resolution process, which included an executive-level meeting and a day of mediation. Nevertheless, FPL refused to lower AT&T's rate, maintaining throughout that the *Pole Attachment Order* imposes no such obligation.[37]

---

[31] *See Pole Attachment Order*, 26 FCC Rcd at 5334, para. 216 n.654 (discussing the many "the different rights and responsibilities in joint use agreements").

[32] *Pole Attachment Order*, 26 FCC Rcd at 5336, para. 218 ("We find it prudent to identify a specific rate to be used as a reference point in these circumstances because it will enable better informed pole attachment negotiations between incumbent LECs and electric utilities."). We also limit our findings to the period ending December 31, 2018, because of the unusual facts of this case. On March 25, 2019, shortly after the close of the 2018 pole rental year, FPL sent AT&T a Notice of Termination purporting to terminate AT&T's right to attach to FPL's existing joint use poles "effective immediately," and terminating the JUA with respect to new poles effective August 26, 2019. The validity of the Notice of Termination insofar as it applies to existing joint use poles is squarely before the district court and is purely a matter of state contract law, as AT&T does not argue that the provision under which FPL gave notice is unjust or unreasonable under section 224 of the Act. Further, the parties agree that the Notice of Termination terminated the JUA as to new poles. *See, e.g.*, Amended Complaint at 10, para. 17 (FPL "terminated AT&T's right to deploy on new poles going forward"); Answer at 10, para. 17.

[33] *Pole Attachment Order*, 26 FCC Rcd at 5334, para. 216.

[34] *See* Amended Complaint Exh. 1 (JUA) at ATT00128, Article XVI. We do not address the impact (if any) of JUA Article XII (Defaults) on Article XVI (Term of Agreement). As discussed, on March 25, 2019 – after the period at issue in this order – FPL sent AT&T a Notice of Termination purporting, pursuant to JUA Articles XII (Defaults) and XVI (Term of Agreement), to terminate AT&T's right to attach to FPL's existing joint use poles "effective immediately." The question of whether the Notice terminates AT&T's right to attach to FPL's existing joint use poles is before the Florida district court and is not relevant to this order because it was sent after the period at issue.

[35] Complaint Exh. 1 (JUA) at ATT00124, Article XI.

[36] *See Pole Attachment Order*, 26 FCC Rcd at 5327, para. 199.

[37] *See, e.g.*, Amended Complaint Exhs. 6 at ATT00172 (letter from M. Jarro, FPL, to AT&T General Counsel – Florida dated Aug. 31, 2018) (AT&T's claim that the JUA rate is contrary to the *Pole Attachment Order* misconstrues the *Order* and "its application to [the JUA]"); 10 at ATT00188 (email from M. Jarro, FPL to D. Miller, AT&T, sent Dec. 4, 2018 at 5:11pm) ("[FPL is] not aware of any federal law that requires FPL to take affirmative (continued….)

12. We reject FPL's assertion that AT&T did not make a genuine effort to obtain a new arrangement. FPL contends that it "emphasized several times [to AT&T] that it was willing to negotiate a new rate going forward."[38] Yet FPL offers no evidence of any such offer or of what rate would apply.[39] FPL adds that it sought "several times" to purchase AT&T's joint use poles "with no pre-set conditions" on the negotiation: "AT&T could have put itself essentially in the position of a competitive LEC licensee but chose not to do so."[40] But AT&T denies that FPL ever seriously made such an offer, asserting that FPL did not agree that, in exchange, AT&T would receive a reduced attachment rate and also did not propose a price for AT&T poles.[41] In any event, AT&T reasonably counters that it should not be required to sell its poles in order to receive a just and reasonable rate.[42] Thus, FPL's arguments are unsuccessful, and AT&T has demonstrated that it "genuinely lacks the ability to terminate [the JUA] and obtain a new arrangement."[43] As discussed, the JUA may not be terminated or its rates amended without the agreement of both parties, and AT&T's lower pole ownership ratio places it in an inferior bargaining position. Further, AT&T has shown that its attempts to negotiate a new rate with FPL in light of the *Pole Attachment Order* were unsuccessful.

13. We further conclude that AT&T has established that the JUA rate is unreasonable. First, AT&T pays virtually the same rate per pole that FPL pays: For example, in the 2017 rental year, AT&T paid ${[ ]} per pole and FPL paid ${[ ]}; in 2018, AT&T paid ${]} and FPL paid ${[}.[44] Yet the JUA reserves six feet of space to FPL and only four feet to AT&T, and FPL admits that, according to its surveys, AT&T's attachments occupy only 1.18 feet of space.[45] Further, FPL charges AT&T a per-pole rate that is at least {[ ]} the rate it charges cable companies and competitive LECs for attaching to the same poles:

Rental year	2014	2015	2016	2017	2018
AT&T rate per pole	${[ ]}	${]}	${[ ]}	${]}	${[ ]}
Competitive LEC rate per pole	${]}	${]}	${]}	${]}	${]}
Cable company rate per pole	${]}	${]}	${]}	${[ ]}	${[ ]}

Thus, AT&T's rate is far higher than that of its cable and competitive LEC competitors, and the disparity may grow if FPL continues to replace wood poles with concrete poles under Florida's Storm Hardening

(Continued from previous page)
action to change an agreed-upon contract rate"), 22 at ATT00228 (email from D. Bromley, FPL to D. Miller, AT&T sent Jan. 8, 2019) ("as we have previously communicated, there is nothing in the 2011 [Pole Attachment] Order that affirmatively requires the parties to modify an existing agreed upon contract rate").

[38] Answer Br. at 42.

[39] *See* Reply Legal Analysis at 42.

[40] Answer Br. at 42.

[41] *See* Reply Legal Analysis at 46-47.

[42] *See* Reply Legal Analysis at 47.

[43] *See Pole Attachment Order*, 26 FCC Rcd at 5334, para. 216.

[44] *See* table at para. 7, *supra*.

[45] *See* Amended Complaint Exh. 1 (JUA) at ATT00110-111, § 1.1.5; Answer Exh. E (Murphy Decl.) at 1, para. 3.

Plan.[46] As a result, AT&T's rate may discourage AT&T's deployment of broadband and other advanced services. As the Commission explained in the *Pole Attachment Order*, "widely disparate pole rental rates distort infrastructure investment decisions and in turn could negatively affect the availability of advanced services and broadband, contrary to the policy goals of the Act."[47] Thus, because we find that the JUA rate is unjust and unreasonable, AT&T is entitled to a lower rate.

14. The *Pole Attachment Order* does not specify the rate that applies where an incumbent LEC, like AT&T, has shown that it is unable to terminate an "existing" agreement and obtain a new arrangement. The *Order* does state, however, that an incumbent LEC that has entered into a "new" agreement should be charged no more than the New Telecom Rate if it is "similarly situated" to competitive LEC or cable attachers and no more than the Old Telecom Rate if it receives benefits under the agreement not afforded these entities.[48] Applying these principles to the present case, we find that AT&T receives significant benefits under the JUA not afforded competitive LECs and cable attachers, and that it therefore is entitled to the Old Telecom Rate, and not the New Telecom Rate. FPL rightly notes that the JUA provides the following advantages:

- Guaranteed access. The JUA guarantees AT&T space on FPL's poles,[49] including "new poles" (i.e., "a new pole line or an extension of an existing pole line").[50] AT&T's competitors are not guaranteed space on any pole to which they are not already attached.[51]
- Four feet reserved space. The JUA reserves four feet of space on FPL's poles to AT&T;[52] other attachers are restricted to {[ ]}.[53] Thus, AT&T has the necessary space to add new attachments, such as fiber optic cable and other advanced services.[54]
- No permitting. AT&T is not required to obtain advance approval through FPL's permitting process before attaching to FPL poles;[55] competitors undergo an expensive and time-consuming permitting process.[56]

[46] *See* Amended Complaint Exh. B (Miller Aff.) at 5, para. 11 (the pace of FPL's replacement of wood with concrete poles is "not expected to slow").

[47] *See Pole Attachment Order*, 26 FCC Rcd at 5295, para. 126 (reducing the disparity in the section 224(d) cable rate and the 224(e) competitive LEC rate will "help remove market distortions that affect attachers' deployment decisions" and "improve[] the ability of different providers to compete with each other on an equal footing").

[48] *See Pole Attachment Order*, 26 FCC Rcd at 5336, para. 217.

[49] *See* Amended Complaint Exh.1 (JUA) at ATT00111, § 1.1.7, ATT00114, § 3.2.; Answer Br. at 48-51.

[50] *See* Amended Complaint Exh.1 (JUA) at ATT00116, § 4.2. AT&T attaches to approximately 3,000 new FPL poles a year. *See* Answer Br. at 26.

[51] *See* Answer Exh. A (Kennedy Decl.) at 5, para. 10. AT&T argues that the JUA's access guarantee is not a benefit because FPL "voluntarily expands capacity to make room for AT&T's competitors," *see* Reply Legal Analysis at 26, but provides no support for its assertion, which FPL denies. *See* Answer Exh. A (Kennedy Decl.) at 5, para. 10.

[52] *See* Amended Complaint Exh.1 (JUA) at ATT00112, Article I § 1.1.7(B).

[53] *See Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777, paras. 84-91 (1998); Reply Legal Analysis at Exh. 3 (attachment agreement between FPL and a competitive LEC) at ATT002805, § 3.4.b (reserving {[ ]} of space to the competitive LEC).

[54] AT&T asserts that it does not need four feet of space because its wireless affiliate attaches elsewhere, but does not address FPL's argument, Answer Exh. A (Kennedy Decl.) at 6-7, that AT&T could use the space for other purposes. *See* Reply Legal Analysis at 29-30.

[55] *See* Amended Complaint Exh.1 (JUA) at ATT00111, §1.1.6, ATT00130, Exh. A.

- No inspection. After attaching, AT&T's competitors are subject to a post-attachment inspection by FPL and must pay a post-attachment inspection fee; the JUA imposes no such requirement, even with respect to "new" poles.[57]
- Lowest space on the pole. AT&T has the right to the lowest spot on the pole,[58] so that its employees work in a safer area of the pole, can identify and access AT&T attachments more easily and use less expensive bucket trucks with shorter reach.[59]
- Payment in arrears. AT&T pays its annual rental fee in arrears (for example, in March 2018 for the 2017 year);[60] others pay in advance semiannually (for example, in June 2017 for July through December 2017).[61]

15. Though we conclude that the JUA provides AT&T advantages over competitive LEC and cable attachers, we are not persuaded that these benefits justify the JUA rates at issue because FPL's calculation of the monetary value of these benefits is inflated.[62] First, FPL overlooks the fact that AT&T must provide FPL many of the same advantages that FPL provides AT&T.[63] Thus, while FPL argues that the value of AT&T's guaranteed access is the cost to FPL of building poles tall and strong enough to accommodate AT&T's attachments, it fails to consider the cost to AT&T of building poles tall and strong enough to accommodate FPL, and that the JUA reserves six feet to FPL and only four feet to AT&T.[64]

(Continued from previous page)

[56] *See* Answer Exh. A (Kennedy Decl.) at 9, paras. 15-16. AT&T's contends that there is no benefit in avoiding FPL's permitting process since it must itself do the surveying and other work involved. *See* Reply Legal Analysis at 32-33. But if the party most incentivized to minimize the time and cost of attaching is in control of the process, attachment almost certainly takes less time and costs less money. *See Third Report and Order*, 33 FCC Rcd 7705 at 7711-9, paras. 11-24 (placing the attacher in control of the surveys, notices and make-ready work required for new attachments so that attachment is faster and cheaper).

[57] *See* Answer Exh. A (Kennedy Decl.) at 9, para. 15. AT&T disagrees that avoiding FPL's inspection is an advantage, asserting that it must itself perform post-attachment inspections of its installation and make-ready work. Yet AT&T admits that it inspects only on a "random" basis. *See* Reply Exh. C (Peters Aff.) at 9, para. 17.

[58] *See* Amended Complaint Exh.1 (JUA) at ATT00112, §1.1.7.

[59] *See* Answer Exh. A (Kennedy Decl.) at 8, para. 13. AT&T maintains that attaching at the lowest spot is not an advantage because it results in accidents but fails to specify a single incident, s*ee* Reply Exh. C (Peter Aff.) at 17, para. 33, and admits that its location "eliminates confusion." *Id.* at 18, para. 34. AT&T has never asked to attach at any other place. *See* Answer Exh. A (Kennedy Decl.) at 12, para. 20.

[60] *See* Amended Complaint Exh.1 (JUA) at ATT00123, §10.7.

[61] *See* Answer Br. at 54, Exh. A (Kennedy Decl.) at 7, para. 12. AT&T's argument that its payment schedule is not an advantage because it pays a higher rate, s*ee* Reply Legal Analysis at 30, misses the point. If AT&T paid the same rate as its competitors, its rate would, in effect, be lower because of the time value of money. The most significant JUA benefit is that FPL pays roughly half of AT&T's pole costs. *See* Amended Complaint, Exh. 1 (JUA) at ATT001333, Article I § 1.1.5, ATT00121-4, Article X. But AT&T states that FPL is entitled to a proportional reduction in its rate. *See* Amended Complaint, Exh. A (Rhinehart) at 12, para. 26; *Pole Attachment Order* at 5336, para. 218 (the Commission "would be skeptical of a complaint by an incumbent LEC seeking a proportionately lower rate . . . than the rate the incumbent LEC is charging the electric utility") & n.662 ("a just and reasonable rate in such circumstances [where the incumbent LEC seeks a lower rate] would be the same proportionate rate charged the electric utility . . .").

[62] *See* Answer Br. at 68-70.

[63] *See Verizon Virginia., LLC v. Virginia Electric and Power Co.*, 32 FCC Rcd 3750, 3760, para. 21 (Enf. Bur. 2017) ("By identifying as alleged 'benefits' to Verizon services that Verizon is likewise required to extend to Dominion under the Joint Use Agreements, Dominion has failed to show that Verizon receives a disproportionate benefit.").

[64] *See* Answer Br. at 50-51.

FPL's calculation also ignores that FPL did not build its poles just to accommodate AT&T. By 1978, cable attachments were so common that Congress saw fit to regulate their rates, and, by 1996, section 224 of the Act was amended to provide cable and competitive LECs a statutory right of access.[65] FPL further attempts to calculate the monetary value of AT&T's guaranteed access by assuming that, without the JUA, AT&T would have built a duplicate pole network.[66] But, as Congress has found, owing to a variety of factors, including environmental and zoning restrictions, there is "often no practical alternative except to utilize available space on existing poles."[67] Finally, FPL also overstates the value of the JUA benefits by ignoring that, although AT&T avoids some of the charges FPL assesses on other attachers, AT&T nevertheless incurs a portion of these costs in undertaking the work itself. For example, even though AT&T is exempt from FPL's permitting process, it must still perform some of the same engineering work involved in that process before it can attach.[68]

16. FPL argues that, in any event, the JUA rate is lower than the Old Telecom Rate.[69] But FPL inflates its calculation of the Old Telecom Rate by (at a minimum) incorrectly applying a "space occupied" factor of 4.5 feet, comprised of the 1.18 feet of space allegedly occupied by AT&T's facilities and 3.3 feet of communication safety space.[70] The communication space should not be attributed to AT&T because, under the Commission's rate formula, "space occupied" means space that is "actually occupied," and AT&T's attachments do not actually occupy the communications safety space.[71] Further, the Commission has long held that the communication safety space is for the benefit of the electric utility, not communications attachers. In the 2000 *Pole Attachments Report and Order*, the Commission rejected electric utilities' request to revise the rate formula by removing the safety space from usable space, stating, "It is the presence of the potentially hazardous electric lines that makes the safety space necessary and but for the presence of those lines, the space could be used by cable and [competitive LEC] attachers. The space is usable and used by the electric utilities."[72]

---

[65] *See Pole Attachment Order* at 5245, paras. 9-10 (history of pole attachment regulation); *Third Report and Order*, 33 FCC Rcd 7705 at 7707, para. 5 (utility poles often accommodate cable, wireline, fiber optic and wireless attachments).

[66] *See* Answer Br. at 48.

[67] *See* S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977 Senate Report), *reprinted in* 1978 U.S.C.C.A.N. 109. FPL points to the rate it charges attachers whose agreements are not governed by section 224 and who have no right to attach. *See* Answer Br. at 46-49. But the relevant comparison under the *Order* is FPL's agreements with cable companies and competitive LECs.

[68] *See* Reply Exh. D (Dippon Aff.) at 988, para. 13. FPL argues that it requires its licensees to purchase liability and workers' compensation insurance, but AT&T rightly counters that it must purchase such insurance in any event, and that FPL's security bond requirement is {[ ]}. *See* Reply Exh. C (Peters Aff.) at 6, para. 12.

[69] *See* Answer Br. at 68-70.

[70] S*ee* Answer Exhs. A (Kennedy Decl.) at 15, para. 30 and Exh. D (Deaton Decl.) at 2, para. 8. As FPL admits, according to its surveys, AT&T's attachments occupy only 1.18 feet of space. *See* Answer Exh. E (Murphy Decl.) at 1, para. 3. The parties disagree as to the proper calculation of various components of the Old Telecom Rate. *Compare* Answer Br. at 68-70 *with* Reply Legal Analysis at 53-57. We reserve judgment on those issues in the hope that the parties can settle the case but will decide them in a subsequent order if necessary.

[71] *See Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12143, para. 78 (2001); 47 CFR § 1.1406(d).

[72] *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, 6467, paras. 21-22 (2000). *See Amendment of Rules and Policies Governing Pole Attachments*, 16 FCC Rcd at 12130, para. 51 (the safety space is "usable and used by the electric utility") (citing *Adoption of Rules for the Regulation of Cable TV Attachments*, Memorandum Opinion and Order, 72 FCC Rcd 59 at paras. 22-25 (1979)).

17. The Commission stated in the *Pole Attachment Order*, "Just as considerations of competitive neutrality counsel in favor of similar treatment of similarly situated providers, so too should differently situated providers be treated differently. In particular, we find it reasonable to look to the [old] telecom rate as a reference point in complaint proceedings involving a pole owner and an incumbent LEC that is not similarly situated . . . ."[73] Applying the Commission's reasoning here, because we find that AT&T is not similarly situated to competitive LEC and cable attachers, we also find that the Old Telecom Rate provides a reference point for a "just and reasonable rate" for the period ending with the 2018 pole rental year.

B. FPL's remaining defenses lack merit.

18. FPL argues that AT&T is not entitled to relief under the *Pole Attachment Order* because, according to FPL, AT&T it is not in an inferior bargaining position. FPL notes that AT&T is the largest telecommunications provider in the world.[74] We are not convinced, for AT&T's size provides little leverage in negotiations over utility poles.[75] FPL argues further that, at the inception of the JUA in 1975, AT&T owned 41% of the joint use poles and therefore was able to negotiate from a position of equality. But the Commission in the *Pole Attachment Order* concluded that it should regulate incumbent LEC joint use agreements because current, not past, pole ownership ratios had reduced incumbent LEC bargaining power.[76] FPL counters that AT&T's current ownership of 34% of the joint use poles does not place it in an inferior bargaining position.[77] But the Commission found that, where an incumbent LEC's pole ownership ratio falls to a level such as AT&T's, the incumbent LEC "may not be in an equivalent bargaining position."[78] That is the case here, particularly given that the JUA provides that its rates may not be changed without FPL's consent, and AT&T's efforts to negotiate new rates have failed.

19. FPL asserts as an affirmative defense that section 224 does not authorize the Commission to regulate the rates, terms, or conditions of incumbent LEC attachment agreements.[79] The United States Court of Appeals for the District of Columbia Circuit, however, has rejected that assertion.[80] FPL also asserts as an affirmative defense that the Commission should exercise forbearance in this proceeding pursuant to section 10 of the Act because "the Commission's justifications for the assertion of jurisdiction over the rates, terms and conditions of [incumbent] LEC attachments . . . are not supported by the facts of this case."[81] Specifically, according to FPL, AT&T "is not in an inferior bargaining position to FPL . . . and the 1975 JUA rates are just and reasonable."[82] This defense is without merit because, as discussed

[73] *Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218.

[74] *See* Answer Br. at 39 (citing https://en.wikipedia.org/AT&T (last visited Sept. 9, 2019)).

[75] FPL ignores that it is "the largest energy company in the United States as measured by retail electricity produced and sold." *See* Amended Complaint at 3, para. 2 (citing Company Profile, *available at* https://www.fpl.com/about/company-profile.html (last visited June 27, 2019)).

[76] *See Pole Attachment Order*, 26 FCC Rcd at 5327, para. 199. We disagree with FPL's assertion, Answer Br. at 36, that "pole ownership ratio is not indicative of inferior bargaining power" for the reasons set forth in the *Order*. *Id.* at 5328, para. 206 n.618.

[77] *See* Answer Br. at 36-7.

[78] *Pole Attachment Order*, 26 FCC Rcd at 5329, para. 206.

[79] *See* Answer at 32-33 (Affirmative Defense H).

[80] *See Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 1183 (D.C. Cir. 2013) (affirming the *Pole Attachment Order*), *cert. denied*, 571 U.S. 940 (2013).

[81] Answer at 29-30 (Affirmative Defense D) (citing 47 U.S.C. § 160(a)).

[82] Answer at 30.

above, we find that AT&T is, in fact, in an inferior bargaining position and that the JUA rate is neither just nor reasonable. In any event, forbearance would not be "consistent with the public interest" because the *Pole Attachment Order* determined that the public interest would be served by permitting incumbent LECs to make the kind of showing AT&T has made here.[83]

III. ORDERING CLAUSES

20. Accordingly, **IT IS HEREBY ORDERED**, pursuant to sections 4(i), 4(j) and 224 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), and 224, and sections 0.111, 0.311, 1.1401, 1.1402, and 1.1404, of the Commission's rules, 47 CFR §§ 0.111, 0.311, 1.1401, 1.1402, and 1.1404, the Amended Complaint is **GRANTED IN PART** and **STAYED IN PART**. The parties are to confer in light of this order to attempt to resolve their remaining disputes and are to report their progress to Commission staff within thirty days. Commission staff will conduct any further proceedings necessary, including issuing an appropriate subsequent order, if the parties are not able to settle this case.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Chief
Enforcement Bureau

[83] *See Pole Attachment Order* at 5327-8, paras.199-203. FPL's forbearance defense suffers from additional flaws, including FPL's failure to comply with 47 CFR § 1.53 et *seq*. FPL waived its affirmative defense that AT&T violated Commission rule 1.722(g) (requiring formal complaints to contain settlement certification), 47 CFR § 1.722(g), by failing to file a motion to that effect. *See* Answer at 27-28 (Affirmative Defense B); Letter-ruling from Lisa Griffin, FCC, to Christopher Huther and Claire Evans, counsel to AT&T, and Charles Zdebski and Will Simmerson, counsel to FPL, proceeding no. 19-187 (sent Aug. 21, 2019) (FPL must file any rule 1.722(g) motion by September 26, 2019).