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

In the Matter of	)	Proceeding No. 20-276
	)	Bureau ID No. EB-20-MD-003
BellSouth Telecommunications, LLC d/b/a AT&T Florida,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
Duke Energy Florida, LLC,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 27, 2021 **Released: August 27, 2021**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. Over the past decade, the Commission has demonstrated its commitment to ensuring that the rates, terms, and conditions under which incumbent local exchange carriers (LECs) attach their facilities to electric utility poles are "just and reasonable" under section 224 of the Communications Act of 1934, as amended (Act).[1] In this case, we grant in part a complaint filed by BellSouth Telecommunications, LLC d/b/a AT&T Florida (AT&T), an incumbent LEC, against Duke Energy Florida (Duke), an electric utility, alleging that the rates AT&T pays for the use of Duke's poles are unjust and unreasonable under section 224 and the Commission's rules and orders.[2] Based on our review

[1] *See* 47 U.S.C. § 224(b)(1); *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011), *aff'd, Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013) (*2011 Pole Attachment Order* or *2011 Order*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Development*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (*2018 Pole Attachment Order* or *2018 Order*), *petition for review denied*, *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), *petition for cert. denied sub nom. Portland, Or. v. FCC*, No. 20-1354, 2021 WL 2637868 (June 28, 2021); *see also Verizon Maryland, LLC v. The Potomac Edison Co.*, Proceeding No. 19-355, Memorandum Opinion and Order, 35 FCC Rcd 13607 (2020) (*Verizon Maryland*); *BellSouth Telecomms., LLC v. Florida Power & Light*, Proceeding No. 19-187, Memorandum Opinion and Order, 35 FCC Rcd 5321 (EB 2020) (*AT&T v. FPL I*); *Bellsouth Telecomms., LLC v. Florida Power & Light*, Proceeding No. 19-187, Memorandum Opinion and Order, 36 FCC Rcd 253 (EB 2021) (*AT&T v. FPL II*).

[2] *See* Pole Attachment Complaint of BellSouth Telecommunications, LLC d/b/a AT&T Florida, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (filed Aug. 25, 2020) (Complaint); *see also* Duke Energy Florida, LLC's Answer and Affirmative Defenses to AT&T's Pole Attachment Complaint, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (filed Oct. 30, 2020) (Answer); AT&T's Reply to Duke Energy Florida's Answer, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (filed Nov. 24, 2020) (Reply); Reply Legal Analysis in Support of Pole Attachment Complaint, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (filed Nov. 24, 2020) (Reply Legal Analysis); Joint Statement, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (filed Jan. 8, 2021) (Joint Statement); AT&T's Initial Supplemental Brief, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (filed April 8, 2021) (AT&T Initial Brief); Duke Energy Florida, LLC's Initial Brief in Response to the Enforcement Bureau's

(continued….)

of the record, we resolve several issues disputed by the parties in order to assist them in negotiating a just and reasonable pole attachment rate and calculating the refund owed to AT&T under the relevant pole attachment rate formula.

II. BACKGROUND

A. Legal Framework

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."[3] Prior to 2011, the Commission construed the "just and reasonable" requirement of section 224(b)(1) to apply to attachments by cable companies and competitive LECs, but not to attachments by incumbent LECs, like AT&T.[4] Sections 224(d) and (e), respectively, establish separate formulas for calculating the maximum attachment rate that may be paid by cable systems and by competitive LECs.[5]

3. In the *2011 Pole Attachment Order*, the Commission reexamined the formula for calculating the section 224(e) attachment rate applicable to competitive LECs. That reexamination resulted in a revised pole attachment rate for competitive LECs (the New Telecom Rate) that is lower than the pre-existing competitive LEC rate (the Old Telecom Rate) and more closely approximates the rate that cable operators pay (the Cable Rate).[6] The Commission also concluded for the first time that section 224 authorized it to regulate the rates, terms, and conditions of incumbent LEC pole attachments.[7] The Commission explained that, while in the past, incumbent LECs were positioned 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

March 8, 2021 Letter, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (filed April 8, 2021) (Duke Initial Brief); AT&T's Reply Supplemental Brief, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (filed April 19, 2021) (AT&T Reply Brief); Duke Energy Florida, LLC's Reply Supplemental Brief, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (filed April 19, 2021) (Duke Reply Brief). Because the State of Florida has not reverse-preempted this Commission's jurisdiction under 47 U.S.C. § 224(c), the Commission has retained jurisdiction of this proceeding. *See* Complaint at 4, para. 5; Answer at 2, para. 5.

[3] 47 U.S.C. § 224(b)(1).

[4] *2011 Order*, 26 FCC Rcd at 5328, para. 205 & n.614. We use the term "competitive LEC" herein as a shorthand for the statutory category of "telecommunications carrier," defined in section 224(a)(5), which excludes incumbent LECs. We note, however, that the definition of "telecommunications carrier" in section 224(a)(5) includes carriers other than competitive local exchange carriers (e.g., interexchange carriers and CMRS providers). The shorthand notation used here should not be construed as limiting in any way the statutory rights available to all providers that qualify as telecommunications carriers under section 224(a)(5). *See* 47 U.S.C. § 224(a)(5).

[5] *See* 47 U.S.C. § 224(d) (applicable to "cable television system[s] solely to provide cable service"), (e) (applicable to "telecommunications carriers to provide telecommunications services").

[6] *See 2011 Order*, 26 FCC Rcd at 5244, para. 8. In the *2011 Order*, the Commission referred to the competitive LEC rate that was in effect prior to that order as the "pre-existing, high-end telecom rate." *See, e.g.*, *2011 Order*, 26 FCC Rcd at 5337, para. 218 & n.661. For ease of reference, we refer to that rate as the "Old Telecom Rate." 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] *See 2011 Order*, 26 FCC Rcd at 5331, para. 209. After reexamining the language and structure of section 224, the Commission held in the *2011 Order* that the definition of "pole attachment" under section 224(a)(4) includes pole attachments of incumbent LECs. Based on this reinterpretation, the Commission concluded that section 224(b), which requires it to regulate the rates, terms, and conditions for *pole attachments*, includes a duty to regulate incumbent LEC pole attachments. *See id.* at 5331-32, paras. 209-211 (holding that "incumbent LECs are entitled to pole attachment rates, terms and conditions that are just and reasonable pursuant to Section 224(b)(1)"); *see also id.* at 5243-44, 5327-28, 5330, paras. 8, 202, 208. Unlike cable and competitive LEC attachers, however, the Commission continued to hold that incumbent LECs have no right of access to utilities' poles pursuant to section 224(f)(1). *See id.* at 5328, 5329-30, 5332-33, paras. 202, 207, 212 & n.643.

bargaining position."[8] The Commission noted that incumbent LEC attachment rates were, in 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 advanced service offerings.[9] The Commission determined that oversight of incumbent LEC attachment rates would promote broadband deployment, given that "the rates charged for pole access are likely to affect deployment decisions for all telecommunications carriers, including incumbent LECs."[10]

4. Having determined that section 224(b) authorized it to regulate incumbent LEC pole attachment rates, terms, and conditions, the Commission sought to do so "in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers."[11] The Commission noted that incumbent LECs frequently obtain access to electric utility poles through joint use agreements, which differ from cable company and competitive LEC attachment agreements in that they are typically "structured as cost-sharing arrangements" and provide incumbent LECs advantages not found in competitive LEC and cable company agreements.[12] Thus, the Commission stated that it "question[ed] the need to second guess" such arrangements and opined that it would be "unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable."[13] Nonetheless, if an incumbent LEC demonstrated that it "genuinely lacks the ability to terminate an existing agreement [i.e., one entered into before the *2011 Order*] and obtain a new arrangement[,]" the Commission concluded that it could take such evidence into consideration in a complaint proceeding examining the rates, terms, and conditions in that agreement.[14]

5. Regarding new agreements, the Commission concluded that if an incumbent LEC could show that such a "new" agreement provides access to poles on terms and conditions that are "comparable to" or do not "provide a material advantage [over]" competitive LEC or cable company agreements with the same electric utility, "competitive neutrality counsels in favor of affording the incumbent LEC the same rate as the comparable attacher."[15] Conversely, if a new agreement includes pole access terms and conditions that "materially advantage" the incumbent LEC in relation to competitive LEC or cable company attachers, the Commission found it "reasonable to look to the [Old Telecom Rate] as a reference point" in resolving such complaint proceedings.[16]

6. In the *2018 Pole Attachment Order*, the Commission observed that incumbent LECs' "bargaining power vis-à-vis utilities has eroded since 2011."[17] Citing evidence that "incumbent LEC pole ownership has declined and incumbent LEC pole attachment rates have increased (while pole attachment rates for cable and telecommunications attachers have decreased)[,]" the Commission reconsidered the

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[8] *2011 Order*, 26 FCC Rcd at 5327, para. 199.

[9] *See 2011 Order*, 26 FCC Rcd at 5330-31, para. 208.

[10] *2011 Order*, 26 FCC Rcd at 5330, para. 208; *see also 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").

[11] *2011 Order*, 26 FCC Rcd at 5333, para. 214. The Commission did not establish a specific rate formula for incumbent LEC attachers, choosing instead to resolve incumbent LEC complaints "on a case-by-case basis." *Id.* at 5334, para. 214.

[12] *2011 Order*, 26 FCC Rcd at 5334, para. 216 & n.651.

[13] *2011 Order*, 26 FCC Rcd at 5335, para. 216.

[14] *2011 Order*, 26 FCC Rcd at 5335-36, para. 216.

[15] *2011 Order*, 26 FCC Rcd at 5336, para. 217.

[16] *2011 Order*, 26 FCC Rcd at 5336-37, para. 218.

[17] *See 2018 Order*, 33 FCC Rcd at 7768, para. 125; *see also id.*, 33 FCC Rcd at 7769, para. 126 ("We therefore conclude that incumbent LEC bargaining power vis-à-vis utilities has continued to decline.").

basis for its original presumption that incumbent LECs differ from and have superior bargaining power vis-a-vis other attachers.[18]

7. In view of declining levels of incumbent LEC pole ownership and a widening disparity in pole attachment rates, the Commission adopted a new rebuttable presumption that, "for new and newly-renewed pole attachment agreements"[19] between incumbent LECs and electric utilities, incumbent LECs "are similarly situated" to "telecommunications attachers" and thus are entitled to "comparable" rates that are no higher than the New Telecom Rate.[20] The Commission held that a utility can rebut this presumption "with clear and convincing evidence that [an] incumbent LEC receives net benefits under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers."[21]

8. In cases where a utility rebuts this presumption, the Commission designated the Old Telecom Rate as "the maximum rate that the utility and incumbent LEC may negotiate."[22] Thus, whereas the *2011 Order* had instructed that the Old Telecom Rate be used as a "reference point" in complaint proceedings involving an incumbent LEC attacher that is not similarly situated to other attachers on a utility's poles,[23] the *2018 Order* made this rate a "hard cap" in order to "provide further certainty within the pole attachment marketplace" and "limit pole attachment litigation."[24] In complaint proceedings regarding agreements that materially advantage an incumbent LEC and that were entered into *after* the effective date of the *2011 Order* but *before* the effective date of the *2018 Order* (March 11, 2019), the Commission determined that the Old Telecom Rate will continue to serve as a reference point.[25]

B. The Parties' Joint Use Agreement

9. AT&T and Duke are parties to a Joint Use Agreement (JUA) that the original signatories, Florida Power Corporation and Southern Bell Telephone and Telegraph Company, entered into on June 1,

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[18] *2018 Order*, 33 FCC Rcd at 7769, para. 126; *id.* at 7769, para. 125 (citing a "recent [USTelecom] member survey" showing that its incumbent LEC members' average annual pole attachment rate paid to investor-owned utilities had increased from $26.00 to $26.12 since 2008 in Commission-regulated states, while cable and competitive LEC provider payments to incumbent LECs, which were averaging $3.00 and $3.75 per year, respectively, had decreased from their 2008 levels of $3.26 and $4.45, respectively) (internal citation omitted).

[19] *2018 Order*, 33 FCC Rcd at 7769, para. 126. A "new or newly-renewed" agreement is "one entered into, renewed, or in evergreen status after the effective date of [the *2018 Order*], and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status." *2018 Order*, 33 FCC Rcd at 7770, para. 127 n.475.

[20] *2018 Order*, 33 FCC Rcd at 7769, para. 126 (establishing a rebuttable presumption that an incumbent LEC that is a party to a new or "newly-renewed" agreement is "similarly situated" to competitive LEC attachers and therefore entitled to the same rate (i.e., the New Telecom Rate)); *see* 47 CFR § 1.1413(b). This presumption became effective on March 11, 2019. *See Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment*, 84 Fed. Reg. 2460-01 (Feb. 7, 2019) (establishing effective date of rate presumption rule revisions). A separate effective date of May 20, 2019 applied to 2018 rule revisions governing pole attachment access and "one-touch-make-ready" requirements, which are not at issue here. *See Accelerating Wireline Deployment by Removing Barriers to Infrastructure Investment*, 84 Fed. Reg. 16412, 16413 (Apr. 19, 2019) (establishing effective date of pole attachment access rule revisions). For ease of reference, our use of the phrase "*2018 Order* effective date," or similar formulations, refers to the March 11, 2019, effective date of the rate presumption rule revisions.

[21] *2018 Order*, 33 FCC Rcd at 7768, para. 123; *see* 47 CFR § 1.1413(b).

[22] *2018 Order*, 33 FCC Rcd at 7771, para. 129.

[23] *2011 Order*, 26 FCC Rcd at 5337, para. 218.

[24] *2018 Order*, 33 FCC Rcd at 7771, para. 129.

[25] *Compare 2018 Order*, 33 FCC Rcd at 7770, para. 127 n.475, *with id.* at 7770, para. 127 n.479 (noting that "for existing agreements, the [*2011 Order*'s] guidance regarding review of incumbent LEC pole attachment complaints will continue to apply") (citing *2011 Order*, 26 FCC Rcd at 5333-38, paras. 214-19).

1969.[26] The JUA contains the rates, terms, and conditions for each party's use of the other party's utility poles.[27]

10. The JUA's initial ten-year term expired on January 1, 1979.[28] Article XVI, Section 16.1 of the JUA states that, after its initial term, the JUA may be terminated by either party upon six months' notice with respect to "the further granting of joint use of poles."[29] Notwithstanding such termination, an evergreen clause in Section 16.1 states that the JUA's other applicable provisions "shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."[30] Neither party has invoked the notice of termination provision described in Section 16.1.[31]

11. Article X of the JUA sets out the methodology for determining each company's "annual rates for joint use pole attachments,"[32] and Article XI specifies the procedure for making annual adjustments to the rates.[33] Duke applies these provisions in calculating each party's annual rate and issues AT&T "an annual net rental invoice that subtracts [Duke's] rental charges for use of AT&T's poles from AT&T's rental charges for use of [Duke's] poles."[34]

12. Under the JUA, Duke charges AT&T pole attachment rates that are substantially higher than the rates that Duke charges competitive LECs and cable providers to attach to the same poles. For example, for the years 2015 through 2019, Duke charged AT&T per pole rates of between {[ ]} for AT&T's use of Duke's poles.[35] In contrast, Duke charged per pole rates for those same years of between {[ ]} to competitive LEC attachers and between {[ ]} to cable company attachers.[36] AT&T thus pays {[ ]} more than what its competitors pay.

C. The Complaint

13. AT&T alleges that Duke has "long charged" AT&T "unjust and unreasonable" pole attachment rates.[37] AT&T argues that, under section 224 and the Commission's *2011* and *2018 Orders*, it is entitled to an attachment rate that does not exceed the New Telecom Rate and, based on that rate

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[26] *See* Complaint, Exh. 1, Joint Use Agreement Between Florida Power Corporation and Southern Bell Telephone and Telegraph Company, dated June 1, 1969 (JUA); Joint Statement at 2, Stipulated Fact No. 3. The JUA was amended on October 16, 1980, and again on January 2, 1990. *Id.*

[27] *See* JUA.

[28] *See* JUA, Art. XVI, Section 16.1.

[29] *See* JUA, Art. XVI, Section 16.1.

[30] *See* JUA, Art. XVI, Section 16.1.

[31] *See* Joint Statement at 2, Stipulated Fact No. 4.

[32] *See* JUA, Art. X, Section 10.4(b) (1990 Amendment). Under Section 10.4(a) of Article X, each party's annual "rental charge" is "based on that company's total number of joint use pole attachments . . . times that company's annual rate, as defined in Section 10.4(b)." Section 10.4(b), in turn, provides that "[t]he Electric company as a Licensee, shall pay {]} of the majority pole owner's annual pole cost and the Telephone Company as a Licensee, shall pay {[ ]} of the majority pole owner's annual pole cost." *See* Joint Statement at 3, Stipulated Fact No. 8 (citing JUA, Art. X, Section 10.4(a), (b)).

[33] *See* JUA, Art. XI (1990 Amendment). Article XI states that the rates for joint use pole attachments "shall be adjusted yearly by the party owning the majority of the jointly used poles." *See id.*, Section 11.1. Duke owns approximately 92.3% and AT&T owns approximately 7.7% of the parties' 67,569 jointly used poles. *See* Joint Statement at 2, Stipulated Fact No. 7.

[34] Joint Statement at 3, Stipulated Fact No. 10 (citing Complaint, Exh. 1 at ATT00108; Answer, Exh. 3 at ATT00155-59) (internal quotation marks omitted).

[35] *See* Joint Statement at 4, Stipulated Fact No. 13.

[36] Answer at 12 & n.28 (citing Answer, Exh. D, Declaration of Marcia Olivier at 4, para. 10 (Olivier Answer Decl.)).

[37] *See* Complaint at 5.

formula, AT&T calculates that it is owed a refund of overpayments of {[ ]} dating back to 2015 (based on a five-year statute of limitation under Florida law).[38] It further argues that the combination of Duke's "substantial pole ownership advantage[,]" the JUA's methodology for calculating the parties' respective rates by "disproportionately divid[ing]" Duke's annual pole cost between Duke and AT&T, and the JUA's "evergreen" provision, which renders the rates "effectively inescapable" even if AT&T were to terminate the JUA, together have enabled Duke to charge AT&T unlawful pole attachment rates.[39] AT&T therefore asks the Commission to (1) find that the rates in the JUA are "unjust and unreasonable;" (2) require Duke to charge AT&T the New Telecom Rate (and, in any event, no more than the Old Telecom Rate) prospectively; and (3) order Duke to refund any amounts collected in excess of the rate that it is authorized to charge, consistent with the relevant statute of limitations.[40]

III. DISCUSSION

14. Reviewing the record within the framework of the Commission's pole attachment rules and orders, we find that the rates that AT&T pays under the JUA to attach to Duke's poles are unjust and unreasonable. Consistent with the Commission's recent analysis in the *Verizon Maryland* pole attachment complaint proceeding, we conclude that (1) the JUA in this case automatically renewed and extended on July 1, 2019, after the March 11, 2019 effective date of the *2018 Order*, and, thus, the JUA rates are subject to review under the *2018 Order* for the period starting July 1, 2019; and (2) the JUA rates are subject to review for the prior period under the *2011 Order* to the extent permitted by the applicable statute of limitations. We also conclude that AT&T is entitled to a pole attachment rate, covering both timeframes at issue, that does not exceed the Old Telecom Rate. We find that AT&T is *not* entitled to the New Telecom Rate because AT&T receives benefits under the JUA that materially advantage AT&T over other attachers.

A. The JUA Was Renewed Every Six Months After January 1, 1979 and Is Thus Subject to the Rules Adopted in the *2018 Order* for the Period Beginning July 1, 2019

15. We conclude that the JUA is reviewable under the rules adopted in the *2018 Order* because it was renewed after the rules went into effect on March 11, 2019. Under section 1.1413(b), the rebuttable presumption regarding rates applies to pole attachment contracts "entered into or renewed after the effective date of this section."[41] Although the term "renewed" is not defined in section 1.1413, the *2018 Order* specified that a "new or newly-renewed" agreement is "one entered into, renewed, or in evergreen status after the effective date of [the *2018 Order*], and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status."[42] Here, the initial ten-year term of the JUA expired on January 1, 1979, and the JUA continued indefinitely after that date under Article XVI, which states that the JUA provisions "relat[ing] to the further granting of joint use of poles hereunder, may be terminated by either party . . . upon six (6) months notice" and, if not so terminated, "shall continue in force thereafter until partially terminated . . . by either party at any time upon six (6) months notice."[43] We agree with AT&T that, under this provision, the JUA "automatically renewed or extended"

[38] *See* Complaint at 6-8, 21-23, 25, paras. 10-12, 31-33, 39. In the alternative, AT&T contends that if the Commission determines that Duke can "show that the JUA provides AT&T a net material advantage over its competitors," then the "just and reasonable" rate could be no higher than "the rate calculated using the FCC's preexisting telecom formula [i.e., the Old Telecom Rate]." Complaint at 25, para. 38 & n.104.

[39] *See* Complaint at 15-18, paras. 25-27.

[40] Complaint at 3, 25-26, paras. 39-42.

[41] 47 CFR § 1.1413(b).

[42] *2018 Order*, 33 FCC Rcd at 7770, para. 127 & n.475.

[43] *See* JUA, Art. XVI, Section 16.1.

after its initial term and did so after the *2018 Order* took effect.[44] Given that the JUA states that it "shall continue in force" until terminated, the Commission has found that "continue" and "extend" are synonymous in this context, and that either party could terminate the agreement with six months' notice, we find that the JUA has been automatically renewed every six months since January 1, 1979 and thus has been renewed after the effective date of the *2018 Order*.[45]

16. We further find that, for purposes of applying the analytical framework of the Commission's pole attachment rules, we consider the JUA automatically renewed on January 1st and July 1st each year, and that the *2018 Order* provides the relevant standard for reviewing the JUA as of July 1, 2019, the first automatic renewal date after the effective date of the *2018 Order*.[46] Similar to the Commission's analysis in *Verizon Maryland*, we find that the six-month notice of termination provision in JUA Article XVI effectively creates a series of six-month contracts that have automatically renewed and extended the JUA since the JUA's initial term expired on January 1, 1979.[47] We reject AT&T's suggestion that the JUA "continues to automatically renew each day[,]" and find, instead, that the notice of termination provision in Article XVI effectively caused the JUA to automatically renew, within the meaning of the *2018 Order*, every six months.[48]

17. Duke argues that the JUA is not "newly-renewed" under the *2018 Order* for three principal reasons.[49] First, it argues that the JUA is not a "pole attachment contract" subject to the *2018 Order*, but is instead a "cost sharing relationship" that falls outside the scope of that order.[50] We disagree. In the *2011 Order*, the Commission considered how best to regulate agreements between electric utilities and incumbent LECs that include cost sharing provisions, noting that joint use agreements "tend to differ from cable and telecommunications carrier license agreements" and are "*[c]ommonly . . . structured as cost-sharing arrangements*, with each party agreeing to own a certain percentage of the joint use poles."[51] In light of these distinctions, the Commission determined to regulate such agreements "in a manner that accounts for the potential differences between incumbent LECs and [competitive LEC or cable company attachers]."[52] Most notably, the Commission declined to establish a specific rate formula for incumbent LEC attachers and, instead, chose to resolve incumbent LEC complaints "on a case-by-case basis."[53] In

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[44] *See* Complaint at 6-7, para. 11.

[45] *See* JUA, Art. XVI, Section 16.1; *accord Verizon Maryland*, 35 FCC Rcd at 13613, paras. 15-16 (joint use pole attachment agreement that continued in force until terminated upon one year's notice was held to have automatically renewed each year on January 1 and thus automatically renewed on January 1, 2020, "the first automatic renewal date after the effective date of the *[2018] Order*"). The evergreen provision in JUA Article XVI provides that termination of the agreement as described does not affect existing attachments, which continue to be subject to the terms of the JUA. For these attachments, the terms and conditions of the JUA also extend and renew automatically. *See id.*

[46] *See Verizon Maryland*, 35 FCC Rcd at 13613, paras. 15-16.

[47] *See Verizon Maryland*, 35 FCC Rcd at 13613, para. 16 & n.49 (citing as "persuasive but not controlling authority" a state court holding that a 120-day notice provision for terminating an agreement that included no express renewal or termination date effectively created a series of 120-day contracts that continuously renew unless terminated) (citing *John Deere Constr. & Forestry Co. v. Reliable Tractor, Inc.*, 957 A.2d 595, 600-02 (Md. Ct. App. 2008) (internal citation omitted)).

[48] *See, e.g.*, Reply Legal Analysis at 4.

[49] Answer at 9, para. 11.

[50] Answer at 6, para. 9; *see also id.* at 55, para. 35 (arguing that if the Commission is statutorily required "to regulate the joint use network cost-sharing relationship between [Duke] and AT&T," it should forbear from exercising that authority).

[51] *2011 Order*, 26 FCC Rcd at 5334, para. 216 & n.651 (internal citations omitted) (italics added).

[52] *2011 Order*, 26 FCC Rcd at 5333, para. 214.

[53] *2011 Order*, 26 FCC Rcd at 5334, para. 214.

the *2018 Order*, the Commission noted the historic cost-sharing feature of many joint use agreements, and yet updated its prior regulation of those agreements by adopting a rebuttable presumption that incumbent LECs in new or newly-renewed agreements are "similarly situated to other telecommunications attachers."[54] The fact that a joint use relationship is "more complex than the relationship between an electric utility and cable company or competitive LEC" because it "involves an interlocking set of reciprocal rights and responsibilities," does not shield it from Commission oversight under section 224.[55] Inasmuch as the JUA sets the "[r]ental charges" owed for each party's "joint use pole attachments," it is subject to the Commission's pole attachment rules and orders.[56] As of July 1, 2019, that includes the presumption the Commission established in section 1.1413(b) and the *2018 Order*.

18. Second, Duke claims that the JUA, as it applies to existing attachments, cannot be considered "newly renewed" within the meaning of the *2018 Order* because "there is no corresponding right of termination" with respect to such attachments.[57] Duke argues that, because the JUA provisions governing existing attachments remain in effect even after termination, the JUA is a "perpetual license" that cannot be terminated and thus cannot renew.[58] As previously noted, "renewed" under section 1.1413(b) "includes agreements that are automatically renewed, extended, or placed in evergreen status."[59] The agreement here fits that description. And nothing in the text or structure of the rules or the *2018 Order* suggests that an express right to terminate with respect to existing attachments is required. Moreover, insulating the attachments at issue here from the benefits of the presumption that yields greater parity between incumbent LECs and cable operators would run contrary to the incentives for new

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[54] *2018 Order*, 33 FCC Rcd at 7769, para. 126; *see also* 47 CFR § 1.1413(b).

[55] *AT&T v. FPL I*, 35 FCC Rcd at 5325-26, para. 10 (citing *2011 Order*, 26 FCC Rcd at 5334, para. 216 & n.654 (discussing the many "different rights and responsibilities in joint use agreements")).

[56] JUA, Art. X, Section 10.4(a)-(b) (1990 amendment).

[57] Answer at 9-10, para. 11.

[58] Answer at 41, para. 27. Duke relatedly argues that the JUA is not an "evergreen contract," because an evergreen contract is an agreement that "does not renew, but continues until such time as one party takes affirmative action to terminate it." Answer at 10, para. 11. In support, Duke cites caselaw explaining the meaning of "evergreen" clause in various commercial contexts. *See* Answer at 10, para. 11 n.23. One of the cases cited by Duke, however, involved an evergreen contract that included a "renewal clause" stating that the agreement "shall remain in full force and effect through May 27, 1992 and from year to year thereafter unless written notice of intent to terminate or modify the Agreement be submitted, at least sixty (60) days prior to the expiration date by either party to the other." *Id*. (citing *Trustees. of the B.A.C. Local 32 Ins. Fund v. Fantin Enters.*, 163 F.3d 965, 968-69 (6th Cir. 1998)). The Sixth Circuit observed that "[w]hen a contract is renewed via the operation of an evergreen clause, all of the attendant contractual obligations naturally continue for the period of renewal" in the contract—in that case, for a one-year period. *Id*. at 969. The court thus equated automatic renewal with an evergreen contract.

In any event, the Commission has held that it is "not bound by state law in our application of the Commission's rules to pole attachment agreements, including the construction and application of terms in our rules such as 'newly-renewed,' as our rules are intended to determine the scope and applicability of rights and obligations under section 224 of the Communications Act, not rights under the contract itself." *Verizon Maryland*, 35 FCC Rcd at 13613, para. 16. Likewise, the Commission is not bound by state law interpretations of the term, "evergreen clause." The Commission has held that (1) it considers a provision that requires a joint use agreement to remain in effect with respect to existing joint use poles after termination of the agreement to be an example of an "evergreen clause," and (2) the inclusion of such a clause in a joint use agreement does not preclude a finding that the agreement has renewed. *See id.*, 35 FCC Rcd at 13611, 13612-13, 13616-17, paras. 10, 15, 22-24 & n.48. Whether that accords with uses of the term "evergreen" clause under state law is irrelevant. We similarly reject Duke's argument that without an express right to terminate the JUA as it relates to existing attachments, the JUA cannot be placed in "evergreen status." *See* Answer at 10, 41, paras. 11, 27. That argument is contrary to *Verizon Maryland*, which expressly identified a clause that provides for the terms and conditions of a pole attachment agreement to remain in full force and effect with respect to existing attachments after termination of the agreement as an "evergreen clause." *Verizon Maryland*, 35 FCC Rcd at 13611, para. 10.

[59] *2018 Order*, 33 FCC Rcd at 7770, para. 127 & n.475.

broadband deployment that the Commission sought to foster through its adoption of that rule in the *2018 Order*.[60] Our interpretation is consistent with the outcome in *Verizon Maryland*, where the Commission concluded that a joint use agreement, which (like the JUA here) did not include an express right to terminate the agreement as it applied to existing attachments, was considered "newly-renewed and extended" because it included a one-year notice of termination provision, similar to the six-month notice provision in the JUA.[61]

19. Finally, Duke argues that a "renewal" requires additional "voluntary action" by the parties for the JUA to be "renewed" or "extended" within the meaning of the *2018 Order*.[62] The Commission considered and rejected this argument in *Verizon Maryland*, noting that it "ignores the Commission's express decision to apply the *2018 Order* to existing agreements that 'are *automatically* renewed, extended, or placed in evergreen status' without requiring further action by the parties."[63] This argument likewise does not account for the impact of Article XVI, which effectively renews and extends the JUA every six months, absent notice of termination by a party.[64]

20. Thus, for purposes of applying the Commission's pole attachment rules, it is reasonable to conclude that, in the *absence* of a notice seeking termination – with respect to existing *or* future attachments – the JUA has automatically renewed consistent with the six-month termination notice provision. On that basis, we find that the JUA created a series of six-month contracts that have automatically renewed twice yearly since 1979. Because automatic renewal and extension have occurred since the *2018 Order*'s effective date, the JUA is "renewed" within the meaning of section 1.1413(b) and the *2018 Order*.[65]

B. AT&T Is Entitled to Relief Under Section 1.1413(b) As Revised in the *2018 Order*

21. Having determined that section 1.1413(b) as revised in the *2018 Order* provides the relevant standard for review of the JUA for the period starting July 1, 2019, we conclude that AT&T is entitled to a rate, as of July 1, 2019, that does not exceed the Old Telecom Rate. The *2018 Order* established a presumption that AT&T may be charged a rate no higher than the New Telecom Rate for agreements entered into or renewed after March 11, 2019, unless Duke demonstrates "with clear and convincing evidence that [AT&T] receives benefits under [the JUA] that materially advantages [it] over other telecommunications carriers or cable television systems providing telecommunications services on

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[60] *2018 Order*, 33 FCC Rcd at 7769-70, paras. 126-27 & n.478.

[61] *See Verizon Maryland*, 35 FCC Rcd at 13611, 13612-14, paras. 10, 15-18. Of course, even an evergreen contract can be terminated by mutual agreement of the parties; thus AT&T and Duke could terminate the agreement, even as to existing attachments, if they both agree to that. *See, e.g.*, *Matanuska Valley Farmers Coop. Ass'n v. Monaghan*, 188 F.2d 906, 909 (9th Cir. 1951) ("It is well established that parties to a contract can, by mutual agreement, modify or rescind a contract and adopt in its stead a new agreement.").

[62] Answer at 10, para. 11 ("A 'renewal' requires some sort of voluntary action by the parties (even if merely acquiescence)."). Duke's argument that a "voluntary action" is required for renewal is inconsistent with its assertion that the JUA "'renewed,' if at all" in 1979. Answer at 9, para. 11. Duke does not describe any "voluntary action" that either party took to effectuate renewal in 1979. In addition, Duke's suggestion that renewal may have occurred in 1979 ignores the fact that in 1979, as is the case today, the JUA included no express right to terminate the agreement with respect to existing attachments. *See* JUA Article XVI, Section 16.1.

[63] *Verizon Maryland*, 35 FCC Rcd at 13613-14 , para. 17 (emphasis added) (citing *2018 Order*, 33 FCC Rcd at 7770, para. 127 & n.475)).

[64] *See Verizon Maryland*, 35 FCC Rcd at 13614, para. 17.

[65] We also reject Duke's argument that, because the JUA prevents Duke from removing AT&T from Duke's poles, a finding that the JUA rates for existing attachments are unjust and unreasonable "would be tantamount to forced access [to Duke poles] at regulated rates." *See* Answer at 11, para. 11. The Commission has made clear that, despite incumbent LECs' lack of a statutory right of access to electric utility poles, "where incumbent LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)." *See 2011 Order*, 26 FCC Rcd at 5328, para. 202.

the same poles."[66] Where Duke makes that showing, the Old Telecom Rate is the maximum permissible rate.[67]

22. The record shows that the JUA provides AT&T with benefits that give material advantages over competitive LEC and cable attachers on the same poles. We find, therefore, that Duke has rebutted the presumption in section 1.1413(b) and the *2018 Order* that AT&T should be charged no higher than the New Telecom Rate.[68] In particular, the record demonstrates that AT&T receives the following benefits that materially advantage AT&T over telecommunications carrier and cable attachers on Duke's poles.

23. *Guaranteed Pole Access.* The JUA specifically reserves for AT&T space on all joint use poles, including any that are newly erected or newly acquired.[69] AT&T's competitors are not guaranteed space on any pole to which they are not already attached and {[

}[70] Further, several of Duke's license agreements provide that Duke {

]}[71] AT&T nevertheless contends that it enjoys less robust contractual protections than do Duke's competitive LEC and cable company licensees, asserting that its access to Duke's poles can be "denied or terminated at any time and

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[66] 47 CFR § 1.1413(b); *see also 2018 Order*, 33 FCC Rcd at 7769-70, paras. 126-28. Duke has provided the pole attachment agreements of competitive LEC, cable, and wireless licensees that attach to the same Duke poles as those to which AT&T attaches under the JUA. *See* Answer, Exh. 7 (CLEC-2 Agreement); Duke's First Set of Interrog. Resp., Exh. 3, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (filed Oct. 7, 2020) (Duke Resp. to Interrog. No. 3); Duke's Supplemental Interrog. Resp., Exh. 2, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (filed Jan. 29, 2021) (Duke Supp. Interrog. Resp., Exh. 2). Duke seeks to keep confidential the identity of those licensees and the specific terms and conditions of their individual license agreements, *see* Duke Initial Brief at 29-30 (App. A - Confidential License Agreement Designations) (public designations and Bates-stamped page numbers of each agreement), and we grant that request here.

[67] *See 2018 Order*, 33 FCC Rcd at 7771, para. 129 (where the presumption is rebutted "the pre-*2011 Pole Attachment Order* telecommunications carrier rate [i.e., the Old Telecom Rate] is the maximum rate"); *Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 83 Fed. Reg. 46812-01, 46828 (Sept. 14, 2018).

[68] *See* 47 CFR § 1.1413(b) (The utility can rebut the presumption with clear and convincing evidence.). AT&T argues that any effort to quantify the value of alleged benefits to AT&T under the JUA must take into account the reciprocal nature of the parties' rights and responsibilities under the JUA and thus reflect the estimated value of the "net benefit" received by AT&T, i.e., the estimated value of the benefit to AT&T minus the estimated value of the benefit to Duke. *See, e.g.*, Complaint, Exh. D, Affidavit of Christian M. Dippon at 23, para. 44 (Dippon Complaint Aff.). In quantifying what it views as material advantages to AT&T under the JUA, Duke does appear to calculate the alleged benefits to AT&T as "net benefits." *See, e.g.*, Duke Initial Brief at 6, 8, 9, 10.

[69] *See* JUA, Art. I, Section 1.1.6(B) (reserving "Standard Space" on each joint use pole for each party's "exclusive use"); *see also* JUA, Arts. I, II, III, IV, V, Sections 1.1.3, 1.1.4, 1.1.6(B), 2.1, 2.2, 3.1, 4.2, 4.4.3(B), 5.1; Answer at 32, para. 29 & n.86 (citing JUA, Art. I, Section 1.1.6).

[70] *See* Duke Resp. to Interrog. No. 3, Exh. 3, CATV-1 at section 0.2, CLEC-1, WIRELESS-1 at section 2.1; Answer, Exh. 7, CLEC-2 at section 2.1; Duke Supp. Interrog. Resp., Exh. 2, CATV-4, CATV-5, CATV-7, CATV-10, CATV-11, CATV-13, CATV-14, CATV-15 at section 0.2; CATV-2, CATV-3, CATV-6, CATV-8, CATV-9, CATV-12, CLEC-3, CLEC-4, CLEC-5, CLEC-6, CLEC-7, CLEC-8, CLEC-9, CLEC-10, CLEC-11, CLEC-12, CLEC-13, CLEC-14, CLEC-15, CLEC-16, CLEC-17, CLEC-18, CLEC-19, CLEC-20, CLEC-21 at section 2.1, WIRELESS-2, WIRELESS-3, WIRELESS-4, at section 2.1 (listing various grounds for denying attachment requests).

[71] *See, e.g.*, Duke Resp. to Interrog. No. 3, Exh. 3, CLEC-1, Wireless-1 at Section 5.2; Duke Supp. Interrog. Resp., Exh. 2, CLEC-3, CLEC-11, CLEC-13, CLEC-21, Wireless-2, Wireless-3, Wireless-4 at Section 5.2.

for any reason."[72] AT&T grossly overstates the case. The JUA allows the parties to "exclude from joint use" only poles "installed for purposes other than or in addition to normal distribution of electric or telephone service,"[73] and, as Duke notes, provides a process for requesting access to a pole that has been excluded from joint use.[74] AT&T offers no evidence that the JUA provision for excluding certain non-standard poles from joint use or the process for requesting access to a pole excluded under that provision, has been or is likely to be, invoked to AT&T's detriment. Indeed, because the right to exclude poles from joint use is reciprocal, both parties have an incentive not to interpret that right broadly. We thus are unpersuaded that Duke's license agreements offer a comparable (let alone superior) right of access to that enjoyed by AT&T under the JUA, which sets aside for AT&T's exclusive use a designated space on each joint use pole.[75]

24. AT&T also claims that the JUA provision allowing either party to terminate the other's pole access with respect to future attachments places AT&T at a material disadvantage relative to its competitors.[76] This claim also fails. As an initial matter, unlike Duke's license agreements, which allow Duke to terminate an agreement {[ ]} for specified reasons, any unilateral effort by Duke to terminate the JUA would not terminate AT&T's access to the tens of thousands of poles "jointly used by the parties at the time of such termination[,]" as the JUA permits termination only with respect to future pole attachments.[77] In addition, the reciprocal nature of the parties' rights under the JUA make termination by either party with respect to future attachments (or exclusion of poles from joint use without a valid basis, as discussed above) highly unlikely and AT&T has provided no evidence to the contrary. Based on the foregoing, we reject AT&T's claim that the JUA's reservation of a designated space for AT&T on every joint use pole in the parties' joint use network, subject to narrowly drawn exclusions, is inferior to the access rights of Duke's competitive LEC and cable company attachers.[78]

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[72] *See* AT&T Initial Brief, Exh. 2 at 1; *see also* Complaint, Exh. C, Affidavit of Mark Peters at 12, para. 24 (Peters Complaint Aff.) (asserting that the JUA gives Duke "the right to exclude poles from joint use and the right to terminate AT&T's ability to attach to new pole lines at any time and for any reason") (italics omitted).

[73] *See* JUA, Art. II, Section 2.2.

[74] Duke Reply Brief at 3 & n.10 (citing JUA, Arts. II, III, Sections 2.2, 3.1).

[75] Although AT&T points to provisions in certain Duke license agreements that {[ ]} *see* AT&T Initial Brief at 3-4 & n.15, other Duke license agreements provide that the decision to erect a new pole or otherwise expand capacity at the request of a licensee is within Duke's sole discretion. *See*, *e.g.*, Duke Resp. to Interrog. No. 3, Exh. 3, CLEC-1, Wireless-1 at section 5.2 (if Duke rejects a licensee's attachment request due to {[ ]} the decision to replace the specific poles with taller or stronger poles is within Duke's {[ ]}); Duke Supp. Interrog. Resp., Exh. 2, CLEC-3, CLEC-11, CLEC-13, CLEC-21, Wireless-2, Wireless-3, Wireless-4 at section 5.2 (same). By contrast, the JUA procedure for expanding capacity when necessary to accommodate either party's attachment requests, is not subject to the discretion of either party. *See generally* JUA, Art. IV, Section 4.4.

[76] *See* AT&T Initial Brief at 3; *id.*, Exh. 2 at 1; Peters Complaint Aff. at 12, para. 24.

[77] *Compare*, *e.g.*, Duke Supp. Interrog. Resp., Exh. 2, CATV-3 at section 7.1 (italics added), *with* JUA, Art. XVI, Section 16.1.

[78] AT&T also suggests that the JUA's space allocation provision is unenforceable, and therefore not beneficial to AT&T, because the Commission invalidated reservations of space in the 1996 *Local Competition Order*. *See* Reply Legal Analysis, Exh. A, Reply Affidavit of Daniel P. Rhinehart at 18, para. 29 & nn.75-77 (Rhinehart Reply Aff.) (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16079, para. 1170 (1996) (*Local Competition Order*); Complaint at 16, para. 25 & n.62; AT&T Reply Brief at 10; *see also Local Competition Order*, 11 FCC Rcd at 16079, para. 1170 ("Section 224(f)(1) prohibits such discrimination among telecommunications carriers."). We disagree. The cited passage from the *Local Competition Order* appears to preclude an incumbent LEC from reserving excess capacity on its own poles to the detriment of competitive attachers who may later seek access to the poles. The complaint here does not involve the rights of an

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25. Finally, AT&T argues that its "limited contractual access" to Duke's poles places it at a material disadvantage compared to its competitors' "guaranteed statutory access" under section 224(f).[79] Although competitive attachers, as discussed above, have a statutory right of nondiscriminatory access to a utility's poles under section 224(f)(1),[80] any discussion of such a right is outside the scope of the present analysis, which necessarily compares the *contractual* rights and responsibilities of AT&T under the JUA with those of AT&T's competitors under their respective license agreements with Duke.[81]

26. *Ability to Use Up to its Full Allocation or More of Space.* The JUA allocates three feet of space on the parties' joint use poles for AT&T's exclusive use and allows AT&T to expand beyond its allocated space if such space is available.[82] Such a right is not granted to competitive LEC or cable company licensees.[83] Even if we accept AT&T's contention that it currently uses only one foot, the

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attacher whose access to an AT&T pole—or a Duke pole—has been denied due to a reservation of space. Rather, the question here is whether the JUA provision that allocated three feet of space to AT&T on Duke poles provides a benefit to AT&T. For the reasons stated above, we find that it does by, among other things, guaranteeing space to AT&T on poles covered by the JUA, and enabling AT&T to expand its attachments on Duke's poles. We reject AT&T's suggestion that the language of the *Local Competition Order* protecting the rights of competitive attachers in certain situations robs that provision of any benefit to AT&T. Indeed, the cited language from the *Local Competition Order* did not prevent the Commission from recognizing in the *2018 Order* that guaranteed space on a pole can be an advantage. *See 2018 Order*, 33 FCC Rcd at 7771, para. 128 (material benefits to an incumbent LEC may include guaranteed space on the pole).

[79] *See* AT&T Initial Brief at 2; 47 U.S.C. § 224(f)(1) (providing competitive LECs and cable companies a right of nondiscriminatory access to a utility's poles).

[80] *See supra* Part II.A. Notwithstanding AT&T's claim that Duke's licensees enjoy "guaranteed statutory access," we note that the right of access provided to competitive LECs and cable companies under section 224(f)(1) is subject to a list of specific exclusions in section 224(f)(2). *See* 47 U.S.C. § 224(f)(2) ("a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles . . . where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes").

[81] *See 2018 Order*, 33 FCC Rcd at 7768, para. 124 (noting that "*joint use agreements* may provide benefits to the incumbent LECs that are not typically found in *pole attachment agreements* between utilities and other telecommunications attachers, such as lower make-ready costs, the right to attach without advance utility approval, and use of the rights-of-way obtained by the utility, among other benefits.") (emphasis added). There is no indication in the *2018 Order* that the Commission intended application of section 1.1413(b) to involve a comparison between statutory rights granted by Congress and negotiated rights granted by agreement.

[82] *See* JUA, Art. I, Section 1.1.6(B) (describing "Standard Space" allocation), (C) ("[E]xcess space, if any, is thereby available for the use of either party without creating a necessity for rearranging the attachments of the other party."); Answer, Exh. E, Affidavit of Kenneth P. Metcalfe at 12-13, para. 29 (Metcalfe Answer Aff.) ("the JUA permits AT&T to use more than 3 feet of space, without additional charge, if that space is available"); Answer at 12-13, para. 12.

[83] *See* Duke Initial Brief at 11 & n.36 (Duke's competitive LEC and cable company licensees "pay a per attachment rate premised upon a single foot of occupancy") (citing language from license agreements); Answer at 4, para. 8 (noting that Duke's competitive LEC and cable company licensees occupy one foot of space on Duke's poles). AT&T asserts that "[Duke's] license agreements provide AT&T's competitors as much space as they require[,]" but cites no language from the licensing agreements supporting that assertion. *See* AT&T Initial Brief at 8; *id.*, Exh. 2, line 5. Indeed, language in the licensing agreements allowing Duke to {[ ]} undermines AT&T's suggestion that the agreements grant licensees the right to occupy as much space as they require. *See supra* note 71. Nor has AT&T cited evidence that the licensee attachments authorized under Duke's license agreements occupy more than one foot of space. *See* AT&T Initial Brief at 8 and Exhibit 2, line 5. We also reject AT&T's complaint that it is disadvantaged because Duke can "sublet" portions of AT&T's allocated space that AT&T is not using, but that AT&T does not have the same opportunity to sublet Duke's allocated but unused space, as AT&T claims that Duke uses all of its allocated space on AT&T's poles. *See* AT&T Initial Brief at 9; *see also* JUA, Art. XIV, Section 14.5 (permissible use of "allotted standard space"). Even if true, this claim does nothing to illuminate the key issue here, i.e., whether the relevant provision of the JUA (i.e., Section 14.5) gives AT&T a benefit relative to competitive

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ability to add more attachments up to three feet[84] (or more if it is available), without additional expense, is an advantage accorded AT&T but not its competitors.[85]

27. *No Requirement to Remove Attachments Upon Termination.* Upon termination of the JUA, the agreement remains in full force and effect with respect to AT&T's attachments on all poles jointly used by the parties at the time of termination.[86] Therefore, AT&T cannot be forced to remove any of its existing attachments on Duke's joint use poles. By contrast, AT&T's competitors are required to remove all attachments upon termination.[87]

28. AT&T denies that it is competitively advantaged by a contractual right to maintain its existing attachments on Duke's poles should the JUA terminate given that Duke's licensees have a "more valuable" statutory right "to maintain [their] attachments on [Duke's] poles and deploy on new [Duke] pole lines" upon termination of their license agreements.[88] AT&T also argues that, to the extent that Duke's license agreements require removal of attachers' facilities upon termination of those agreements, they are unenforceable in light of the licensees' statutory right of access to Duke's poles, and therefore cannot represent a competitive advantage to AT&T.[89] As explained above, however, the present analysis is limited to comparing the contractual rights of AT&T and its competitors and, thus, a comparison of extracontractual rights of Duke's licensees under section 224(f) is beyond the scope of this discussion.[90] AT&T's statement is also incompatible with the *Verizon Maryland* order, to the extent that the Commission concluded there that an incumbent LEC's right to remain attached to existing joint use poles following termination of a joint use agreement provides a "material advantage[] over competitive LEC and cable [company] attachers on the same poles."[91] In order for the Commission to have found that the absence of a "removal upon termination" provision from the joint use agreement there provided a material

LEC and cable company attachers on the same poles.

[84] Although the JUA allocates three feet of space to AT&T, as discussed below, we find that, for purposes of calculating the proper pole attachment rate, Duke has not rebutted the presumption that AT&T's attachments occupy more than one foot of space. *See infra* Part III.E (discussing specific inputs used to calculate the Old Telecom Rate). To be clear, our discussion in Part III.E finds that, for purposes of calculating the relevant pole attachment rate, Duke has not provided statistically valid evidence establishing that AT&T occupies more than one foot of space, which leads us to conclude that the appropriate input for space occupied by AT&T is the Commission's rebuttable presumption of one foot. It does not establish, as a factual matter, that AT&T actually occupies one foot of space.

[85] *Accord Verizon Maryland*, 35 FCC Rcd at 13615, para. 20 (noting that space allocation benefitted incumbent LEC by providing "the necessary space to add new attachments without additional expense"); *AT&T v. FPL I*, 35 FCC Rcd at 5328, para. 14 & n.54 (noting that incumbent LEC "has the necessary space to add new attachments, such as fiber optic cable and other advanced services").

[86] *See* JUA, Art. XVI, Section 16.1.

[87] *See* Duke Resp. to Interrog. No. 3, Exh. 3, CATV-1 at section 1.1, CLEC-1, WIRELESS-1 at section 17; Answer, Exh. 7, CLEC-2 at section 17; Duke Supp. Interrog. Resp., Exh. 2, CATV-4, CATV-5, CATV-7, CATV-10, CATV-11, CATV-13, CATV-14, CATV-15, at section 1.1; CATV-2, CATV-3, CATV-6, CATV-8, CATV-9, CATV-12, CLEC-4, CLEC-5, CLEC-6, CLEC-7, CLEC-8, CLEC-9, CLEC-10, CLEC-12, CLEC-14, CLEC-15, CLEC-16, CLEC-17, CLEC-18, CLEC-19, CLEC 20 at section 7.3; CLEC-3, CLEC-11, CLEC-13 at section 17; WIRELESS-2, WIRELESS-3, WIRELESS-4, at section 17 (removal of licensee attachments upon termination of pole attachment agreement).

[88] AT&T Reply Brief at 8-9.

[89] AT&T Reply Brief at 9. AT&T does not cite any Commission authority holding that a provision in a pole attachment agreement requiring removal of attachments upon termination of the agreement is unenforceable.

[90] *See supra* paragraph 25.

[91] *Verizon Maryland*, 35 FCC Rcd at 13615, para. 20.

advantage to the incumbent LEC, it necessarily viewed the license agreements' "removal upon termination" provisions, at least as a general matter, as enforceable.[92]

29. *No Additional Permitting Fees.* AT&T does not pay any fees in connection with Duke's permitting costs. Its competitors must pay permitting fees.[93] AT&T contends that there is no benefit in avoiding permitting fees that Duke charges its competitive LEC and cable licensees but does not charge to AT&T given that AT&T incurs the expense to complete this task when Duke seeks to attach to AT&T's poles because the JUA "runs two ways," requiring AT&T to extend to Duke "each and every term and condition" for the use of AT&T's poles that Duke provides to AT&T.[94] Although the JUA requires both AT&T and Duke to submit a permit application to the other party before attaching to the other's poles, neither party pays a fee to cover the administrative cost of processing those applications.[95] By contrast, Duke charges competitive LEC and cable attachers a permitting fee.[96] Thus, the absence of such a requirement in the JUA is among the benefits that gives AT&T material advantages relative to competitive LEC and cable attachers on the same poles.[97] In addition to avoiding the payment of such fees, AT&T generally incurs less expense in processing permitting applications than does Duke, despite the reciprocal nature of the JUA's permitting obligation, because Duke's "significantly greater pole ownership" results in Duke absorbing more unrecovered permitting costs and "AT&T receiving the great majority of any 'reciprocal' benefits for avoided permitting fees."[98]

30. *Lowest Position on Poles*. The JUA reserves to AT&T the lowest position in the communications space on Duke's poles.[99] AT&T's competitors must attach above AT&T's reserved space or attach within that space, subject to AT&T's right to reclaim the space without cost to AT&T.[100]

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[92] The outcome of any proceeding challenging the enforcement of such a provision would, of course, depend on the particular facts and circumstances of the case. *See generally* 47 CFR § 1.1403(c)(1).

[93] *See* Duke Resp. to Interrog. No. 3, Exh. 3, CATV-1 at sections 3.1, 3.3, CLEC-1 at sections 5.1, 5.2, WIRELESS-1 at sections 1.1, 5.1, 5.3; Answer, Exh. 7, CLEC-2 at sections 5.1, 5.2; Duke Supp. Interrog. Resp., Exh. 2, CATV-2, CATV-3, CATV-6, CATV-8, CATV-9, CATV-12, CLEC-4, CLEC-5, CLEC-6, CLEC-7, CLEC-8, CLEC-9, CLEC-10, CLEC-12, CLEC-14, CLEC-15, CLEC-16, CLEC-17, CLEC-18, CLEC-19, CLEC-20 at section 3.01; CATV-4, CATV-5, CATV-7, CATV-10, CATV-11, CATV-13, CATV-14, CATV-15, at section 3.1; CLEC-3, CLEC-11, CLEC-13, CLEC-21 at sections 5.1, 5.2; WIRELESS-2, WIRELESS-3, WIRELESS-4 at sections 1.1, 5.1, 5.3 (obligation to obtain and pay for permit for all attachments).

[94] Reply at 12; AT&T Reply Brief at 5-6.

[95] *See* JUA, Arts. II, III, Sections 2.3, 3.1; Answer, Exh. A, Declaration of Gilbert Scott Freeburn at 9, para. 18 (Freeburn Answer Decl.); Metcalfe Answer Aff. at 11-12, para. 26.

[96] *See* Freeburn Answer Decl. at 9, para. 18 (citing Answer, Exh. A-1) (showing permitting, engineering and inspection costs for competitive LEC and cable licensees in Duke's service area).

[97] *See Verizon Florida LLC v. Florida Power and Light Co.*, Memorandum Opinion and Order, 30 FCC Rcd 1140, 1148-49, paras. 21-22 (2015) (citing among the unique benefits that Verizon receives under its joint use agreement the fact that Verizon was not required to pay an initial permitting fee) (*Verizon Florida*).

[98] Metcalfe Answer Aff. at 19, para. 41; *see also* Freeburn Answer Decl. at 9, para. 18 (citing Answer, Exh. A-1).

[99] *See* JUA, Arts. I, XIV, Sections 1.1.6(B), 14.5.

[100] *See* JUA, Art. XIV, Section 14.5 ("Third party space requirements must be accommodated without permanent encroachment into the standard space allocation of the Licensee; therefore, neither party hereto shall, as Owner, lease to any third party, space on a joint use pole within the allocated standard space of Licensee without adequate provision for subsequent use of such standard space by Licensee without cost to Licensee."); *see also* Duke Resp. to Interrog. No. 3, Exh. 3, CATV-1 at section 0.2; CLEC-1, WIRELESS-1 at section 2.1; Answer, Exh. 7, CLEC-2 at section 2.1; Duke Suppl. Interrog. Resp., Exh. 2, CATV-4, CATV-5, CATV-7, CATV-10, CATV-11, CATV-13, CATV-14, CATV-15 at section 0.2; CATV-2, CATV-3; CATV-6; CATV-8, CATV-9, CATV-12, CLEC-3, CLEC-4, CLEC-5, CLEC-6, CLEC-7, CLEC-8, CLEC-9, CLEC-10, CLEC-11, CLEC-12, CLEC-13, CLEC-14, CLEC-15, CLEC-16, CLEC-17, CLEC-18, CLEC-19, CLEC-20, CLEC-21 at section 2.1; WIRELESS-2, WIRELESS-3, WIRELESS-4, at section 2.1 ({[

(continued….)

Duke asserts that "[o]ccupying the lowest position in the communications space provides numerous operational advantages to AT&T[,]" including (1) "ease of access to [AT&T's] attachments, as there is no need to work through the lines of other attaching entities," (2) "the ability to sag cable more than [cable companies or competitive LECs] because there is never another wireline attachment beneath them[,]" and (3) "the ability to transfer its facilities to new poles for maintenance projects and operational upgrades faster and more easily than higher mounted communications attachments."[101] AT&T alleges only disadvantages related to its lowest position in the communications space on Duke's poles,[102] while acknowledging none of the advantages commonly associated with that position.[103]

31. Based on our review of the record, we find that the significant competitive benefits to AT&T resulting from its lowest position on the pole outweigh the alleged disadvantages identified by AT&T. Although the Commission has recognized that a "preferential" position on the pole can be a material advantage,[104] AT&T discounts any such advantage and states that its lowest position is the result of "history rather than choice [because] in the early days of joint use[,] . . . AT&T was the only consistent communications attacher on utility poles."[105] But this statement underscores that, unlike subsequent attachers, AT&T had unfettered access to any position within the communications space and the opportunity to move to a higher position once other prospective attachers began requesting access. As Duke notes, it is telling that "AT&T has never sought to abandon its right to the lowest position in the communications space."[106] Indeed, AT&T concedes that "consistency in placement of facilities" allows

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]}). Nothing in this discussion should be read to imply that AT&T or Duke may impose on a third-party attacher any costs associated with an effort by AT&T to exercise a right under the JUA to "reclaim" space on any joint use pole.

[101] Freeburn Answer Decl. at 8-9, para. 17.

[102] *See* AT&T Initial Brief at 6-8. In particular, AT&T contends that, as the lowest attacher, it (1) "is most likely to receive a request to temporarily raise its facilities to accommodate an oversized vehicle or a load that exceeds standard vertical clearance[,]" (2) may make "multiple trips" to the pole when transferring facilities to a replacement pole, if "other attachers [do] not transfer their facilities as scheduled[,]" and (3) "incurs higher repair costs" due to the vulnerability of its attachments "to being struck by large vehicles" or damaged "by workers ascending a pole to work on higher-placed facilities." *Id.* at 6-7.

[103] *See, e.g.*, *2018 Order*, 33 FCC Rcd at 7770-71, para. 128 (identifying "preferential location" on poles as evidence that may demonstrate "material benefits" under a joint use agreement); *AT&T v. FPL I*, 35 FCC Rcd at 5328-29, para. 14 (explaining that the lowest position on the pole allows the incumbent LEC's employees to "work in a safer area of the pole, [] identify and access [the incumbent LEC's] attachments more easily and use less expensive bucket trucks with shorter reach"); *Verizon Florida*, 30 FCC Rcd at 1148-49, paras. 21-22.

[104] *2018 Order*, 33 FCC Rcd at 7771, para. 128 (brackets omitted).

[105] AT&T Initial Brief at 7.

[106] Duke Reply Brief at 5 & n.22; *see also* Freeburn Answer Decl. at 9, para. 17 (asserting that in 17 years as manager of Duke's joint use department AT&T never asked "to assume a higher position on the pole"). AT&T contends that it attempted to do so by filing comments in support of a petition for declaratory ruling in another proceeding. *See* AT&T Initial Brief at 7 & n.33 (citing *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, 35 FCC Rcd 7936, 4840, para. 9 n.28 (2020)). In those comments, AT&T argued that electric utilities violate section 224 by adopting "blanket prohibitions" to adding wireless attachments to certain parts of poles and that such prohibitions impede AT&T's ability to deploy its 5G services. AT&T thus endorsed a Commission ruling prohibiting utilities from imposing blanket prohibitions on any portions of electric utility poles, and more specifically, on the "unusable space." *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, AT&T Comments, at 26-28 (filed Oct. 29, 2019); *id.*, AT&T Reply Comments, at 23-25 (filed Nov. 20, 2019). AT&T does not explain how endorsing a ruling that would potentially make it easier for AT&T's wireless affiliate to attach wireless equipment to various parts of poles, including in the "unusable space" *beneath* the communications space, would address any of the "competitive disadvantages" that AT&T (the incumbent LEC) asserts that it experiences in connection with occupying the lowest position in the communications space on Duke's poles. *See* AT&T Initial

(continued….)

"all companies[,]" including AT&T, to readily identify the ownership of particular attachments and avoids "physical damage that would result if facilities crisscrossed mid-span."[107] Thus, the record reflects that, unlike its competitors, AT&T's position on the pole is by choice and that choice has benefited AT&T by providing a consistent and predictable space on each pole in a position of its choosing. Being guaranteed this position means that when AT&T seeks to make a new attachment to a Duke pole or attach to a new pole, it will know in advance where its attachments will be placed and, unlike a competitive attacher, will not incur the make-ready expense involved in relocating or rearranging existing attachments in order to make space for its attachment.[108] We have held in prior cases that the lowest position on the pole is a material benefit and, based on the forgoing, we make that same finding here.[109]

32. *Other Arguments.* Although Duke asserts that it "absorbs the costs of . . . engineering and inspections in connection with AT&T's attachments[,]"[110] AT&T counters that "AT&T completes its own make-ready, engineering, and survey work, or pays [Duke] at cost for the work it asks [Duke] to perform."[111] 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.

33. Based on the forgoing discussion of the benefits available to AT&T under the JUA, we conclude that, on balance, the JUA collectively provides AT&T with a variety of unique benefits that materially advantage AT&T over other telecommunications attachers on the same poles.[112] Accordingly, we find that AT&T is entitled to a rate no greater than the Old Telecom Rate for the timeframe covered by the *2018 Order*, i.e., from July 1, 2019, forward.

Brief at 6-7; *see also* 47 CFR § 1.1402(l) (defining "unusable space" as "the space on a utility pole below the usable space . . . ."). These comments do not demonstrate an effort by AT&T to move its attachments to a higher position on Duke's poles.

[107] AT&T Initial Brief at 8.

[108] *See 2018 Order*, 33 FCC Rcd at 7770-71, para. 128 (identifying "[n]o relocation and rearrangement costs" on poles as evidence that may demonstrate "material benefits" under a joint use agreement).

[109] *See, e.g.*, *AT&T v. FPL I*, 35 FCC Rcd at 5328-29, para. 14. AT&T's claim that its lowest position on the pole is a competitive disadvantage and that it experiences no advantages in occupying that position is not credible. As noted, AT&T claims that it is the attacher "most likely" to receive a request to raise its facilities to accommodate an oversized vehicle, that it incurs "increased transfer costs" when it makes multiple trips to a new pole to verify that the transfers above it have been completed, and that it incurs "higher repair costs" due to vulnerability of its attachments to being struck by vehicles or damaged by workers ascending poles to work on higher-placed facilities. AT&T Initial Brief at 6-7; Peters Complaint Aff. at 11-12, paras. 22-23. But AT&T provides scant information relating to the frequency of such events, the actual costs incurred, and the extent to which such events similarly impact other telecommunications attachers on the same poles. Although AT&T provides a document listing "instances in which damage can be attributed to AT&T's location as the lowest attacher on the pole[,]" *see* Peters Complaint Aff. at 11-12, para. 23 (citing Complaint, Exh. 17), the document does not indicate the extent to which the instances described could also have impacted the facilities of other attachers, and thus whether AT&T's position on the pole resulted in harm unique to it. Given the significant, unique competitive advantages identified above relating to AT&T's lowest pole position, we find, on balance, that these benefits to AT&T outweigh the mostly unsupported disadvantages alleged by AT&T. Finally, although AT&T asserts that it does not always occupy the very lowest position on the pole, *see* Reply at 25, para. 12, it concedes that that is its "typical" position. *See* AT&T Initial Brief at 8.

[110] Answer at 4, para. 8; Duke Initial Brief at 8-9.

[111] Reply Legal Analysis at 18; Reply Legal Analysis, Exh. C, Reply Affidavit of Mark Peters at 19, para. 33 (Peters Reply Aff.) ("AT&T completes its own engineering for new attachments, which includes . . . identifying make-ready required of other attachers on the pole; performing its own pre- and post-construction inspections; and conducting its own structural, loading, and field analyses of poles to determine the capacity for a new AT&T attachment").

[112] We express no view with respect to any additional material advantages (or disadvantages) alleged by the parties as those identified clearly establish the requisite material benefits to AT&T.

C. The JUA Is Subject to the *2011 Order* for the Period Prior to July 1, 2019

34. The *2011 Order* provides the relevant standard for reviewing the JUA rates for the period prior to the JUA's renewal on July 1, 2019.[113] In the *2011 Order*, the Commission held that, in determining the need to review the rates, terms, and conditions of "existing" joint use agreements, it could take into consideration whether an incumbent LEC has demonstrated that it lacks the ability to terminate an existing agreement and obtain a new arrangement.[114] AT&T has met that threshold for review here.

35. *First*, the JUA has no fixed termination date and, even if "partially" terminated as provided in the JUA, it would require AT&T to continue paying the JUA rate for all existing attachments unless and until they are removed. Article XVI of the JUA ensures that termination only affects the future granting of joint use, stating that, "notwithstanding any such termination, other applicable provisions of [the JUA] shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."[115] Given that termination of the JUA, in its entirety, would require the consent of both parties, AT&T "may not unilaterally terminate it or simply wait for it to expire in order to 'obtain a different arrangement.'"[116] *Second*, AT&T may not obtain a lower attachment rate without Duke's concurrence, which has effectively locked in an unreasonable rate (as discussed below) for existing attachments due to Duke's refusal to offer meaningful rate reductions.[117] *Third*, we find that Duke's nearly 12-to-1 pole ownership advantage places AT&T in "an inferior bargaining position."[118] *Finally*, the record reflects that protracted negotiations between the parties have failed to produce a mutually agreeable, just and reasonable rate.[119] Accordingly, we find that AT&T has demonstrated that it "genuinely lacks the ability to terminate [the JUA] and obtain a new arrangement."[120]

36. Duke disputes AT&T's claim that AT&T lacks the ability to terminate the JUA and enter into a new agreement because of its inferior bargaining position relative to Duke.[121] While conceding its nearly 12-to-1 pole ownership advantage, Duke nevertheless claims that it is not in a superior bargaining

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[113] *Accord Verizon Maryland*, 35 FCC Rcd at 13616, para. 22.

[114] *See 2011 Order*, 26 FCC Rcd at 5335-36, para. 216 ("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."); *see also 2018 Order*, 33 FCC Rcd at 7770, para. 127 n. 478 (citing *2011 Order*, 26 FCC Rcd at 5333-38, paras. 214-19 (noting that, pending renewal of an existing agreement, "the [*2011 Order*'s] guidance regarding review of incumbent LEC pole attachment complaints will continue to apply")). Although we determined in Part III.A above that the JUA was "renewed" for purposes of establishing AT&T's right to review under the rules adopted in the *2018 Order*, it is not a "new" agreement for purposes of establishing a right to review under the *2011 Order*. *See 2011 Order*, 26 FCC Rcd at 5291, para. 114 (referring to "new agreements" as those "executed after the effective date of this Order").

[115] JUA, Art. XVI, Section 16.1.

[116] *Verizon Maryland*, 35 FCC Rcd at 13616, para. 23 (quoting *AT&T v. FPL I*, 35 FCC Rcd at 5326, para. 11). No provision in the JUA, or in general contract law, precludes the parties from terminating the JUA in its entirety by mutual consent.

[117] *See* JUA, Art. XI, Section 11.1 (stating that "rates shall be adjusted yearly by the party owning the majority of the jointly used poles") (1990 Amendment). *See also infra* Part III.D (finding that the JUA rates are unjust and unreasonable).

[118] *See 2011 Order*, 26 FCC Rcd at 5327, para. 199; *see also* Joint Statement at 2, Stipulated Fact No. 7 (stating that Duke and AT&T own, respectively, 62,363 (92.3%) and 5,233 (7.7%) of the joint use poles).

[119] *See* Joint Statement at 5-6, Stipulated Fact Nos. 17-24 (negotiations began in May 2019, 15 months prior to filing of the Complaint and involved face-to-face meetings, telephone calls, and correspondence); *see also* Reply Legal Analysis at 25-26.

[120] *2011 Order*, 26 FCC Rcd at 5336, para. 216.

[121] *See* Answer at 38-42, paras. 26-27.

position to AT&T.[122] In particular, Duke argues that disparate bargaining power could only exist if the JUA allowed Duke to remove AT&T's facilities from Duke's poles without the parties' mutual agreement.[123] Because the JUA does not allow Duke to unilaterally force AT&T from Duke's poles, Duke argues that it is unable to wield any bargaining leverage over AT&T.[124] But the Commission has never considered unilateral authority to force another party from one's poles as a necessary factor among those supporting an inference of unfair bargaining leverage.[125] Indeed, the Commission has held that a utility's four-to-one pole ownership advantage, combined with a "relatively high" attachment rate "support[ed] an inference of [the incumbent LEC's] inferior bargaining position relative to [the utility]" and thus justified the decision to review the rates charged to the incumbent LEC.[126] The Enforcement Bureau has held that a utility's two-to-one pole ownership advantage, paired with a high rate, "constitutes probative evidence" of the incumbent LEC's inferior bargaining position relative to the utility.[127] The disparity in pole ownership is significantly greater in this case. Therefore, consistent with these precedents, we conclude that Duke's substantial 12-to-1 pole ownership advantage, in combination with a relatively high attachment rate (as discussed below) supports an inference of AT&T's inferior bargaining position relative to Duke, and thus supports our decision to review the JUA's rates.[128]

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[122] *See* Joint Statement at 2, Stipulated Fact No. 7; *see also* Answer at 38, para. 26 ("the notion that relative pole ownership affects the ability to negotiate is not merely incorrect—it is a foundational error").

[123] Answer at 38, para. 26.

[124] Answer at 38-39, para. 26 & n.106 (arguing that bargaining leverage might exist "where one party can force the other off its poles" but "it does not exist here").

[125] *Verizon Maryland*, 35 FCC Rcd at 13618, para. 26 (rejecting argument that utility had no bargaining leverage over incumbent LEC because the terms of the parties' joint use agreement prevented the utility from removing the incumbent LEC's facilities from the utility's poles without the parties' mutual agreement). As far back as 2011, the concern regarding electric utilities' superior bargaining power led the Commission to conclude that "market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates." *See 2011 Order*, 26 FCC Rcd at 5327, para. 199 (noting potential impact of disparate pole ownership on parties' relative bargaining power); *id.* at 5329, para. 206 & n.618 (expressing concern that, because electric utilities, in the aggregate, own approximately 65-70% of all poles today, "incumbent LECs . . . may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases"); *see also 2018 Order*, 33 FCC Rcd at 7769, para. 126 (incumbent LECs' reduced pole ownership and higher rates supported the conclusion that "incumbent LEC bargaining power vis-à-vis utilities has continued to decline").

[126] *Verizon Maryland*, 35 FCC Rcd at 13617, para. 25.

[127] *Verizon Virginia and Verizon South, v. Virginia Electric and Power Company D/B/A Dominion Virginia Power*, Proceeding No. 15-190, Memorandum Opinion and Order, 32 FCC Rcd 3750, 3756-57, para. 13 (MDRD 2017); *see also AT&T v. FPL I*, 35 FCC Rcd at 5331, para. 18 (review of JUA rates appropriate where utility owned 66 percent of the parties' joint use poles, any rate change would have required the utility's consent, and the parties' efforts to negotiate new rates had failed).

[128] Duke argues that to establish lack of bargaining leverage, AT&T must prove that (1) the JUA was unjust and unreasonable "at the time it was first executed;" or (2) "[Duke] subsequently wielded a growing pole ownership imbalance to its financial benefit." Answer at 39, para. 26. Duke provides no support for this assertion. Because the Commission has not considered either of these points necessary to support the inference we have drawn here, we reject this claim. Nor do we see any reason to require AT&T to establish that the JUA was unjust and unreasonable in 1969, more than fifty years ago, The issue is whether there is an imbalance of bargaining power today, when AT&T is attempting to terminate the JUA and negotiate a new agreement. In addition, we disagree with Duke's claim that {[

]} establishes the reasonableness of the JUA's rates today. Answer at 39, para. 26 & nn.107-108 (quoting Answer, Exh. 6 ({[ ]}at 17). As AT&T asserts, {

]} Reply Legal Analysis at 23-24 & n.123. Likewise, the fact that AT&T "certified the correctness of . . . the applicable rates" each year, as required by the JUA, does not contradict AT&T's claims of

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37. Duke also disputes AT&T's claim that AT&T genuinely lacks the ability to terminate the JUA and obtain a new arrangement through negotiations with Duke.[129] To the contrary, the record indicates that, after more than 15 months of active negotiations, the parties had failed to reach consensus on a new rate, and Duke's one formal settlement proposal was transmitted only after AT&T had filed the Complaint in this case.[130] Nor are we persuaded by Duke's assertion that AT&T can simply remove its attachments from Duke's poles to avoid the JUA's rates.[131] First, Duke has not shown that removing AT&T attachments would help AT&T obtain a new arrangement with Duke containing reasonable rates.[132] Further, as AT&T notes, neither section 224 nor the Commission's rules or orders requires an incumbent LEC that is burdened with an unjust and unreasonable attachment rate to remove and redeploy its attachments.[133] Instead, "where incumbent LECs have . . . access" to a utility's poles, "they are entitled to rates, terms and conditions that are 'just and reasonable.'"[134] Duke's proposed solution (i.e., the removal of AT&T's attachments), underscores the disproportionate financial burden AT&T would bear if the parties were to extract themselves from the JUA and redeploy their facilities under an alternative arrangement, and thus demonstrates AT&T's lack of any realistic alternative to the JUA and the superiority of Duke's bargaining position. In particular, AT&T would be forced to relocate 12 times the facilities as Duke by virtue of the 12-to-1 disparity in the parties' pole ownership, making AT&T's alternative to the JUA far costlier.[135] Thus, the disparity in pole ownership makes terminating the JUA

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unfair bargaining leverage or constitute an admission by AT&T that the cost sharing formula in the JUA is fair. *See* Freeburn Answer Decl. at 10-11, para. 21. In particular, AT&T's ministerial act of certifying the accuracy or "correctness" of Duke's rate calculations, as required under the JUA, does not constitute proof that AT&T believed the rates were just and reasonable at the time, let alone that they were just and reasonable within the meaning of section 224(b). *Id.*

[129] *See* Answer at 42, para. 27; Complaint at 18, para. 27.

[130] *See* Joint Statement at 5-6, Stipulated Fact Nos. 17-25; Answer at 42, para. 27. According to AT&T, in the parties' negotiations, Duke insisted on using "inflated inputs that contradict FCC precedent" in calculating its proposed rates, including allocating the safety space on Duke's poles to AT&T, and it refused to consider refunds for any prior period. Reply Legal Analysis at 25-26. Duke does not dispute these claims regarding its negotiating position on the proper allocation of the safety space and on AT&T's entitlement to a refund.

[131] *See, e.g.*, Answer at 40, para. 27 ("[Duke] denies that either party to the joint use agreement is indefinitely 'stuck' paying rentals to the other party in accordance with the joint use agreement. Neither party is required to keep its facilities attached to the other party's poles. Both parties retain the right at any time to remove some or all of their facilities from the other's poles. If AT&T were to remove its facilities from some or all of Duke's poles, it would no longer be bound to share in the cost of those poles.").

[132] *See 2011 Order*, 26 FCC Rcd at 5335-36, para. 216 (the Commission can consider whether incumbent LEC "can demonstrate that it genuinely lacks the ability to terminate an existing agreement *and obtain a new arrangement*") (emphasis added).

[133] *See* Reply Legal Analysis at 24-25 ("They need not disrupt their network or rebuild a duplicative one in order to obtain the just and reasonable rates required by law."); *cf. AT&T v. FPL I*, 35 FCC Rcd at 5327, para. 12 (expressing agreement that "[AT&T] should not be required to sell its poles in order to receive a just and reasonable rate").

[134] *2011 Order*, 26 FCC Rcd at 5328, para. 202.

[135] *See Verizon Maryland*, 35 FCC Rcd at 13618, para. 26 (finding utility had bargaining leverage where a four-to-one pole ownership disparity meant that the incumbent LEC would be required to relocate four times the facilities if the parties extracted themselves from their joint use agreement). Duke's expert states that, if both parties were to furnish and install poles to replace those to which they attach under the JUA, the cost to AT&T would be {[ ]} per pole annually in perpetuity (representing the cost to replace the 62,363 Duke poles to which AT&T is attached), while the cost to Duke would be {[ ]} per pole annually in perpetuity (representing the cost to replace the 5,233 AT&T poles to which Duke is attached). *See* Metcalfe Answer Aff. at 9-10, paras. 18-20.

economically unfeasible,[136] and reinforces Duke's ability "to perpetuate the status quo and refuse reductions to its unjust and unreasonable rates."[137]

38. Commission review of rates in an existing agreement is justified "[t]o the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement."[138] Based on the foregoing, we find that AT&T has demonstrated that it genuinely lacks the ability to terminate the JUA and obtain a new arrangement. Accordingly, the JUA is subject to review under the *2011 Order* for the period prior to July 1, 2019.

D. AT&T Is Entitled to Relief Under the *2011 Order*

39. The *2011 Order* does not specify the rate that applies when an incumbent LEC has shown, as AT&T has here, that it is unable to terminate an "existing" agreement and obtain a new arrangement. But the *2011 Order* indicates that the Commission would look to the Old Telecom Rate in complaint proceedings involving a new agreement between an incumbent LEC and a pole owner when the incumbent LEC is not "similarly situated" to competitive LECs or cable company attachers on the same poles.[139] AT&T argues that it should instead receive the New Telecom Rate because, in its view, "[Duke] has not identified any material advantages that AT&T enjoys over its competitors" on the same poles.[140] We disagree. Under the rules adopted in the *2011 Order*, AT&T bears the burden of demonstrating that it is similarly situated to competitive LEC or cable attachers with respect to the terms and conditions of its attachments.[141] Because AT&T receives material advantages that are not afforded to competitive LEC or cable attachers on the same poles, as we have found above, we conclude that AT&T has not demonstrated that it is similarly situated to such other attachers.[142] Thus, we find that AT&T is not entitled to the new telecom rate.

40. We nevertheless find that AT&T has shown that the material advantages it receives under the JUA do not justify the JUA's rates—which are {[ ]} higher than both the Old and New Telecom Rates and {[ ]} higher than the rates that AT&T charges competitive LECs and cable

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[136] Duke's pole ownership advantage also makes the option of terminating the JUA and replicating Duke's 62,000 pole network unrealistic from AT&T's perspective given the difficulty of obtaining the necessary zoning and other approvals. *See FPL I*, 35 FCC Rcd at 5330, para. 15 (identifying factors, including environmental and zoning restrictions, that make it highly impractical to build a duplicate pole network); *see also* Peters Reply Aff. at 9-10, paras. 14-15.

[137] *Verizon Maryland*, 35 FCC Rcd at 13618, para. 26 (internal quotes and citation omitted).

[138] *2011 Order*, 26 FCC Rcd at 5335-36, para. 216.

[139] *See 2011 Order*, 26 FCC Rcd at 5336-37, para. 218 (describing the Old Telecom Rate as a reasonable "reference point" when the incumbent LEC is not similarly situated to competitive LEC and cable attachers); *id.*, 26 FCC Rcd at 5337, para. 218 ("As a higher rate than the [New Telecom Rate], [the Old Telecom Rate] helps account for particular arrangements that provide net advantages to incumbent LECs relative to cable operators or telecommunications carriers."); *see also A National Broadband Plan for Our Future*, 76 Fed. Reg. 26620-02, 26630 (May 9, 2011).

[140] Reply Legal Analysis at 27. AT&T also contends that section 1.1413(b) "does not carve complaint proceedings into different time periods subject to different standards." AT&T Reply Brief at 2 (arguing that the burdens and presumptions in the *2018 Order* should apply to the entire timeframe at issue in the Complaint). But this contention ignores the Commission's express instructions to the contrary. *See 2018 Order*, 33 FCC Rcd at 7770, para. 127 n. 478 (citing *2011 Order*, 26 FCC Rcd at 5333-38, paras. 214-19 (noting that, pending renewal of an existing agreement, "the [*2011 Order*'s] guidance regarding review of incumbent LEC pole attachment complaints will continue to apply")).

[141] *See* 47 CFR § 1.1424 (2018); *2011 Order*, 26 FCC Rcd at 5336, paras. 217 (an incumbent LEC can demonstrate that it obtains access to poles on terms and conditions that are the same as a telecommunications carrier or cable operator); *see also A National Broadband Plan for Our Future*, 76 Fed. Reg. 26620-02, 26630 (May 9, 2011).

[142] *See supra* Part III.B (listing material advantages).

companies to attach to AT&T's poles.[143] In particular, we find that the rates that AT&T and Duke pay under the JUA are disproportionate to the amount of space allocated to each on the pole. In fact, the JUA rate formula divides Duke's annual pole costs between the parties by assigning {[ ]} percent of those costs to AT&T and {[ ]} percent to Duke even though the JUA allocates to Duke nearly {[ ]} the space on the pole.[144] As a result, rather than each party paying "the same proportionate rate" given its "relative usage of the pole (such as the same rate per foot of occupied space)[,]" AT&T pays far more than Duke on a per-foot basis.[145] Further, AT&T has shown that its share of annual pole costs does not decrease when a third party attaches to Duke's poles.[146] Instead, Duke "continues to collect the full {[ ]} percent of pole cost from AT&T along with additional rents from third parties," which effectively reduces Duke's cost-sharing responsibility, but not AT&T's.[147] We thus find that AT&T has made a *prima facie* case that the JUA rates are unjust and unreasonable.

41. Duke has not rebutted that case by showing that the advantages AT&T receives under the JUA justify the rates.[148] In an effort to justify the rates charged to AT&T under the JUA, Duke attempts to calculate the monetary value of the advantages that the JUA provides to AT&T, but its calculations are speculative and unsupported by reliable evidence. For example, Duke calculates the net value of AT&T's guaranteed access to Duke's poles under the JUA by assuming that, absent the JUA, Duke would not have built poles of sufficient height and strength to accommodate AT&T's attachments. Duke assumes further that AT&T, as the first attacher on most Duke poles, "likely would have been required to (a) pay make-ready cost[s] to replace nearly every [Duke] pole to which it is attached, or (b) construct an entirely redundant network of poles."[149] Based on these hypothetical scenarios, Duke estimates the net annualized value of avoided make-ready costs to AT&T—i.e., the cost to replace 100 percent of Duke poles to which AT&T is attached at current day prices—as {[ ]} per pole.[150]

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[143] AT&T asserts that the rates that AT&T paid during the relevant time period here "averaged about {[ ]} times the [New Telecom Rate] . . . and over {[ ]} times the [Old Telecom Rate]"). *See* Complaint at 15, para. 24. AT&T further states that the rates that it charged competitive LEC and cable company attachers on AT&T's poles during the relevant time period here ranged from {[ ]} per pole. *See* AT&T Initial Brief at 5 n.20; *see also 2011 Order*, 26 FCC Rcd at 5337, para. 219 ("[I]n evaluating an incumbent LEC's complaint, the Commission may . . . consider the rates . . . that the incumbent LEC offers to . . . other attachers for access to the incumbent LEC's poles, including whether they are more or less favorable than the rates . . . the incumbent LEC is seeking.").

[144] *See* Joint Statement at 3, Stipulated Fact No. 8; JUA, Art. X, Section 10.4(b) (1990 Amendment) ("The Electric company as a Licensee, shall pay {]} of the majority pole owner's annual pole cost and the Telephone Company as a Licensee, shall pay {[ ]} of the majority pole owner's annual pole cost.").

[145] *See 2011 Order*, 26 FCC Rcd at 5337, para. 218 n.662. Thus, in 2019, AT&T paid {[ ]} per pole for {[ ]} of allocated space and Duke paid {[ ]} per pole for {[ ]} of allocated space. Complaint at 16, para. 25. *See also AT&T v. FPL I*, 35 FCC Rcd at 5327, para. 13 (finding joint use agreement rate unreasonable where AT&T paid virtually the same rate per pole that FPL paid even though the agreement reserved six feet of space to FPL and only four feet to AT&T.).

[146] *See* Dippon Complaint Aff. at 18, para. 34.

[147] *Id*.

[148] *See* 47 CFR § 1.1406(a) ("The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable."); *see also Dominion Virginia*, 32 FCC Rcd at 3759, para. 19 n.70 ("Once a *prima facie* showing has been made by the complainant, the Commission's pole attachment complaint rules require the respondent to 'set forth justification for the rate, term or condition alleged in the complaint not to be just and reasonable.'") (quoting then-current 47 CFR § 1.1407(a) (2018)); *Marcus Cable Assocs. v. Tex. Utils. Elec. Co.*, 18 FCC Rcd 15932, 15938-39, para. 13 (2003) ("Once a complainant in a pole attachment matter meets its burden of establishing a *prima facie* case, the respondent bears a burden to explain or defend its actions.").

[149] *See* Freeburn Answer Decl. at 6, para. 11.

[150] *See* Duke Initial Brief at 3; Metcalfe Answer Aff. at 13, para. 30; Answer Exh. E-3.1.

42. Duke's analysis is flawed in at least three respects. *First*, Duke cannot justify charging AT&T a vastly inflated rate based on AT&T's historical status as the first communications attacher on Duke's poles. In particular, Duke has not explained how any alleged advantages associated with being the first attacher stem from specific terms and conditions in the JUA, as opposed to AT&T's historic status as an incumbent LEC.[151] *Second*, Duke's valuation of allegedly avoided make-ready costs based on the cost to build "an entirely redundant network of poles" is at odds with precedent. 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.[152]

43. *Third*, Duke's claim that the JUA spared AT&T the expense of replacing Duke's entire pole network in their overlapping service area with taller and stronger poles lacks persuasive support.[153] Duke maintains that it "built . . . *and continues to build*" "a network of poles that are much taller and stronger" "to specifically accommodate AT&T[,]"[154] and Duke's witness states that "because of the [JUA,]" Duke "began building a network of primarily 40-foot, Class 5 poles in its overlapping service area with AT&T."[155] But 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 have required space on Duke's joint use poles for decades. As the Commission has noted, "[b]y 1978, cable attachments were so common that Congress saw fit to regulate their rates and, by 1996, amended section 224 of the Act to provide cable and

[151] *See Verizon Maryland, LLC v. The Potomac Edison Co.*, Proceeding No. 19-355, Letter Order, at 4 (MDRD May 22, 2020) (noting that Potomac Edison had failed to explain how alleged benefits of being first on the poles "derive from the terms and conditions of the joint use agreement rather than Verizon's historical status as an incumbent LEC"); *see also Verizon Maryland*, 35 FCC Rcd at 13620, para. 32 (rejecting alleged benefits that "relate to the date the JUA was entered into and not to any specific terms and conditions in the JUA"). Indeed, if an incumbent LEC's status as the first attacher were enough to justify higher rates, there would be little need to compare the terms and conditions in joint use agreements with those in competitors' license agreements to determine if the former provide the incumbent LEC with material advantages, as the *2011 Order* contemplates. *See 2011 Order*, 26 FCC Rcd at 5336, para. 217 ("Where incumbent LECs are attaching to other utilities' poles on terms and conditions that are comparable to those that apply to [competitive LECs or cable companies] . . . competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider[.]").

[152] *See, e.g.*, *AT&T v. FPL I*, 35 FCC Rcd at 5330, para. 15 (rejecting attempt to calculate the monetary value of a benefit to the incumbent LEC that assumed the incumbent LEC would have built a duplicate pole network because, "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") (internal quotations and citation omitted). As AT&T notes, Duke's valuation is further flawed by the fact that Duke calculates the value of a duplicate pole network based on present-day costs and materials. *See* Reply Legal Analysis at 14 & n. 68 (asserting that, because AT&T and competitive attachers have been attaching to Duke's poles for decades, the use of current replacement cost is "entirely inappropriate").

[153] *See, e.g.*, Answer at ii, 20-21, paras. 15-16.

[154] *See* Duke Initial Brief at 5 (emphasis added).

[155] *See* Answer, Exh. B, Declaration of David J. Hatcher at 3, para. 6 (Hatcher Answer Decl.) (Duke "has always installed poles taller and stronger than would have been necessary to meet [Duke's] service needs alone"); *see also* Freeburn Answer Decl. at 5, para. 10 ("because of the [JUA], [Duke] constructed its pole infrastructure to be of sufficient height and strength to accommodate AT&T's facilities"). Although Duke's witnesses state that Duke erected taller and stronger poles specifically to accommodate AT&T, they provide no explanation as to the basis for those statements and offer no information regarding the height and strength of poles in Duke's pole network prior to the JUA or in the period immediately after its execution.

competitive LECs a statutory right of access."[156] Based on the forgoing, we reject Duke's purported valuation of AT&T's guaranteed right of access under the JUA.[157]

44. Duke finally argues that AT&T receives certain additional advantages under the JUA that justify the rate that it charges AT&T. For example, Duke points to AT&T's allocation of three feet of usable space and to the designated safety space on the joint use poles as alleged advantages to AT&T.[158] Although we have found that the JUA provides an advantage to AT&T by giving it an option to use up to its full three foot allocation of space and potentially more,[159] we find that this advantage is of limited value because, as discussed below, Duke has not shown that AT&T actually occupies the full amount of space allocated to it under the JUA.[160] Likewise, as explained below, we are not persuaded by Duke's suggestion that the designated communications safety space is a benefit attributable to AT&T that justifies the JUA rates.[161] Finally, although AT&T avoids some of the charges Duke assesses on other attachers, AT&T nevertheless incurs a portion of these costs in undertaking work on its own attachments and the joint use poles that it owns.[162] Thus, AT&T still must perform some of the same engineering, make-ready, and inspection work that other attachers must perform or pay others to perform before they can attach.[163]

45. For all of these reasons, we find that the JUA rates cannot be justified under the *2011 Order*. Moreover, because neither party has provided a credible valuation of the advantages that AT&T receives under the JUA, we conclude that AT&T is entitled to a rate for the period prior to July 1, 2019 that does not exceed the Old Telecom Rate.[164]

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[156] *See Verizon Maryland*, 35 FCC Rcd at 13620, para. 32 & n.100 (citing *2011 Order*, 26 FCC Rcd at 5245, paras. 9-10; *2018 Order*, 33 FCC Rcd at 7707, para. 5); *see also AT&T v. FPL I*, 35 FCC Rcd at 5330, para. 15. In addition, a Duke exhibit shows that, by 1972 (i.e., 3 years after the JUA), it was electric utilities—and *no*t telephone companies—that more commonly required taller poles. *See* Answer Exh. 6 at 15 (identifying electric utilities' need for additional pole space as "one of the more common reasons for premature pole replacement"); *id.* at 1 (noting that electric utilities' poles frequently are of sufficient "strength and clearances" to allow telephone company attachments "with little or no rearrangements or pole replacements"). Finally, the JUA recognizes that AT&T could attach to shorter 35-foot poles, thus obviating the need to replace such poles for AT&T's benefit. *See* JUA, Art. I, Section 1.1.5(B).

[157] For similar reasons, we reject Duke's purported valuation of AT&T's right to remain on the poles following termination of the agreement. Duke argues that AT&T's right to keep its attachments on Duke poles following termination of the JUA provides an annualized net benefit of {[ ]}. *See* Duke Initial Brief at 7-8. Because Duke once again assumes that AT&T would incur the costs of a duplicate network, plus other costs, in arriving at this figure, *see id.*, we find that Duke's analysis is speculative and lacking support.

[158] *See, e.g.*, Answer at 4, para. 8 (describing AT&T's three foot space allocation as one of the "primary material advantages" provided to AT&T under the JUA); *id.* at 31, para. 25 (arguing that the safety space on joint use poles "inure[s] equally to the parties' benefit").

[159] *See supra* paragraph 26.

[160] *See infra* Part III.E (discussing space occupied input and proper allocation of safety space in calculating Old Telecom Rate).

[161] *See, e.g.*, Answer at 31, para. 25 (arguing that the safety space on joint use poles "inure[s] equally to the parties' benefit"). *See also infra* Part III.E (discussing proper allocation of safety space in calculating Old Telecom Rate).

[162] *See, e.g.*, JUA, Arts. III, IV, Sections 3.3, 4.4; Peters Reply Aff. at 7, para. 10.

[163] *See, e.g.*, Peters Complaint Aff. at 8-9, para. 17; Reply Legal Analysis, Exh. D, Reply Affidavit of Timothy R. Davis at 5, para. 7 (Davis Reply Aff.).

[164] *2011 Order*, 26 FCC Rcd at 5337, para. 218 (adopting the Old Telecom Rate as a "reference point in complaint proceedings involving a pole owner and an incumbent LEC attacher that is not similarly situated to [competitive attachers,] and noting that, "[a]s a higher rate than the regulated rate available to [competitive attachers], it helps account for particular arrangements that provide net advantages to incumbent LECs relative to [competitive attachers]").

E. Calculating the Old Telecom Rate

46. The parties disagree about several inputs for calculating the Old Telecom Rate.[165] As an initial matter, the parties dispute two facts regarding Duke's poles: (1) how much space AT&T occupies, and (2) how many attachers are on the poles. The parties also disagree as to the methodology for calculating the carrying charge rate in the Old Telecom Rate formula. We resolve below the parties' disputes regarding the facts and methodology for calculating the Old Telecom Rate, so that they may calculate the maximum amount Duke was permitted to charge AT&T during the period at issue.

47. Space Occupied by AT&T. The Commission has established a rebuttable presumption of one foot of space occupied.[166] This presumption may be rebutted by "probative direct evidence,"[167] which may include, "[w]here the number of poles is too large, and/or complete inspection impractical . . . a statistically sound survey."[168] Because 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.[169]

48. Duke alleges that AT&T occupies {[ ]} feet of space on its poles.[170] Duke arrives at {[ ]} feet by allocating the 3.33 feet of safety space on the pole to AT&T and adding {[ ]} feet which Duke claims is the space AT&T's attachments occupy on the pole.[171] The {[ ]} feet figure is based on make-ready survey data produced by Duke that purportedly shows that the average height of AT&T's highest attachment is {[ ]}.[172] Duke subtracts the Commission's presumed 18-foot minimum ground clearance from the {[ ]} average height of AT&T's attachments to arrive at a space occupied figure of {[ ]} feet.[173] Duke's space calculation has several flaws.

49. First, Duke may not assess AT&T for the communications safety space. We reaffirm that safety space is not attributable to communications attachers 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.[174] Duke's attempt to charge AT&T for the safety space is inconsistent with the Commission's rules, which permit a utility to charge attachers only for the

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[165] AT&T alleges that it is currently charged more than {[ ]} times the Old Telecom Rate. Complaint at 14-15, paras. 22, 24.

[166] *See* 47 CFR § 1.1410.

[167] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387, 4394, para. 52 n.27 (1987); *Teleport Commc'ns Atlanta, Inc. v. Georgia Power Co.*, Order on Review, 17 FCC Rcd 19859, 19866, para. 19 n.41 (2002).

[168] *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12135, para. 63 (2001) (*Consolidated Order on Reconsideration*); *AT&T v. FPL II*, 36 FCC Rcd at 258-60, paras. 17, 21.

[169] Complaint Exh. A, Affidavit of Daniel P. Rhinehart, at 3, para. 6 (Rhinehart Complaint Aff.); AT&T Initial Brief at 16.

[170] Answer at ii, 47; Duke Reply Brief at 19.

[171] Answer at 12-13, para. 12; Freeburn Answer Decl. at 4, para. 8; Duke Initial Brief at 19-20 and Exh. B.

[172] Answer at 12, para. 12; Freeburn Answer Decl. at 4, 6, paras. 8, 12.

[173] Freeburn Answer Decl. at 4, para. 8. The {]} feet figure thus includes all the communications space below AT&T's attachments. *See id.*

[174] *See AT&T v. FPL I*, 35 FCC Rcd at 5330, para. 16 (stating "the communications safety space is for the benefit of the electric utility, not communications attachers"). *See also Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, 6467, paras. 21-22 (2000); *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 2d 59, 69-71, paras. 22-25 (1979)).

physical space occupied by their attachments.[175] Because AT&T's attachments do not occupy the safety space, Duke may not charge AT&T for that space.[176]

50. Second, we find that Duke's make-ready survey does not provide reliable data regarding the physical space that AT&T occupies on Duke's poles to rebut the one-foot presumption in section 1.1410.[177] The Commission permits parties to rebut its pole attachment presumptions with actual data or statistically valid surveys, which are both considered to be direct probative evidence about the appropriate inputs.[178] A basic tenet of statistical sampling is that the sample should be randomly selected to ensure confidence that the sample is reliably representative of the population measured.[179] But the make-ready survey data that Duke relies on does not provide a representative, random sample of the Duke poles with AT&T attachments.[180] The survey sample was not taken from poles distributed throughout the Duke

[175] *See* 47 CFR § 1.1406(d)(2) (calculating new telecom rates based on "Space Occupied"); *see also* 47 CFR § 1.1406(d)(1) (calculating cable rates based on "Space Occupied"); 47 CFR § 1.1409(e)(2) (2010) (calculating preexisting telecom rates based on "Space Occupied").

[176] Duke offers various reasons why incumbent LECs, unlike competitive LEC and cable attachers, should be required to bear the cost of the safety space. *See, e.g.*, Duke Initial Brief at 21; Answer at 35-38, para. 25. Duke asserts, for example, that the Commission's decision in early pole attachment rulemaking orders not to allocate any portion of the safety space to CATV attachers was based on a recognition that incumbent LECs and electric utilities share the cost of safety space under joint use agreements. Answer at 35, para. 25 (citing *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, Docket No. 78-144, 72 F.C.C.2d 59, 71, para. 24 (May 23, 1979)); Duke Initial Brief at 21. This argument fails to recognize that when the Commission later ruled in the *2018 Order* that the Old Telecom Rate was the maximum rate that a utility may charge an incumbent LEC attacher, it found that incumbent LECs should be subject to the same pole attachment rate formulas that have been applied to competitive LECs. *See 2018 Order*, 33 FCC Rcd at 7771, para. 129; *see also* 47 CFR § 1.1413(b). The Commission made a similar finding in the *2011 Order* when it designated the Old Telecom Rate as a reference point in resolving rate disputes between incumbent LECs and electric utilities. *2011 Order*, 26 FCC Rcd at 5337, para. 218. The Old Telecom Rate formula (like the New Telecom Rate formula) allocates the cost of the usable space on a pole based on the space the incumbent LEC actually occupies. The usable space excludes the safety space, which is not occupied by any attacher. Duke's attempt to force AT&T to bear the cost of the safety space is, in essence, an attempt to revisit settled rulings in the Commission's *2011* and *2018 Orders*.

[177] Because we accept AT&T's argument that the make-ready survey does not provide statistically sound data regarding AT&T's pole attachments, we reject AT&T's suggestion that the survey data provides "relevant information" concerning pole height. AT&T Initial Brief at 15.

[178] *See Verizon Maryland*, 35 FCC Rcd at 13623, n.128 (citing *Consolidated Order on Reconsideration*, 16 FCC Rcd at 12139, para. 70; *Teleport v. Georgia Power*, 17 FCC Rcd at 19866, para. 18).

[179] *See, e.g.*, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 18 FCC Rcd 13284, 13288, para. 10 (2003) ("Statistical sampling is a way of estimating the unknown characteristics of an entire population by examining a random sample that is representative of the population."); *see also, e.g.*, *Application of Bellsouth Corporation, Bellsouth Telecommunications, Inc., and Bellsouth Long Distance, Inc., For Provision of In-Region, Interlata Services In Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd 20599, para. 35 (1998) (rejecting a sample group that was not randomly selected as "fundamentally flawed" because, in part, the lack of randomness was a "significant methodological deficienc[y]").

[180] By contrast, in *AT&T v. FPL II*, the utility produced a random sample, buttressed by an expert declaration, describing the statistical soundness of the sample. *See AT&T v. FPL II*, 36 FCC Rcd at 259, para. 19 & n.52. AT&T additionally argues that the survey is flawed because its sample size – {[ ]} poles out 62,363 Duke-owned poles is too small, rendering its results "non-random." AT&T Initial Brief at 13. Duke originally stated that the sample size was {[ ]} poles, but later acknowledged that AT&T had correctly determined that the survey data was based on only {[ ]} unique poles. Freeburn Answer Decl. at 6, para. 12; AT&T Initial Brief at 13, n.61; Duke Reply Brief at 8. Because we find the survey unreliable for other reasons, we do not address the sufficiency of the sample size.

territory with AT&T attachments.[181] Rather, the data encompasses {[ ]} Duke poles with AT&T attachments that were the subject of make-ready surveys between 2019 and 2020.[182] Because the data comes from make-ready surveys, however, it tends to provide information from lines of adjacent poles in places where pole attachment build-out projects were active, rather than information from a random selection of poles.[183] The make-ready survey thus does not represent a random sample of Duke poles with AT&T attachments in the territory covered by the JUA, and we cannot rely on it to determine the height of AT&T's attachments or the space the attachments occupy on Duke's poles.[184] For all of these reasons, Duke has failed to rebut the one-foot presumption.

51. Average number of attachers. Calculating the Old Telecom Rate requires a determination of the average number of attachers per pole.[185] The Commission has established rebuttable presumptions of three or five attachers (for rural and urban areas, respectively).[186] AT&T argues that the urban presumption of five attaching entities is appropriate because the parties' service areas include service areas with a population greater than 50,000. Duke challenges the use of this presumptive average and contends that the average number of attachers is {[ ]}.[187] As with the one-foot space presumption, the presumption as to number of attachers may be rebutted by "probative direct evidence,"[188] including "a statistically sound survey."[189]

52. Here, we accept Duke's average number of attaching entities of {[ ]} because this figure is based on a 2017 audit of the approximately {[ ]} Duke poles to which AT&T is attached in AT&T's incumbent LEC service area.[190] AT&T counters that Duke's data is flawed because it does not include approximately {[ ]} Duke poles with AT&T attachments.[191] Duke explains that while the audit data it produced to AT&T included records for these {[ ]} poles, they were not included in

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[181] Duke Resp. to Interrog. No. 8, Exh. 4.

[182] *See* Freeburn Answer Decl. at 6, para. 12; Duke Resp. to Interrog. No. 8, Exh. 4; AT&T Initial Brief at Exh. 6. AT&T notes that all {[ ]} poles are located in just {[ ]} of the {[ ]} counties covered by the JUA. AT&T Initial Brief at 13. While Duke argues that more than {[ ]} percent of the Duke poles to which AT&T is attached are located in the {[ ]} counties encompassed by the survey data, it implicitly acknowledges that over {[ ]} percent of the Duke poles to which AT&T is attached are in counties that were not even considered as a target population for the survey data. Duke Reply Brief at 10. Without any explanation in the record regarding why the poles in the two counties selected are sufficiently representative, we are unable to rely on this non-random survey that fails to consider such a large percentage of poles.

[183] AT&T Reply Brief, Exh. 1.

[184] Because we find that the make-ready survey does not provide statistically sound data regarding the height of AT&T's attachments, we need not reach Duke's argument that the amount of space AT&T occupies on the pole should be determined by subtracting the presumed 18 feet of minimum clearance from the height of AT&T's highest attachment. Answer at 12, 20-21, 31-32, 46-47, paras. 12, 16, 25, 31. We also need not reach Duke's related attempt to justify charging AT&T for the balance of the communications space below its attachments by arguing that many of AT&T's attachments have significant sag that effectively displaces other potential wireline attachments. Duke Reply Brief at 10-11.

[185] *AT&T v. FPL II*, 36 FCC Rcd at 258-59, para. 17.

[186] *See* 47 CFR § 1.1409(c).

[187] Rhinehart Complaint Aff. at 3-4, para. 7; Duke Initial Brief at 22; Duke Reply Brief at 13-14.

[188] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387, 4394, para. 52 n.27 (1987); *Teleport Commc'ns Atlanta, Inc. v. Georgia Power Co.*, Order on Review, 17 FCC Rcd at 19866, para. 18 n.41.

[189] 47 CFR § 1.1409(d)(3); *Consolidated Order on Reconsideration*, 16 FCC Rcd at 12135, para. 63; *AT&T v. FPL II*, 36 FCC Rcd at 259-60, paras. 17, 21.

[190] Duke Initial Brief at 22; Duke Reply Brief at 14.

[191] AT&T Initial Brief at 20-21.

Duke's calculation of the average number of attachers because the {[ ]} poles are located outside AT&T's incumbent LEC service area, and AT&T did not request that they be added as poles within the JUA until the audit concluded.[192] Duke asserts that including the {[ ]} poles in the calculation of the average number of attachers would have a *de minimis* impact on the average[193] — a point AT&T does not dispute. We thus are unpersuaded by AT&T's claim that the audit data is unreliable or that Duke's calculation of the average number of attachers is flawed. Accordingly, we find that Duke provides sufficient evidence to rebut the presumption and we accept Duke's {[ ]} average attacher figure.

53. Cost Inputs. The parties disagree as to the tax expense in the numerator of the taxes element of the carrying charge rate reflected in the Old Telecom Rate formula, and gross plant investment in the denominator of the administrative and taxes elements.[194] As explained below, we accept AT&T's tax expense and Duke's gross plant investment figures.

54. *Tax Expense*. We agree with AT&T's methodology for calculating tax expense in the numerator of the taxes element. AT&T uses the FERC Form 1 tax expense accounts prescribed by the Commission in Appendix E of the *Consolidated Order on Reconsideration*.[195] Duke seeks to fashion a formula outside of the Commission's methodology, stating that Duke's tax calculation "grosses up the equity component of [Duke's] weighted average cost of capital . . . by the statutory tax rate, thereby arriving at a clear and accurate income tax component of the carrying charge."[196] We find no basis, however, to accept Duke's calculation which departs from longstanding Commission precedent, and therefore accept AT&T's tax expense calculation.

55. *Gross Plant Investment*. The mathematical expressions for the administrative and taxes elements in the Commission's Old Telecom Rate formula for poles owned by an electric utility do not specify a particular FERC Form 1 account for the "Gross Plant Investment" input in the denominators of these expressions or specify whether this input is limited to plant in service: they are stated only as "Gross Plant Investment (Electric)" and "Gross Plant Investment (Total Plant)," respectively.[197] The expressions for the administrative and taxes elements in the Commission's Old Telecom Rate formula for poles owned by an incumbent LEC do specify a Part 32 account (Account 2001 – Telecommunications plant in service) for the gross plant investment input and this account is limited to plant in service.[198] Accordingly, we agree with Duke's gross plant investment input because Duke uses gross investment in plant in service, consistent with the input used in the rate formula for poles owned by an incumbent LEC.[199] AT&T, on the other hand, argues Duke improperly excludes portions of plant investment, including plant leased to others, held for future use, construction work in progress, and acquisition

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[192] Duke Reply Brief at 14 (asserting that AT&T asked that these 4,000 poles "be added as poles within the JUA upon the conclusion of the audit" and that "otherwise, they were poles to which AT&T had attached without authorization.").

[193] Duke states that including the poles would change the average from {]} to {[ ]}. Duke Reply Brief at 14 & n.60.

[194] Duke Initial Brief, Exh. B (Disputed Telecom Rate Inputs). In its responsive brief, Duke does not address AT&T's cost input arguments.

[195] Rhinehart Complaint Aff. at 5, 8, paras. 9, 17; AT&T Initial Brief at 22 (citing *Consolidated Order on Reconsideration*, 16 FCC Rcd at 12176 (App. E-2, Section 224(e) Telecom Formula for Determining Maximum Rate For Use of Electric Utility Poles Using FERC Form 1 Accounts)).

[196] Duke Initial Brief at 18 (citing Olivier Answer Decl. at 5, para. 12).

[197] *Consolidated Order on Reconsideration*, 16 FCC Rcd at 12176 (App. E-2).

[198] *Id.* at 12175 (App. E-1); 47 CFR § 32.2001.

[199] *See* Answer, Exh. D-1 (showing Duke's calculation for plant investment); AT&T Initial Brief, Exh. 13 (showing the "Total Utility Plant" amount from line 13 of Duke's FERC Form 1).

adjustments.[200] AT&T's cite to the parenthetical "Total Plant" as support for its use of a broader definition of gross plant investment ignores the fact that this parenthetical is only reflected in the expression for the taxes element. A different parenthetical, i.e., "Electric," is reflected in the expression for the administrative element. "Total Plant" therefore could easily be understood to be total *company* plant (as recorded on FERC Form 1, page 200, column (b)), as distinct from *electric* plant alone (as recorded on FERC Form 1, page 200, column (c)). In fact, gross plant in service (and its components) as well as gross plant leased to others, held for future use, and related to construction work in progress and acquisition adjustments are separately reported on FERC Form 1 for the total company and for the electric, gas, other, and common utility functions (page 200, lines 3-12, columns (b)-(h)), where each of these types of plant exist. At the same time, neither party argues that the gross investment input should differ as between the administrative and taxes elements. Thus, we do not find that these other plant categories should be included in the gross plant investment input, and we therefore accept Duke's methodology.

F. AT&T is Entitled to a Refund of Overpayments Consistent with the Applicable Statute of Limitations, Which in Florida is Five Years

56. Commission rule section 1.1407 states that, if the Commission finds that a rate is not just and reasonable, it may "prescribe a just and reasonable rate" and "[o]rder a refund."[201] The refund "will normally be the difference between the amount paid under the unjust and/or unreasonable rate" and "the amount that would have been paid under the rate . . . established by the Commission, plus interest, consistent with the applicable statute of limitations."[202] Neither the Act nor Commission rules specify a limitations period for incumbent LEC pole attachment complaints. Consequently, the Commission recently adopted the general federal court practice, applied when adjudicating a federal claim with no federal statute of limitations, of "borrowing" "the most closely analogous statute of limitations under state law" and applying it to the federal claim.[203] Under this approach, the Commission looks to the law of the state in which the utility's poles are located, determines the state cause of action most analogous to the claims at issue, and applies the statute of limitations governing that cause of action.[204]

57. The Commission recently held that a state limitations period governing breach of contract actions was the most closely analogous statute of limitations in a pole attachment complaint proceeding because "[t]he Commission has long recognized that pole attachment agreements are individually-negotiated contracts that may be subject to claims for breach of contract under local jurisdictions."[205]

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[200] *See* AT&T Initial Brief at 21; *see id*., Exh. 13 (Duke FERC Form 1, at line 8(c)); *see also* Complaint, Exh. R-3 (containing AT&T's original plant investment calculation).

[201] 47 CFR § 1.1407(a).

[202] 47 CFR § 1.1407(a)(3).

[203] *See Verizon Maryland*, 35 FCC Rcd at 13626, paras. 41-42 (quoting *Reed v. United Transp. Union*, 488 U.S. 319, 323 (1989)); *see also AT&T v. FPL II*, 36 FCC Rcd at 256, para. 9.

[204] *See Verizon Maryland*, 35 FCC Rcd at 13626-28, paras. 43-46 ("borrowing" Maryland's three-year statute of limitations for breach of contract actions to supply the "applicable statute of limitations" under rule section 1.1407); *AT&T v. FPL II*, 36 FCC Rcd at 255-56, paras. 9-10 ("borrowing" Florida's five-year statute of limitations for a "legal or equitable action on a contract"). Duke objects that applying "variable state-level limitations periods" can lead to "highly variable results, depending on the state at issue." Answer at 53, para. 32. This variability is inherent in the Commission's decision to adopt a state law borrowing rule in pole attachment complaint cases similar to that used in federal court. *Verizon Maryland*, 35 FCC Rcd at 13626, paras. 41-42.

[205] *Verizon Maryland*, 35 FCC Rcd at 13626-27, para. 43 (Maryland statute of limitations governing breach of contract actions governs complaint challenging pole attachment rates in a joint use agreement because "[t]he Commission has long recognized that pole attachment agreements are individually-negotiated contracts . . . subject to claims for breach of contract under state law") (citing *Ala. Cable Telecomms. Ass'n v. Ala. Power Co.*, Order, 16 FCC Rcd 12209, 12217, para. 18 (2001) (*Ala. Cable Telecomms. Ass'n*); *Marcus Cable Assocs., L.P. v. Texas Utils. Elec. Co.*, Order on Review 18 FCC Rcd 15932, 15935, para. 6 (2003)).

Moreover, in January 2021, subsequent to the filing of AT&T's Complaint and Duke's Answer in this proceeding, the Enforcement Bureau held that the applicable statute of limitations for a pole attachment complaint relating to poles located in Florida is the state's five-year limitations period applicable to a "legal or equitable action on a contract."[206] This precedent resolves the applicable statute of limitations for AT&T's complaint here: it is Florida's five-year statute of limitations for a "legal or equitable action on a contract."[207]

58. We reject Duke's argument that application of Florida's limitations period for a breach of contract action would be inconsistent with the Commission's policy of "'refusing to adjudicate private contract law questions for which a forum exists in the state courts'".[208] This argument overlooks the Commission's long history of adjudicating pole attachment complaints that challenge the justness and reasonableness of rates, terms, and conditions contained in pole attachment agreements under section 224 of the Act.[209]

59. We also reject Duke's argument that we should not apply the five-year limitations period for contract actions in Fla. Stat. § 95.11(2)(b) because that statute applies only to "civil actions," meaning court proceedings, and not to agency proceedings such as this one.[210] Duke cites the Commission's *Sandwich Isles Reconsideration Order* which declined to apply the four-year federal "catchall" statute of limitations in 28 U.S.C. § 1658(a) to an administrative action to recover universal service support because, *inter alia*, the text, purpose, and history of section 1658(a) made clear that it governs court actions, not agency proceedings to recover government funds.[211] But that order 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. Because the Commission has adopted a state borrowing rule for pole

[206] *AT&T v. FPL II*, 36 FCC Rcd at 256, para. 10 & n.26 (citing Fla. Stat. § 95.11(2)(b)).

[207] Fla. Stat. § 95.11(2)(b); *see AT&T v. FPL II*, 36 FCC Rcd at 256, para. 10. Although Duke opposes application of any state statute of limitations in this case, it argues that Florida's four-year statute of limitations for actions to rescind a contract provides a "more analogous state cause of action" than Florida's five-year statute of limitations period for a "legal or equitable action on a contract." Answer at 50, para. 32 (citing Fla. Stat. § 95.11(l)). We disagree. First, Duke's position is inconsistent with our precedent. *See AT&T v. FPL II*, 36 FCC Rcd at 256, para. 10. Second, AT&T's complaint here seeks to establish a just and reasonable rate in the JUA that will apply from a date defined by the statute of limitations and on a going-forward basis; it does not seek to rescind the JUA. We also reject Duke's suggestion that even if Florida's five-year statute of limitations for a "legal or equitable action on a contract" applies here, AT&T's refund claim is time-barred because it accrued no later than the July 12, 2011 effective date of the *2011 Order*. Answer at 50, para. 32 & n.139. Even assuming that Florida's claim accrual rules apply here, Duke fails to cite a single Florida case barring an action to refund charges paid annually under a contract through the date the action was filed because the payments began more than five years before.

[208] Answer at 50 & n.141 (citing *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987), a case that did not involve a pole attachment agreement and has no apparent relevance to the present matter).

[209] *See Ala. Cable Telecomms. Ass'n*, 16 FCC Rcd at 12217, para. 18 (adjudicating a complaint over rates in a pole attachment agreement and observing "[a]lthough certain remedies for breach of contract may be pursued in forums other than the Commission, the Commission has primary jurisdiction over issues about the reasonableness of rates, terms and conditions concerning pole attachments."); s*ee also Salsgiver Commc'ns, Inc. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, File No. EB-06-MD-004, 22 FCC Red 20536, 20541 para. 16 (EB 2007) (finding several terms in a pole attachment agreement unlawful under section 224(b) and ordering the utility to amend the parties' pole attachment agreement to eliminate those terms).

[210] *See* Answer at 51, para. 32.

[211] *Sandwich Isles Commc'ns, Inc.*, Order on Reconsideration, 34 FCC Rcd 577, 626-28, paras. 131-35 (2019) (*Sandwich Isles Reconsideration Order*).

attachment complaint proceedings, Duke's arguments about direct application of 28 U.S.C. § 1658(a) are inapposite.[212]

60. Duke argues that we should instead apply the two-year limitations period in section 415(c) of the Act governing a "complaint filed with the Commission against carriers" for recovery of "overcharges."[213] Duke contends that section 415(c) provides a closer analogy to AT&T's claims than any state cause of action.[214] We disagree. When the Commission adopted a borrowing rule similar to that used by federal courts, it noted that courts recognized a "narrow exception" to the borrowing rule allowing application of a federal, rather than a state, statute of limitations.[215] But that exception applies only where the federal statute "'provides a closer analogy than available state statutes and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'"[216] Duke has failed to show that the narrow exception applies here.

61. Specifically, Duke has not established that application of section 415(c) either "provides a closer analogy" or is "significantly more appropriate" than the Florida statute.[217] Duke is not a "carrier" subject to the various rights and obligations of carriers specified in the Act and the Commission's rules.[218] Duke is a defendant in this proceeding because it is a "utility" under section 224(a)(1) of the Act that has entered into an agreement with a "provider of telecommunications service" (AT&T) concerning the rates, terms, and conditions of attachments to its poles.[219] We are not persuaded that the balancing of interests and obligations of common carriers—of which the limitations period in section 415(c) is one component—is particularly analogous to the regulation of Duke as a utility under section 224 of the Act. Indeed, in *Verizon Maryland*, the Commission found unpersuasive the utility's argument that the two-year limitations period in section 415(b), which governs complaints against a "carrier" seeking damages, should apply to a pole attachment complaint, noting that a utility is not a "carrier," and "is not subject to the various rights and obligations of carriers specified in the Act and the Commission's rules."[220] Likewise, the language of section 415(c), which deals with "overcharges," defined in section 415(g) as charges exceeding those listed in a carrier's filed tariff,[221] is specifically concerned with the broad

[212] *See Verizon Maryland*, 35 FCC Rcd at 13626, para. 42.

[213] Answer at 52-53, para. 32. *See* 47 U.S.C. § 415(c).

[214] Answer at 52, para. 32 & n.145.

[215] *Verizon Maryland*, 35 FCC Rcd at 13626, para. 41 (*quoting North Star Steel*, 515 U.S. at 35 (quoting *Reed*, 488 U.S. at 324, which in turn was quoting *DelCostello v. Teamsters*, 462 U.S. 151, 172 (1983) (internal quotation marks omitted)).

[216] *Id*. The Supreme Court has made clear that "the 'state-borrowing doctrine' may not be lightly abandoned" and has described federal borrowing as a "closely circumscribed exception" that applies "only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'" *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 356 (1991) (*Lampf*).

[217] *Lampf*, 501 U.S. at 356.

[218] *See Verizon Maryland*, 35 FCC Rcd at 13627, para. 45.

[219] *See Verizon Maryland*, 35 FCC Rcd at 13627, para. 45 & n.159 (citing 47 U.S.C. § 224(a)(1) (defining "utility" to include "an electric . . . utility"), (a)(4) (defining "pole attachment" as "any attachment by a . . . provider of telecommunications service to a pole . . ."), (b)(1) (the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable . . .")).

[220] *See Verizon Maryland*, 35 FCC Rcd at 13627, paras. 44-45; *see also AT&T v. FPL II*, 36 FCC Rcd at 257, para. 11 (rejecting application of section 415(b)).

[221] 47 U.S.C. § 415(g) (defining "overcharges" as "charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission.").

regulatory treatment of common carriers. Duke does not file tariffs with the Commission and AT&T's complaint does not seek to recover amounts paid in excess of any tariffed charges.[222]

62. Duke asserts additional grounds to limit or bar AT&T's recovery of a refund, none of which has merit. Duke asserts the equitable defenses of estoppel,[223] unjust enrichment,[224] waiver,[225] and laches[226] as well as other affirmative defenses, including accord and satisfaction,[227] and ratification.[228] All of these defenses fail because Duke did not plead the essential elements of each defense, explain how the evidence supports each element, or cite any supporting legal authority as our rules require.[229] Further, Duke has failed to show prejudice, which is an essential element of its equitable defenses.[230] Duke asserts, for example, that waiver and equitable estoppel preclude AT&T from seeking a refund for the period preceding May 22, 2019, because prior to that date, AT&T attested to the accuracy of the billed JUA rates and provided no notice that it disputed the rates.[231] But Duke has not shown that it suffered any harm from AT&T's failure to challenge the JUA rates at an earlier time, as AT&T's liability for refunds is limited by the applicable statute of limitations.[232]

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[222] Duke argues that it "expects" that AT&T "would contend" in any action against AT&T by a communications attacher under section 224 that the two-year limitations period in section 415(c) governs. *See* Answer at 53, para. 32. AT&T has not taken that position here, and we need not address Duke's contention that if AT&T were to make and prevail in such an argument in the future, suits against electric utilities and incumbent LECs under section 224 would unfairly be subject to different limitations periods. *Id*.

[223] Answer at 48, para. 32; *id*. at 59 (Affirmative Defense 1).

[224] Answer at 59 (Affirmative Defense 8).

[225] Answer at 59 (Affirmative Defenses 2, 7).

[226] Answer at 60 (Affirmative Defense 14).

[227] Answer at 59 (Affirmative Defense 5).

[228] Answer at 59 (Affirmative Defense 6).

[229] *See* 47 CFR § 1.721(b) (all matters concerning a claim or defense "should be pleaded fully and with specificity"), (d) (claims or defenses "must be supported by relevant evidence"), (e) (legal arguments "must be supported by appropriate statutory, judicial, or administrative authority"); *see also* 47 CFR § 1.726(b) (an answer must state "fully and completely" "the nature of any defense"), (c)(an answer shall "include legal analysis relevant to the claims and arguments set forth therein"). *See also AT&T Corp. v. Business Telecom, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 12312, 12336, para. 52 & n.154 (2001) (*AT&T Corp.*) (defendant's attempt to plead an estoppel defense did not comply with the Commission's rules where the defendant "failed to cite any legal authority supporting the affirmative defense and failed to allege and provide evidentiary support for facts which, if true, would establish an estoppel defense") (citing then Commission rules 47 CFR §§ 1.724(b) and 1.720(b)); *AT&T Servs. v. 123.net*, Proceeding No. 19-222, Memorandum Opinion and Order, 35 FCC Rcd 6401, 6414, para. 29 (EB 2020) (rejecting asserted defenses where the defendant "failed adequately to explain in its Answer the factual or legal basis for these defenses and their applicability to this dispute, as the Commission's rules require) (citing 47 CFR §§ 1.721(b), (d), (e) and 1.726(b), (c)).

[230] *See, e.g., AT&T v. FPL II*, 36 FCC Rcd at 258, para. 14 ("If its equitable defenses are to succeed, FPL must show prejudice."); *AT&T Corp.*, 16 FCC Rcd at 12336 ("The Commission has repeatedly held that, in order to invoke equitable estoppel to preclude a party from asserting a right he would otherwise possess, but has forfeited because of his conduct, "[t]he aggrieved party must have justifiably *relied* upon such conduct and *changed* his position so that he will suffer injury if the other is allowed to repudiate his conduct.") (emphasis in original) (citations and internal quotes omitted).

[231] Answer at 48, para. 32; *id*. at 59 (Affirmative Defenses 1, 2 and 7).

[232] *AT&T v. FPL II*, 36 FCC Rcd at 258, para. 14.

63. We also reject Duke's argument that the Commission should either forbear from exercising its authority to regulate the rates in the JUA under section 10(a) of the Act[233] or exercise its authority under rule 1.3 to suspend or waive the applicability of rule 1.1413 (and its predecessor rule).[234] Duke's forbearance request lacks merit because, as discussed above, we find that the JUA rate is not just and reasonable; thus forbearing from enforcement of section 224(b) here would impede, rather than ensure, just and reasonable charges.[235] Further, forbearance would not be "consistent with the public interest" because the Commission has determined that the public interest is served by permitting incumbent LECs to file complaints, like AT&T's here, addressing the justness and reasonableness of rates, terms and conditions in a pole attachment joint use agreement.[236] For similar reasons, we reject Duke's request, under section 1.3 of the rules, for a waiver or suspension of rule 1.1413. Rule 1.3 requires a showing of "good cause." Duke's request for waiver or suspension is not supported by the showing of good cause that rule 1.3 requires.[237] In the absence of such a showing, and having found that Duke is charging AT&T pole attachment rates that are unjust and unreasonable, we see no good cause to waive or suspend a rule that allows incumbent LECs to challenge such rates.

64. In sum, we find, consistent with Commission precedent, that the applicable statute of limitations under Commission rule section 1.1407(a)(3) is Florida's five-year limitations period for an "action on a contract."[238] AT&T is entitled to a refund for the period beginning August 25, 2015, which is five years from the date it filed its Complaint.

IV. ORDERING CLAUSES

65. Accordingly, **IT IS ORDERED** that, pursuant to sections 4(i), 4(j), 201, 202, 208, and 224 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201, 202, 208, and 224 and sections 1.720 - 1.740, and 1.1401-1.1415 of the Commission's rules, 47 CFR §§ 1.720 -1.740, and 1.1401-1.1415, and for the reasons explained above, AT&T's Complaint **IS GRANTED IN PART** as follows:

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[233] Answer at 55, para. 35 & n.152; *id*. at 2, 8, paras. 4, 10 & n.19; *id*. at 59-60 (Affirmative Defense 11). *See* 47 U.S.C. § 160(a) (The "Commission shall forbear from applying any regulation or any provision of [the Act] to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services . . . if the Commission determines that - - (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest."). Duke disputes AT&T's assertion that the Commission is "statutorily required" to ensure that the pole attachment rates Duke charges AT&T are just and reasonable, but argues that to the extent there is such a statutory requirement, the Commission should forbear from exercising its authority under 47 U.S.C. § 160(a). Answer at 55, para. 35.

[234] Answer at 55, para. 35 & n.153 (citing 47 CFR §§ 1.3, 1.1413). Rule 1.3 states in pertinent part that a Commission rule "may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission. . . ." 47 CFR § 1.3.

[235] *See supra* Parts III.B, III.D, III.E; *see also* 47 U.S.C. § 160(a) (forbearance requires a determination, *inter alia*, that enforcement of a regulation or provision is "not necessary to ensure that . . . charges . . . are just and reasonable"); *AT&T v. FPL I*, 35 FCC Rcd at 5332, para. 19. Because we find the requirements in section 10(a) for forbearance would not be met in this case, we need not resolve the question whether the Commission's forbearance authority under section 10 extends to regulation of terms and conditions for pole attachments charged by those other than telecommunications carriers.

[236] *See 2011 Order*, 26 FCC Rcd at 5327-28, paras. 199-203; *see also AT&T v. FPL I*, 35 FCC Rcd at 5332, para. 19. 47 U.S.C. § 160(a) (Forbearance requires a determination that it is "consistent with the public interest.").

[237] *See* Answer at 8, 55, paras. 10 & n.19, 35 & n.153.

[238] Fla. Stat. § 95.11(2)(b).

(a) The rate Duke may charge AT&T for attachments to Duke's poles under the JUA may equal but not exceed the Old Telecom Rate;

(b) AT&T and Duke are directed to negotiate a new reciprocal joint use agreement consistent with (a) above that reflects proportional reciprocal rates for Duke's attachments to AT&T's poles under the JUA;

(c) Consistent with the applicable statute of limitations and as determined under the JUA after the parties negotiate proportional reciprocal rates, AT&T is entitled to a refund and interest extending for a period of five years prior to the filing of the Complaint; and

(d) AT&T and Duke are directed to negotiate in good faith to reach an agreement on the amount of AT&T's refund consistent with this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Chief
Enforcement Bureau

Appendix A

Confidential License Agreement Designations

CATV-1	{[ ]}
CATV-2	{[ ]}
CATV-3	{[ ]}
CATV-4	{[ ]}
CATV-5	{[ ]}
CATV-6	{[ ]}
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