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

In the Matter of	)	Proceeding No. 20-293
	)	Bureau ID No. EB-20-MD-004
BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina,	)	
Complainant,	)	
v.	)	
Duke Energy Progress, LLC,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 21, 2021 **Released: September 21, 2021**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In recent years, 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 North Carolina and d/b/a AT&T South Carolina (collectively, AT&T), an incumbent LEC, against Duke Energy Progress (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 of the record, we resolve several issues disputed by the parties in order to

[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 North Carolina and d/b/a AT&T South Carolina, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004 (filed Sept. 1, 2020) (Complaint); *see also* Duke Energy Progress, LLC's Answer and Affirmative Defenses to AT&T's Pole Attachment Complaint, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004 (filed Nov. 13, 2020) (Answer); AT&T's Reply to Duke Energy Progress, LLC's Answer, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004 (filed Dec. 18, 2020) (Reply); Reply Legal Analysis in Support of Pole Attachment Complaint, Proceeding No. 20-293, Bureau ID No.
(continued….)

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.[3]

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."[4] In the recent companion case in *AT&T v. DEF*, we provided a lengthy description of the Commission's pole attachment rules and orders under section 224, which we incorporate by reference and do not repeat here.[5]

B. The Parties' Joint Use Agreement

3. AT&T and Duke are parties to a Joint Use Agreement (JUA) between Carolina Power & Light Company and BellSouth Telecommunications, Inc. that was executed in 2000, with an effective date of January 1, 2001.[6] The JUA contains the rates, terms, and conditions for each party's use of the other party's utility poles.[7]

4. Article XVII of the JUA states that, as of the 2001 effective date, the JUA "shall continue in force until terminated by either party."[8] Under Article XVII, either party may terminate "the right to make additional Attachments" upon one year's notice to the other party.[9] An evergreen clause in Article XVII states that such termination "shall not, however, abrogate or terminate the right of either party to maintain the existing Attachments on the poles . . . and all existing Attachments shall continue pursuant to

(Continued from previous page)
EB-20-MD-004 (filed Dec. 18, 2020) (Reply Legal Analysis); Joint Statement, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004 (filed Jan. 8, 2021) (Joint Statement); AT&T's Initial Supplemental Brief, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004 (filed April 8, 2021) (AT&T Initial Brief); Duke Energy Progress, LLC's Initial Brief in Response to the Enforcement Bureau's March 8, 2021 Letter, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004 (filed April 8, 2021) (DEP Initial Brief); AT&T's Reply Supplemental Brief, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004 (filed April 19, 2021) (AT&T Reply Brief); Duke Energy Progress, LLC's Reply Supplemental Brief, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004 (filed April 19, 2021) (DEP Reply Brief). Because neither the State of North Carolina nor the State of South Carolina has reverse-preempted this Commission's jurisdiction under 47 U.S.C. § 224(c), the Commission retains jurisdiction of this proceeding. *See* Complaint at 4, para. 5; Answer at 2, para. 5.

[3] We addressed in a separate order a companion pole attachment complaint that AT&T Florida filed with the Commission against Duke Energy Florida. *See BellSouth Telecomms., LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003, Memorandum Opinion and Order, DA 21-1008 (EB Aug. 27, 2021); Erratum, Proceeding No. 20-276 (MDRD Sept. 10, 2021) (*AT&T v. DEF*).

[4] 47 U.S.C. § 224(b)(1).

[5] *See AT&T v. DEF*, DA 21-1008, at 2-4, paras. 2-8; *see also Verizon Maryland*, 35 FCC Rcd at 13608-11, paras. 2-10.

[6] *See* Complaint, Exh. 1, Amended and Restated Agreement Covering Joint Use of Poles Between Carolina Power & Light Company and BellSouth Telecommunications, Inc., executed Oct. 20, 2000, as updated (JUA); Joint Statement at 2, Stipulated Fact No. 3. Predecessors of AT&T and Duke were parties to a prior joint use agreement dated September 29, 1977 (1977 JUA). *Id.* at 2, Stipulated Fact No. 6 (citing Answer, Exh. 2 at DEP000138-167).

[7] *See* JUA. The cover of the JUA indicates that the JUA is applicable to the payment of rentals for 1997 and thereafter.

[8] JUA, Art. XVII.A at 12.

[9] JUA, Art. XVII.B at 12.

and in accordance with the terms of [the JUA]."[10] Neither party has invoked the notice of termination provision described in Article XVII.[11]

5. Article XIII of the JUA describes the methodology for calculating each party's annual rental rate for attachments on the other party's joint use poles.[12] Under that provision, "[t]he annual payments due from each party as Licensees shall be compared" and, Duke, as "the party which [is] due the greater amount," issues a bill to AT&T for the net rental amount owed by AT&T.[13]

6. Under the JUA, Duke charges AT&T pole attachment rates that are much higher than the rates that Duke charges competitive LECs and cable providers to attach to the same poles. For example, for the years 2017 through 2019, Duke charged AT&T per pole rates of between {[ ]} for AT&T's use of Duke's poles.[14] In contrast, Duke charged per pole rates for those same years of between {[ ]} to competitive LEC and cable company attachers.[15] AT&T thus pays {[ ]} more than what its competitors pay.

C. The Complaint

7. AT&T alleges that "[t]he rates that Duke charges AT&T under the JUA are, and have long been, unjust and unreasonable" under section 224.[16] AT&T argues that, under the presumption adopted in the *2018 Order*—incumbent LECs are similarly situated to telecommunications attachers and are therefore entitled to comparable rates—and under the principle of competitive neutrality adopted in the *2011 Order*, the just and reasonable rate in this case is the New Telecom Rate.[17] Based on that rate formula, AT&T calculates that it is owed a refund for overpayment of {[ ]} dating back to 2017 (based on a three-year statute of limitations under North Carolina and South Carolina law).[18] AT&T asserts that Duke has been able to charge unlawful rates because Duke has a "substantial pole ownership advantage[;]" the JUA calculates the parties' rates by "disproportionately divid[ing]" Duke's annual pole cost between Duke and AT&T; the JUA's "evergreen" provision renders the rates "effectively inescapable" even if AT&T were to terminate the JUA; and the JUA prevents AT&T from obtaining a lower rate without Duke's concurrence.[19] 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

[10] *Id.*

[11] Joint Statement at 3, Stipulated Fact No. 8.

[12] JUA, Art. XIII.C at 10. Under Article XIII.C, the rental rates "shall be adjusted annually by the percentage as calculated by dividing the current year July Index rate by the previous year July Index rate" and "[t]he values used in determining this percentage are as shown in the Handy Whitman Index in category FERC Account 364." *Id.*

[13] *See* JUA, Art. XIII.C at 10; *see also* Joint Statement at 4, Stipulated Fact No. 14.

[14] Joint Statement at 4-5, Stipulated Fact Nos. 17-18.

[15] Joint Statement at 5, Stipulated Fact No. 21.

[16] Complaint at 25, para. 36.

[17] Complaint at 6-22, paras. 8-30. As in *AT&T v. DEF*, we use the term, New Telecom Rate to denote the rate that results from the revised formula for calculating the section 224(e) attachment rate applicable to competitive LECs that the Commission adopted in the *2011 Pole Attachment Order*. We use the term, Old Telecom Rate to denote the higher pre-existing competitive LEC rate. *See AT&T v. DEF*, DA 21-1008, at 2, para. 3 & n.6 (citing *2011 Order*, 26 FCC Rcd at 5244, 5337, paras. 8, 218 & n.661).

[18] Complaint at 24, para. 33. 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 26, para. 38 & n.111.

[19] *See* Complaint at 17-20, paras. 25-27.

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. [20]

III. DISCUSSION

8. 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 *Verizon Maryland*, we conclude that (1) the JUA in this case automatically renewed and extended on January 1, 2020, after the March 11, 2019 effective date of the *2018 Order*, and the JUA rates are thus subject to review under the *2018 Order* for the period starting January 1, 2020; and (2) the JUA rates are subject to review for the prior period under the *2011 Order*. [21] We also conclude that AT&T is entitled to a pole attachment rate that does not exceed the Old Telecom Rate, covering both timeframes at issue. 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 "Newly-Renewed" Every Year After January 1, 2001 and Is Thus Subject to Rules Adopted in the *2018 Order* for the Period Beginning January 1, 2020

9. 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." [22] 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." [23] Here, the JUA is open ended and has continued indefinitely since its January 1, 2001 effective date under Article XVII, which states that the JUA "shall continue in force until terminated by either party" upon one year's notice to the other party. [24] Consistent with our conclusion in *Verizon Maryland* and *AT&T v. DEF*, we find that, under this provision, the JUA has "automatically renewed or extended" since January 1, 2001 and did so after the *2018 Order* took effect. [25] Given that the JUA states that it "shall continue in force" until terminated, and the Commission has found that "continue" and "extend" are synonymous in this context, we find that the JUA has been automatically renewed and extended after the effective date of the *2018 Order*. [26]

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[20] Complaint at 27-28, paras. 39-42.

[21] Our conclusions here are also consistent with the analysis in our recent decision in *AT&T v. DEF*.

[22] 47 CFR § 1.1413(b).

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

[24] *See* JUA, Art. XVII.A, B at 12.

[25] *See AT&T v. DEF*, DA 21-1008, at 6-7, para. 15.

[26] *See* JUA, Art. XVII.A, B at 12; *accord AT&T v. DEF*, DA 21-1008, at 6-7, para. 15 (citing *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 XVII.B 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.*

10. We further find that, for purposes of applying the analytical framework of the Commission's pole attachment rules, the JUA automatically renewed on January 1st each year, and that the *2018 Order* provides the relevant standard for reviewing the JUA as of January 1, 2020, the first automatic renewal date after the effective date of the *2018 Order*.[27] Similar to the Commission's analysis in *Verizon Maryland*, we find that the one-year notice of termination provision in JUA Article XVII.B effectively creates a series of one-year contracts that have automatically renewed and extended the JUA since the JUA's effective date on January 1, 2001.[28] We reject AT&T's suggestion that the JUA "automatically extends every day[,]" and find, instead, that the notice of termination provision in Article XVII.B effectively caused the JUA to automatically renew, within the meaning of the *2018 Order*, every 12 months.[29]

11. Duke argues that the JUA is not "newly-renewed" under the *2018 Order* for three principal reasons.[30] First, it argues that the JUA is not a "pole attachment contract" subject to the *2018 Order*, but is instead a "cost sharing arrangement" that falls outside the scope of that order.[31] 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."[32] 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]."[33] 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."[34] In 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."[35] 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

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

[28] *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)).

[29] *See, e.g.*, Complaint at 7-8, para. 11.

[30] Answer at 6-7, 10-12, paras. 9, 11.

[31] Answer at 6, 31, 33, paras. 9, 22, 23; *see also id.* at 59, 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).

[32] *See 2011 Order*, 26 FCC Rcd at 216 n.651 (internal citations omitted) (italics added).

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

[34] *See 2011 Order*, 26 FCC Rcd at 5334, para. 216.

[35] *See 2018 Order*, 33 FCC Rcd at 7768, para. 124 n.462; *id.*, 33 FCC Rcd at 7769, para. 126.

Commission oversight under section 224.[36] Inasmuch as the JUA sets the "rental rates" owed for each party's "joint use pole attachments," it is subject to the Commission's pole attachment rules and orders.[37]

12. 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.[38] Duke argues that, because the JUA requires payment of the JUA rates for existing attachments even after termination, the JUA is a "perpetual license" that cannot be terminated and thus cannot renew.[39] As previously noted, "renewal" under the *2018 Order* "includes agreements that are automatically renewed, extended, or placed in evergreen status."[40] And nothing in the *2018 Order* suggests that an express right to terminate is required. Moreover, in *Verizon Maryland*, 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" consistent with a one-year notice of termination provision.[41]

13. Third, 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*.[42] 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,

[36] *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")).

[37] *See* JUA, Art. XIII.C at 10.

[38] *See* Answer at 10, para. 11.

[39] Answer at 45, 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 one party takes affirmative action to terminate it. *See* Answer at 11, para.11; *see also id*. at 45, para. 27. In support, Duke cites caselaw explaining the meaning of "evergreen" clause in various commercial contexts. *See* Answer at 11, para. 11 n.28. But 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." *See 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, e.g.*, *id.*, 35 FCC Rcd at 13611, 13612-13, 13616-17, paras. 10, 15, 22-24 & n.48. Whether that accords with other uses of the term "evergreen" clause 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 11, 45, 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." *See Verizon Maryland*, 35 FCC Rcd at 13611, para. 10; *see also AT&T v. DEF*, DA 21-1008, at 8, para. 18 n.58.

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

[41] *See Verizon Maryland*, 35 FCC Rcd at 13611, 13612-13, paras. 10, 15-18. Of course, as we noted in *AT&T v. DEF*, even an evergreen contract can be terminated by mutual agreement of the parties; thus the JUA permits AT&T and Duke to terminate the agreement, even as to existing attachments, if they both agree to that. *See AT&T v. DEF*, DA 21-1008, at 9, para. 18 n.61.

[42] Answer at 10-11, para. 11 ("A 'renewal' requires some sort of voluntary action by the parties (even if it is merely acquiescence).").

extended, or placed in evergreen status' without requiring further action by the parties."[43] This argument likewise does not account for the impact of Article XVII, which effectively renews and extends the JUA annually, absent notice of termination by a party.[44]

14. 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 one-year termination notice provision. On that basis, we find that the JUA created a series of one-year contracts that have automatically renewed on January 1st of each year since 2001. 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*.[45]

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

15. 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 January 1, 2020, we conclude that AT&T is entitled to a rate, as of January 1, 2020, 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 the same poles."[46] Where Duke makes that showing, the Old Telecom Rate is the maximum permissible rate.[47]

16. 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

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

[44] *See Verizon Maryland*, 35 FCC Rcd at 13614, para. 17; *see also AT&T v. DEF*, DA 21-1008, at 9, para. 19.

[45] 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 12, 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; *see also AT&T v. DEF*, DA 21-1008, at 9, para. 20 n.65.

[46] *See* 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 company, and wireless licensees that attach to the same Duke poles as those to which AT&T attaches under the JUA. *See* Answer, Exh. 7 (Answer, Exh. 7-CLEC Agreement); Duke's First Set of Interrog. Resp., Exh. 2, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004 (filed Oct. 14, 2020) (Duke Resp. to Interrog. No. 3) (filed Oct. 14, 2020); Duke's Supplemental Interrog. Resp., Exh. 2, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004 (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 32-33 (App. A - Confidential License Agreement Designations) (public designations and Bates-stamped page numbers of each agreement), and we grant that request here.

[47] *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).

has rebutted the presumption in section 1.1413(b) and the *2018 Order*.[48] In particular, the record demonstrates that AT&T receives the following material advantages over telecommunications carrier and cable attachers on Duke's poles.

17. *Guaranteed Pole Access.* The JUA specifically requires Duke to reserve and maintain for AT&T space on all joint use poles, including any that are newly erected or newly acquired.[49] AT&T's competitors are not guaranteed space on any pole to which they are not already attached and {

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

]} [51]

18. 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 for any reason."[52] AT&T grossly overstates its case. In particular, the JUA requires the parties to "permit[] Joint Use by the other party of any of its poles" (i) "if the requirements of the Code are met[;]" (ii) where there is agreement on "sound engineering practices" relating to minimum clearances; and (iii) "so long as such use does not unreasonably interfere with the use being made by the other party."[53] A provision requiring AT&T's attachments to comply with generally applicable safety requirements and engineering practices and not "unreasonably interfere" with Duke's use of the pole, hardly constitutes denial of access "at any time and for any reason."[54] Moreover,

[48] *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 23-24, para. 41 (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 2-4, 6-8, 10-12.

[49] *See* JUA, Art. III.A at 3 ("[E]ach party hereby permits Joint Use by the other party of any of its poles . . . so long as such use does not unreasonably interfere with the use being made by the other party."); JUA, Art. I.E at 2 (defining "Joint Use" as "[m]aintaining space for the attachments of both parties on the same pole at the same time").

[50] *See* Duke Resp. to Interrog. No. 3, Exh. 2, CATV-1 at section 2.1; *id.*, CLEC-2, WIRELESS-1 at sections 2.1, 5.2; Answer, Exh. 7-CLEC Agreement at sections 2.1, 5.2; Duke Supp. Interrog. Resp., Exh. 2, CATV-3, CATV-5, CLEC-1, CLEC-3, CLEC-5, CLEC-6, CLEC-8, CLEC-9, CLEC-10, CLEC-12, CLEC-13, CLEC-14, CLEC-16, CLEC-17, CLEC-19, CLEC-20, WIRELESS-3 at section 2.1; *id.*, CATV-7, WIRELESS-1, WIRELESS-2, WIRELESS-4, WIRELESS-5, WIRELESS-6, WIRELESS-7, at sections 2.1, 5.2; *id.*, CLEC-7, CLEC-11, CLEC-15 at Section 1.2; CATV-2, CATV-4, CATV-6, CATV-8, CATV-9, CATV-10, CLEC-4, CLEC-18 at section 1.4 (grounds for denying or removing licensees' attachments).

[51] *See, e.g.*, Duke Resp. to Interrog. No. 3, Exh. 2, CLEC-2, WIRELESS-1 at section 5.2; Answer, Exh. 7-CLEC Agreement at section 5.2; Duke Supp. Interrog. Resp., Exh. 2, CATV-7, Wireless-2, Wireless-4, Wireless-5, Wireless-6, Wireless-7 at section 5.2.

[52] *See* AT&T Initial Brief, Exh. 2 at 1; *see also* Complaint, Exh. C, Affidavit of Mark Peters at 13, para. 25 (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).

[53] *See* JUA, Art. III.A at 3. The JUA defines the "Code" as "[t]he then current edition of the National Electrical Safety Code as amended from time to time." JUA, Art. I.C at 1.

[54] *See* Peters Complaint Aff. at 13, para. 25; *see also* JUA, Art. III.A at 3.

AT&T offers no evidence that JUA Article III.A, the provision governing permission for joint use, has been, or is likely to be, invoked in an unreasonable manner or to AT&T's detriment. Indeed, because the right to deny joint use is reciprocal, both parties have an incentive not to interpret that right broadly.[55] We are thus 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 requires Duke to maintain space on its poles exclusively for AT&T's use, subject to limited exceptions.[56]

19. 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.[57] This claim also fails. As an initial matter, unlike many of Duke's license agreements, which allow Duke to terminate an agreement "*in whole or in part*" for specified reasons, any unilateral effort by Duke to terminate the JUA would not terminate AT&T's right "to maintain" the tens of thousands of AT&T's "existing Attachments on the poles of the other[,]" as the JUA permits termination only with respect to future pole attachments.[58] In addition, the reciprocal nature of the parties' rights under the JUA make termination by either party with respect to future attachments (or denying permission for 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 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.[59]

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[55] AT&T's claim that Article II of the JUA permits Duke "to deny AT&T access to any pole it deems unsuitable for joint use" is similarly overstated. AT&T Initial Brief at 3 & n.9. That provision states that the JUA "shall cover all wood poles of each of the parties" and other poles, as agreed to by the parties, subject to limited exclusions. *See* JUA, Art. II at 2. We find that the reciprocal nature of this provision, and the limited grounds for excluding poles from joint use, make excluding poles from joint use without a valid basis highly unlikely.

[56] AT&T points to certain Duke license agreements that {[

]} as evidence of licensees' superior access to Duke's poles. *See* AT&T Initial Brief at 3-4 & n.15. The multi-step process described for replacing poles is not comparable to the JUA's guaranteed space for AT&T on all Duke poles, however, and the fact that *other* Duke license agreements give Duke sole discretion in deciding whether to replace a pole or otherwise expand capacity at the request of a licensee further undercuts AT&T's point. *See*, *e.g.*, Duke Resp. to Interrog. No. 3, Exh. 2, CLEC-2, Wireless-1 at section 5.2 (if Duke rejects a licensee's attachment request due to "capacity concerns," the decision to replace the specific poles with taller or stronger poles is within Duke's "sole discretion"); Duke Supp. Interrog. Resp., Exh. 2, CATV-7, Wireless-2, Wireless-4, Wireless-5, Wireless-6, Wireless-7 at section 5.2 (same); Answer, Exh. 7-CLEC Agreement at section 5.2 (same); Duke Supp. Interrog. Resp., Exh. 2, CLEC-7, CLEC-11, CLEC-15 (stating that nothing in the agreement {[

]} 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* JUA, Art. VII.A at 4 {[(

]}.

[57] *See* AT&T Initial Brief at 3 & n.10 (citing JUA, Art. XVII.B at 12); *id.*, Exh. 2 at 1; Peters Complaint Aff. at 13, para. 25.

[58] *Compare, e.g.*, Duke Resp. to Interrog. No. 3, Exh. 2, CATV-1 at section 7.1 (italics added), *with* JUA, Art. XVII.B at 12.

[59] AT&T argues that the current JUA does not allocate to AT&T any specific amount of space on Duke's poles, and that any space allocation would be unenforceable, and therefore not beneficial to AT&T, because the Commission invalidated reservations of space in the 1996 *Local Competition Order*. *See* Reply at 12, 26; Reply Legal Analysis at 9-10, Exh. A, Reply Affidavit of Daniel P. Rhinehart at 20, para. 31 & n.86 (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; (continued….)

20. *Ability to Use Additional Space on the Poles*. The parties' previous joint use agreement allocated {[redacted]} of space on Duke's poles to AT&T's predecessor.[60] The current JUA does not specify the amount of space allocated to either party, but generally allows the parties to use an unspecified amount of space on the poles "if the requirements of the Code are met" and "so long as such use does not unreasonably interfere with the use being made by the other party."[61] Such an arrangement is not provided to competitive LEC or cable company licensees.[62] Even if we accept AT&T's contention that it

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see also Local Competition Order, 11 FCC Rcd at 16079, para. 1170 ("Section 224(f)(1) prohibits such discrimination among telecommunications carriers."). AT&T's reliance on the *Local Competition Order* is misplaced. The passage AT&T cites precludes 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. *See AT&T v. DEF*, DA 21-1008, at 12, para. 24 n.78. The complaint here, as in *AT&T v. DEF*, does not involve the rights of an attacher whose access to an AT&T pole—or a Duke pole—has been denied due to a reservation of space. *Id*. Rather, the question here is whether an allocation to AT&T of space on Duke's 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 and enabling it to expand its attachments, as needed, on Duke's poles. Further, as in *AT&T v. DEF*, we reject AT&T's suggestion that the *Local Competition Order* language protecting the rights of competitive attachers in certain situations robs that provision of any benefit to AT&T. *See id.* Indeed, the cited language from that 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).

[60] *See* 1977 JUA, Art. I.A.2. The 1977 JUA allocated {[redacted]} of space on AT&T's poles to Duke's predecessor. *See id.*, Art. I.A.1.

[61] *See* JUA, Art. III.A at 3. The extent to which the space allocation provisions in the 1977 JUA carried over to the current agreement under Article III.B of the JUA is unclear. *See* JUA, Art. III.B at 3 ("[A]ll existing Attachments to poles jointly used by the parties shall continue to exist in their current condition as of the date of this Agreement and nothing contained herein shall be construed as requiring either party to remove, transfer, or rearrange any such existing Attachments.").

[62] *See* Duke Initial Brief at 11 & n.47 (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 5, 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 8-9; *id.*, Exh. 2, at 3, line 5. Indeed, language in several licensing agreements allowing Duke to {[redacted]} undermines AT&T's suggestion that the agreements grant licensees the right to occupy as much space as they require. *See supra* note 51. 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 & Exh. 2, at 3, 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 10. Even if true, this claim does nothing to illuminate the key issue here, i.e., whether the relevant provision of the JUA (i.e., Article III.A) gives AT&T a benefit relative to competitive LEC and cable company attachers on the same poles.

currently uses only one foot of space, the ability to add more attachments, as needed,[63] without additional expense, is an advantage accorded AT&T but not its competitors.[64]

21. *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.[65] 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.[66]

22. 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 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.[67] AT&T further 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.[68]

23. Although competitive attachers have a statutory right of nondiscriminatory access to a utility's poles under section 224(f)(1),[69] as we held in *AT&T v. DEF*, any discussion of such a right is

[63] Although Duke contends that AT&T actually occupies, on average, {[ ]} of space on Duke's poles, *see* Duke Initial Brief at 11, 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.

[64] *See AT&T v. DEF*, DA 21-1008, at 13, para. 26; *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").

[65] *See* JUA, Art. XVII.B at 12 (stating that a party's notice of termination "shall not . . . abrogate or terminate the right of either party to maintain the existing Attachments on the poles of the other and all such existing Attachments shall continue pursuant to and in accordance with the terms of this Agreement").

[66] *See* Duke Resp. to Interrog. No. 3, Exh. 2, CLEC-2, WIRELESS-1, at section 17; *id.*, CATV-1 at section 16.4.1; Answer, Exh. 7, CLEC Agreement at section 17; Duke Supp. Interrog. Resp., Exh. 2, CLEC-1, CLEC-3, CLEC-5, CLEC-6, CLEC-8, CLEC-9, CLEC-10, CLEC-12, CLEC-13, CLEC-14, CLEC-16, CLEC-17, CLEC-19, CLEC-20, CATV-5, WIRELESS-3 at section 7.3; *id.*, CATV-2, CATV-4, CATV-6, CATV-8, CATV-9, CATV-10, CLEC-4, CLEC-18, at section 16.4.1; CLEC-7, CLEC-11, CLEC-15 at section 15.4; *id.*, WIRELESS-2, WIRELESS-4, WIRELESS-5, WIRELESS-6, WIRELESS-7, CATV-7 at section 17 (requiring removal of licensee attachments upon termination of pole attachment agreement).

[67] AT&T Reply Brief at 9 (emphasis omitted). *See* AT&T Reply Brief at 9 (emphasis omitted); 47 U.S.C. § 224(f)(1) (providing competitive LECs and cable companies a right of nondiscriminatory access to a utility's poles). AT&T argues generally 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). *See* AT&T Initial Brief at 2-3.

[68] 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.

[69] *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

(continued….)

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.[70] Thus, a comparison of extracontractual rights of Duke's licensees under section 224(f) is beyond the scope of this discussion. 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."[71]

24. *Predictability of Scheduled Cost Billing for Pole Replacements*. If Duke replaces a pole for AT&T because (i) AT&T requires additional space or (ii) AT&T's facilities do not meet relevant safety code requirements, Article VII of the JUA requires AT&T to pay the "scheduled" (a/k/a "tabulated") cost "as shown in Table 1 of [JUA] Exhibit B."[72] The current scheduled cost in Table 1 of JUA Exhibit B for a replacement pole that is 50 feet or less in height is {[ ]}.[73] By contrast, Duke states that when it replaces a pole for its competitive LEC or cable licensees, the licensees are responsible for "actual, work order costs," which average {[ ]} per pole replacement.[74] Duke thus claims that the difference represents an average cost advantage to AT&T of {[ ]} for the same work.[75]

25. AT&T counters that, under the JUA, "the scheduled costs *are* 'the costs' to perform the relevant work[,]" so there should be no difference between the two.[76] AT&T points to Article VII of the JUA[77] which provides a mechanism for annually updating the Exhibit B scheduled costs "based on the percentage change" in a specified index (the Handy Whitman Index).[78] Article VII authorizes "actual cost" billing when a party objects to a proposed revision of the scheduled costs "and the parties fail to

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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").

[70] *See AT&T v. DEF*, DA 21-1008, at 13-14, para. 28; *id*. at 12, para. 25 & n.81 (citing *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.

[71] *See Verizon Maryland*, 35 FCC Rcd at 13615, para. 20; *see also AT&T v. DEF*, DA 21-1008, at 13-14, para. 28 & n.92.

[72] *See* JUA, Art. VII.F.4 at 5 ("If . . . the Licensee requires additional height, the Licensee shall pay the Owner the cost as shown in Table I of Exhibit B and computed based on the size of the pole installed."); JUA, Art. VII.F.6.b at 6 ("If the existing pole is inadequate to support the existing Attachments . . . . [and] the problem exists because the Licensee's facilities are not installed to meet the Code requirements, the pole shall be replaced and the Licensee shall pay the Owner the full cost as shown in Table I of Exhibit B and computed based on the size of the pole installed."); *see also* JUA, Exh. B, Table 1 (Exhibit B Cost Schedule).

[73] *See* Answer, Exh. 5 (containing updated values for JUA Exhibit B Cost Schedule).

[74] *See* Answer at 24-25, para. 17; Freeburn Answer Decl. at 11-12, paras. 23-24; Duke Initial Brief at 8-9.

[75] *See id*.

[76] *See* Reply at 15, para. 8 (emphasis in original) (citing JUA, Art. VII; Peters Reply Aff. at 21, paras. 33-34).

[77] *See* AT&T Reply Brief at 5-6 (citing JUA, Art. VII); Peters Reply Aff. at 21, paras. 33-34; Dalton Reply Aff. at 5-6, paras. 9-10; Oakley Reply Aff. at 4, para. 8.)

[78] *See* JUA, Art. VII.K.1 at 7-8 (describing mechanism for "Exhibit B revisions" "based on the percentage change as shown in Handy Whitman Index and computed by comparing the present year July figure for FERC account 364 to the previous year July figure for FERC account 364.").

agree upon such revision." [79] But the fact that the JUA authorizes "actual cost" billing when a party objects to a proposed revision of the Exhibit B scheduled costs based on the Handy Whitman Index "and the parties fail to agree upon such revision" undercuts AT&T's argument that scheduled and actual costs are, or should be, one and the same. [80] Further, because the JUA authorizes "actual cost" billing if the *recipient* of a proposed revision objects (thus leading to a "fail[ure] to agree" by the parties), AT&T may have no incentive to object to an increase in the scheduled costs, as proposed by Duke based on the Handy Whitman Index, if actual cost billing would result in higher costs. [81] We thus are not persuaded that the scheduled costs for pole replacements listed on JUA Exhibit B are the same as the actual costs that Duke bills competitive LEC and cable attachers for pole replacement.

26. Further, AT&T criticizes Duke's {[ ]} average cost estimate as "unsourced and uncorroborated." [82] AT&T also argues that the {[ ]}figure is "misleading" insofar as it reflects "the combined costs to replace the pole *and* complete additional transfer work after the pole is replaced" whereas the scheduled cost in JUA Exhibit B includes only "the replacement cost for the pole itself." [83] Because the record does not indicate the extent to which equipment transfer costs are included in Duke's average cost estimate or in the Exhibit B scheduled cost for a pole replacement, we make no finding with respect to Duke's claim that the average cost advantage to AT&T is {[ ]}.

27. We find, however, that the mere fact that the JUA provides AT&T with a list of scheduled pole replacement costs, obviating the need to wait for an estimate or invoice to learn the cost of each pole replacement job, provides AT&T with a budgeting and planning advantage over its competitors whose licensing agreements do not contain scheduled costs. [84] Thus, the use of scheduled cost billing for pole replacements, as referenced in JUA Articles VII.F.4 and VII.F.6.b, and set forth in JUA Exhibit B, is among the benefits that give AT&T material advantages relative to competitive LEC and cable attachers on the same poles.

28. *No Additional Permitting Fees or Requirements*. AT&T is not required to obtain prior authorization or pay permitting fees when it attaches to Duke's poles. [85] Its competitors must obtain such authorization from Duke and pay a permitting fee for all such attachments. [86]

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[79] *See id*.

[80] *See* JUA, Art. VII.K at 7-8.

[81] *See* JUA, Art. VII.K at 7-8. Although the record indicates that the scheduled costs in JUA Exhibit B have been updated, there is no evidence that either party has objected to any prior updates. *See* Answer, Exh. 5 (containing updated values for JUA Exhibit B Cost Schedule).

[82] *See* Peters Reply Aff. at 21, para. 33.

[83] *See* Dalton Reply Aff. at 5-6, para. 10 (emphasis in original); *see also* AT&T Reply Brief at 5-6 & n.28. AT&T further criticizes Duke's calculation on the asserted ground that the {[ ]}figure represents the scheduled cost of replacing a pole that is 50-foot or less in height whereas the {[ ]} figure appears to represent Duke's "average cost to replace poles of all heights." Reply Legal Analysis at 18-19 & n.96.

[84] *See*, *e.g.*, Duke Supp. Interrog. Resp., Exh. 2, CATV-3, CLEC-1, CLEC-3, CLEC-5, CLEC-6, CLEC-8, CLEC-9, CLEC-12, CLEC-13, CLEC-14, CLEC-16, CLEC-20 at section 3.06; *id.*, CLEC-6 at section 3.6; *id.*, CATV-2, CATV-4, CATV-6, CATV-8, CATV-9, CATV-10, CLEC-4, CLEC-18 at Article 11, Definitions App'x-definition of "actual cost billing;" *id.*, WIRELESS-2, WIRELESS-4, WIRELESS-6 at Sections 1.15, 1.18, 5.3 (actual cost billing provisions).

[85] *See, e.g.*, Answer at 5, 8, paras. 8, 10 & n.11; Freeburn Answer Decl. at 10, para. 20; Reply at 14, para. 8 (conceding that there is no permitting requirement in the JUA, but denying that the absence of such a requirement is an advantage).

[86] *See* Duke Resp. to Interrog. No. 3, Exh. 2, CATV-1 at section 3.01; *id.*, CLEC-2 at sections 1.1, 5.1, 5.3; *id.*, WIRELESS-1 at sections 1.2, 5.1, 5.3; Answer, Exh. 7, CLEC Agreement at sections 1.1, 5.1; Duke Supp. Interrog. (continued….)

29. AT&T does not dispute that Duke's competitive LEC and cable licensees are required to obtain and pay for a permit from Duke before attaching to Duke's poles. It nevertheless contends that there is no "net" benefit to AT&T in avoiding such permitting requirements and fees, given that the JUA requires AT&T to extend to Duke every term and condition for the use of AT&T's poles that Duke provides to AT&T.[87] As Duke notes, however, in addition to avoiding the payment of such fees, Duke's "significantly greater pole ownership" results in "AT&T receiving the great majority of any 'reciprocal' benefits for avoided permitting fees."[88]

30. AT&T further claims that it receives no "competitive" benefit from avoided permitting fees and requirements given that AT&T must compile for its own purposes the same information that must be included on Duke's permitting applications and because AT&T bears pole ownership costs that its competitors do not.[89] Even if AT&T must compile for its own purposes the same information that its competitors include on permit applications, AT&T nevertheless enjoys immediate access to Duke's poles, requires no prior approval from Duke for any planned attachments, and avoids paying fees that competitive attachers pay in connection with Duke's permitting requirements.[90] Thus, the absence of permitting requirements and fees in the JUA are among the benefits that give AT&T material advantages relative to competitive LEC and cable attachers on the same poles.[91]

31. *Lowest position on poles*. The parties' previous joint use agreement reserved to AT&T the lowermost position in the communications space on Duke's poles.[92] The current JUA retained AT&T's right to occupy that position by providing that "all existing Attachments" "shall continue to exist in their current condition" and that there is no requirement for "either party to remove, transfer, or rearrange any such existing Attachments."[93] Thus, AT&T can maintain its position as the lowest attacher

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Resp., Exh. 2, CLEC-4, CLEC-18, WIRELESS-6, CATV-2, CATV-4, CATV-6, CATV-8, CATV-9, CATV-10 at sections 1.2, 7.1; *id.*, CLEC-7, CLEC-11, CLEC-15 at sections 1.2, 6.1; *id.*, CATV-3, CATV-5, CLEC-1, CLEC-3, CLEC-5, CLEC-8, CLEC-9, CLEC-10, CLEC-12, CLEC-13, CLEC-14, CLEC-16, CLEC-17, CLEC-19, CLEC-20 at section 3.01; *id.*, CLEC-6, WIRELESS-3 at section 3.1; *id.*, CATV-7, WIRELESS-5, WIRELESS-7 at sections 1.2, 5.1, 5.3; *id.*, WIRELESS-2 at sections 1.3, 5.1, 5.3, 6.1; *id.*, WIRELESS-4, WIRELESS-6 at sections 1.3, 5.1, 5.3 (obligation to obtain and pay for permit from Duke for all attachments).

[87] Reply at 14, para. 8; AT&T Initial Brief at 10-11.

[88] *See* Metcalfe Answer Decl. at 22, para. 49; *see also* Freeburn Answer Decl. at 10, para. 20. AT&T's claim that avoided permitting fees provide no benefit to AT&T in light of pole ownership costs that AT&T, but not its competitors, must bear, is also unavailing in that it ignores the value of its ownership interest in its own pole network and the significant contribution that other attachers to AT&T's poles make toward AT&T's pole ownership costs in the form of pole attachment rental fees.

[89] *See* AT&T Initial Brief at 10-11; Peters Reply Aff. at 16-17, paras. 28-29.

[90] Though AT&T asserts that it "often must wait longer than its competitors to begin the work it requires," it offers no explanation or support for this assertion. *See* Peters Reply Aff. at 17, para. 28.

[91] *See 2011* Order, 26 FCC Rcd at 5335, para. 216 n.654 (noting that joint use agreements "provide incumbent LECs advantages not afforded to cable operator and competitive LEC attachers, such as . . . no need to obtain advance attachment approval"); *see also 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 the incumbent LEC received under its joint use agreement the avoidance of a requirement to obtain advance approval or pay a permitting fee) (*Verizon Florida*); *Verizon Maryland*, 35 FCC Rcd at 13616, para. 20 (same); *AT&T v. FPL I*, 35 FCC at 5328, para. 14 (same).

[92] *See* 1977 JUA, Art. I.A.2.

[93] *See* JUA, Art. III.B at 3 ("[A]ll existing Attachments to poles jointly used by the parties shall continue to exist in their current condition as of the date of this Agreement and nothing contained herein shall be construed as requiring either party to remove, transfer, or rearrange any such existing Attachments.").

for all such attachments on the parties' joint use poles. Indeed, AT&T concedes that it "is typically the lowest attacher on the pole[.]"[94] AT&T's competitors, on the other hand, must attach above AT&T's space.

32. 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."[95] AT&T alleges only disadvantages related to its lowest position in the communications space on Duke's poles,[96] while acknowledging none of the advantages commonly associated with that position.[97]

33. Based on our review of the record, we find that the significant competitive benefits to AT&T resulting from its lowest position with respect to "existing" attachments outweigh the alleged disadvantages identified by AT&T.[98] Although the Commission has recognized that a "preferential" position on the pole can be a material advantage,[99] 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."[100] 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."[101] Indeed, AT&T concedes that "consistency in

[94] *See* Peters Reply Aff. at 22, para. 35; *see also* AT&T Initial Brief at 8 (describing "the typical location of AT&T's facilities" as the lowest position on the pole).

[95] Freeburn Answer Decl. at 9, para. 19.

[96] *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.

[97] *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").

[98] *See* JUA, Art. III.B at 3. Moreover, the parties' desire to avoid the "physical damage that would result if facilities crisscrossed mid-span[,]" *see* AT&T Initial Brief at 8, makes it unlikely that Duke would seek to change the position of future AT&T attachments (i.e., those made after the January 1, 2001 effective date of the JUA).

[99] *2018 Order*, 33 FCC Rcd at 7771, para. 128 (brackets omitted).

[100] AT&T Initial Brief at 7-8.

[101] Duke Reply Brief at 5 & n.25; *see also* Freeburn Answer Decl. at 10, para. 19 (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 8 & n.32 (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

(continued….)

placement of facilities" allows "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." [102] Thus, the record reflects that, unlike its competitors, AT&T's position on the pole is by choice and that that choice has benefited AT&T by providing a consistent and predictable space on each pole in a position of its choosing. 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. [103]

34. *Other Arguments.* Duke asserts that AT&T is not required to pay for inspections that Duke performs in connection with AT&T's attachments, but its competitive LEC and cable company licensees are required to pay Duke for such inspections. [104] AT&T counters that AT&T completes its own make-ready, engineering, inspections, and survey work. [105] 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. [106]

(Continued from previous page)
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 Brief at 8; *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.

[102] AT&T Initial Brief at 8.

[103] *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 12, para. 22. 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 12, para. 23 (citing Complaint, Exh. 18), 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* Peters Reply Aff. at 22, para. 35, it concedes that that is its "typical" position. *See* AT&T Initial Brief at 8.

[104] Answer at 17, para. 14.

[105] Peters Reply Aff. at 19, para. 30 ("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").

[106] *See generally* Peters Reply Aff. at 17-19, paras. 29-30 & n.58 (asserting that the first time AT&T had heard that Duke "double-checks" AT&T's inspection work was in reading the declaration of Duke's parent corporation's Joint Use Manager, Mr. Freeburn).

35. 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. [107] 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*.

C. The JUA Is Subject to the *2011 Order* for the Period Prior to January 1, 2020

36. The *2011 Order* provides the relevant standard for reviewing the JUA rates for the period prior to the JUA's renewal on January 1, 2020. [108] 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. [109] AT&T has met that threshold for review here.

37. *First*, the JUA has no fixed termination date and, even if terminated by either party 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 XVII of the JUA provides that termination only affects "the right to make additional Attachments" and "shall not … abrogate or terminate the right of either party to maintain the existing Attachments on the poles . . . and all such existing Attachments shall continue pursuant to and in accordance with the terms of [the JUA]." [110] 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.'" [111] *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. [112] *Third*, we find that Duke's nearly five-to-one pole ownership advantage places AT&T in "an inferior bargaining position." [113] *Finally*, the record reflects that protracted negotiations between the parties have

[107] 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.

[108] *Accord Verizon Maryland*, 35 FCC Rcd at 13616, para. 22; *AT&T v. DEF*, DA 21-1008, at 17, para. 34.

[109] *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 *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").

[110] JUA, Art. XVII.B at 12.

[111] *See 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. *See AT&T v. DEF*, DA 21-1008, at 17, para. 35 & n.116.

[112] *See* JUA, Art. XIII.E at 11 (stating that "[i]f the parties fail to agree upon a new pricing methodology . . . the existing methodology will remain in force"); Complaint at 18, para. 26; Answer at 44, para. 26. *See also infra* Part III.D (finding that the JUA rates are unjust and unreasonable).

[113] *See 2011 Order*, 26 FCC Rcd at 5327, para. 199; *see also* Joint Statement at 3, Stipulated Fact No. 7 (stating that Duke and AT&T own, respectively, 148,064 (83%) and 30,598 (17%) of the joint use poles).

failed to produce a mutually agreeable, just and reasonable rate. [114] Accordingly, we find that AT&T has demonstrated that it "genuinely lacks the ability to terminate [the JUA] and obtain a new arrangement." [115]

38. 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. [116] While conceding its nearly five-to-one pole ownership advantage, Duke nevertheless claims that it is not in a superior bargaining position to AT&T. [117] 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. [118] 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. [119] 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. [120] 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. [121] 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. [122] The disparity in pole ownership is even greater in this case. Therefore, consistent with these precedents, we conclude that Duke's substantial five-to-one pole ownership advantage, in combination with a relatively

[114] *See* Joint Statement at 6-7, Stipulated Fact Nos. 22-29 (negotiations began in May 2019, approximately 15 months prior to filing of the Complaint and involved face-to-face meetings, telephone calls, and correspondence); *see also* Reply Legal Analysis at 26-28.

[115] *2011 Order*, 26 FCC Rcd at 5336, para. 216.

[116] *See* Answer at 42-46, paras. 26-27.

[117] *See* Joint Statement at 3, Stipulated Fact No. 7; *see also* Answer at 42, para. 26 ("the notion that relative pole ownership affects the ability to negotiate is not merely incorrect—it is a foundational error").

[118] Answer at 42, para. 26.

[119] Answer at 42-44, para. 26 & n.117 (arguing that bargaining leverage might exist "where one party can force the other off its poles" but "it does not exist here").

[120] *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").

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

[122] *See 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).

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. [123]

39. Duke also disputes AT&T's claim that AT&T genuinely lacks the ability to terminate the JUA and obtain a new arrangement through its negotiations with Duke. [124] 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. [125] 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. [126] First, Duke has not shown that removing AT&T attachments would help AT&T obtain a new arrangement with Duke containing reasonable rates. [127] 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. [128] Instead, "where incumbent LECs have . . . access" to a utility's poles, "they are entitled to rates, terms and conditions that are 'just and reasonable.'" [129] Duke's proposed

[123] 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 42-43, para. 26. Duke provides no support for this assertion. Because there is no Commission precedent that requires us to find for Duke regarding these points in order to establish the inference we have drawn here, we reject this claim. Further, we see no 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 43, para. 26 & nn.118-119 (quoting Answer, Exh. 6 ({[ ]}at 17). As AT&T asserts, {[} Reply Legal Analysis at 25 & n.131. 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 unfair bargaining leverage or constitute an admission by AT&T that the cost sharing formula in the JUA is fair. *See* Answer at 33-34, 43, paras. 23, 26; Freeburn Answer Decl. at 13, para. 27. In particular, AT&T's ministerial act of certifying the accuracy 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).

[124] Answer at 46, para. 27.

[125] Joint Statement at 6-7, Stipulated Fact Nos. 22-30; Answer at 45-46, 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 27. 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.

[126] *See, e.g.*, Answer at 44, 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 pay an annual rate on those poles.").

[127] *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).

[128] Reply Legal Analysis at 26 ("They need not disrupt their network or rebuild a duplicative one in order to obtain the just and reasonable rates required by law.").

[129] *2011 Order*, 26 FCC Rcd at 5328, para. 202.

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 nearly five times the facilities as Duke by virtue of the five-to-one disparity in the parties' pole ownership, making AT&T's alternative to the JUA far costlier. [130] Thus, the disparity in pole ownership makes terminating the JUA economically unfeasible, [131] and reinforces Duke's ability "to perpetuate the status quo and refuse reductions to its unjust and unreasonable rates." [132]

40. 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." [133] 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 January 1, 2020.

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

41. 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 attachers on the same poles. [134] 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. [135] Because, as we have found above, AT&T receives material advantages that are not afforded to competitive LEC or cable attachers on the same poles, we conclude that AT&T has not

[130] 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 total annualized cost to AT&T would be {[ ]} (representing the cost to replace the 148,064 Duke poles to which AT&T is attached), while the annualized cost to Duke would be {[ ]} (representing the cost to replace the 30,598 AT&T poles to which Duke is attached). *See* Metcalfe Answer Decl. at 9-10, paras. 18-20 & Exh. E-2 at 1.

[131] Duke's pole ownership advantage also makes the option of terminating the JUA and replicating Duke's 148,000 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 5329-30, para. 15 (identifying factors, including environmental and zoning restrictions, that make it highly impractical to build a duplicate pole network); *AT&T v. DEF*, DA 21-1008, at 19-20, para. 37 & n.136; *see also* Peters Reply Aff. at 8-9, paras. 12-13.

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

[133] *2011 Order*, 26 FCC Rcd at 5335-36, para. 216.

[134] *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).

[135] *See* 47 CFR § 1.1424 (2018); *2011 Order*, 26 FCC Rcd at 5336-37, paras. 218 (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); *AT&T v. DEF*, DA 21-1008, at 20, para. 39.

demonstrated that it is similarly situated to such other attachers. [136] AT&T thus is not entitled to the New Telecom Rate.

42. Nevertheless, however, we find that AT&T has shown that the material advantages it receives under the JUA do not justify the JUA 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 companies to attach to AT&T's poles. [137] In particular, we find that the rates that AT&T and Duke pay under the JUA are disproportionate to the amount of space each uses on the poles. The rate AT&T pays Duke under the JUA is about 75 percent of the rate Duke pays AT&T, even though Duke's attachments occupy much more space on the poles. [138] Duke admits that its attachments generally occupy 8 feet of space on a pole, [139] while AT&T presumptively occupies only one foot. [140] Thus, 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. [141] Further, the rents Duke collects from third party attachers on the same poles has no impact on the rate AT&T pays under the JUA; thus, these third party rents effectively reduce the percentage of the pole cost that Duke pays, but do not reduce the percentage that AT&T pays. [142] These facts lead us to conclude that AT&T has made a *prima facie* case that the JUA rates are unjust and unreasonable.

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[136] *See supra* Part III.B (listing material advantages). We therefore reject AT&T's assertion that it is entitled to the New Telecom Rate because "[Duke] has not identified any material advantages that AT&T enjoys over its competitors" on the same poles. Reply Legal Analysis at 28. Further, for the reasons stated in *AT&T v. DEF*, we reject AT&T's suggestion that the burdens and presumptions in the *2018 Order* should apply to the entire timeframe at issue in the Complaint. *See* AT&T Reply Brief at 2; *AT&T v. DEF*, DA 21-1008, at 20 n.140.

[137] 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 16, para. 24. *See also* Joint Statement at 4-5, Stipulated Fact Nos. 17-18, 21 (for the years 2017 through 2019, Duke charged AT&T rates between {[ ]} per pole and during the same years, Duke charged competitive LEC and cable company attachers rates between {[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 ranged from {[ ]} per pole in North Carolina and from {[ ]} per pole in South Carolina. *See* AT&T Initial Brief at 5 n.20; Complaint, Exh. A, Affidavit of Daniel P. Rhinehart at 2, para. 2 n.1 (Rhinehart Complaint Aff.); *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.").

[138] For example, in 2019, AT&T paid rent of {[ ]} per pole, whereas Duke paid rent of {[ ]} per pole. *See* Complaint, Exh. B, Affidavit of Dianne Miller at 4, para. 8 (Miller Complaint Aff.); Dippon Compl. Aff. at 17, para. 30. AT&T calculates that the rent it pays Duke is {[ ]} of Duke's annual pole cost. *See* Complaint at 17 n.65; Dippon Compl. Aff. at 13-14, 17-18, paras. 23 & n.42, 30-32.

[139] Duke's witness stated that "under [Duke]'s typical horizontal three-phase construction" Duke "requires 96 inches (8') feet from the top of the pole to the neutral." Burlison Answer Decl. at 5, para. 14. This is consistent with the terms of the 1977 JUA, which allocated {[ ]} of space on joint use poles to Duke's predecessor. *See* 1977 JUA, Art. I.A.1.

[140] As discussed below, Duke has not provided reliable evidence overcoming the presumption in 47 CFR § 1.1410 that AT&T's attachments occupy one foot of space on the poles, and we reject Duke's argument that the communications safety space should be attributed to AT&T. *See infra* Section III.E (discussing space occupied input and proper allocation of safety space in calculating Old Telecom Rate).

[141] *See 2011 Order*, 26 FCC Rcd at 5337, para. 218 n.662; *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).

[142] Dippon Compl. Aff. at 17-18, paras. 31-32.

43. Nor has Duke rebutted that case by showing that the advantages AT&T receives under the JUA justify the rates. [143] 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 either (a) pay make-ready costs to replace nearly every [Duke] pole to which it is attached, or (b) construct an entirely redundant network of poles." [144] 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. [145]

44. 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. [146] *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. [147]

[143] *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."); *AT&T v. DEF*, DA 21-1008, at 21, para. 41.

[144] *See* Freeburn Answer Decl. at 6, para. 12. The hypothetical scenario on which Duke's calculations are based assumes the absence of both the 1977 JUA and the JUA, which was executed in October 2000. *Id*. These calculations would presumably yield a substantially lower value if Duke assumed only the absence of the JUA, given that AT&T was already attached to thousands of Duke poles when the parties executed the JUA in 2000. *See* Peters Reply Aff. at 6, para. 9 (asserting that AT&T was attached to more than 125,000 Duke poles when the parties entered the JUA in 2000).

[145] *See* Duke Initial Brief at 5-6; Metcalfe Answer Decl. at 13-14, para. 30; Answer, Exh. E-4.1.

[146] *See AT&T v. DEF*, DA 21-1008, at 22, para. 42 & n.151 (citing *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[.]").

[147] *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

(continued….)

45. *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. [148] Duke maintains that it "built . . . *and continues to build*" "a network of poles that are much taller and stronger" "to specifically accommodate AT&T[,]" [149] 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." [150] 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 competitive LECs a statutory right of access." [151] For these reasons, we reject Duke's purported valuation of AT&T's guaranteed right of access under the JUA. [152]

46. 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 guaranteed reservation of

(Continued from previous page)
omitted); *AT&T v. DEF*, DA 21-1008, at 22-23, para. 42. 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 13-14 & n.69 (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").

[148] *See, e.g.*, Answer at 20-22, paras. 15-16; Duke Initial Brief at 4-6.

[149] *See* Duke Initial Brief at 4 (emphasis added).

[150] *See* Answer, Exh. B, Declaration of David J. Hatcher at 3, para. 8 (Hatcher Answer Decl.) (Duke "has always installed (and continued to install) poles taller and stronger than would have been necessary to meet [Duke's] service needs alone"); *see also id.* at 7, para. 15; Freeburn Answer Decl. at 5-6, para. 11 (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 in conclusory terms 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.

[151] *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; *AT&T v. DEF*, DA 21-1008, at 22, para. 43. 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 expressly recognizes that in some circumstances the parties may use a joint use pole that is shorter than 40 feet, thus undermining Duke's suggestion that it was required to install 40-foot poles for AT&T's benefit throughout the joint use network. *See* JUA, Article I.K (defining "Standard Joint Use Poles" as 40-foot poles, and stating that "this definition is not intended to preclude the use of joint use poles shorter than" the standard "in locations where such poles will meet the known or anticipated requirements of the parties." *See also* Peters Reply Aff. at 6-7, para. 9 (arguing that a 35-foot pole can accommodate Duke and communications attachers and pointing out that 47 CFR §§ 1.1409(c), 1.1410 assume that a 37.5-foot pole can accommodate communications attachers).

[152] 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; Metcalfe Answer Decl. at 9-10, paras. 18-20; Answer, Exh. E-2. 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.

space and to the designated safety space on the joint use poles as alleged advantages to AT&T. [153] Although we have found that the JUA provides an advantage to AT&T by giving it an option to use as much space as it needs so long as such use does not "unreasonably interfere" with Duke's use of the pole, [154] we find that this advantage does not justify the rate disparity between AT&T and its competitors. As discussed below, Duke has not shown that AT&T actually occupies more than one foot of space. [155] 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. [156] Duke also asserts that the average cost savings to AT&T when Duke replaces a pole at AT&T's request represents a "key benefit[]" to AT&T under the JUA because AT&T "pays scheduled costs for this work rather than actual work order costs." [157] Though we found above that the predictability of scheduled cost billing provides some benefit to AT&T relative to its competitors, we were unable to validate Duke's claimed average cost advantage to AT&T because the record did not indicate the extent to which the scheduled pole replacement costs in the JUA, or the actual costs Duke claims to bill competitive attachers, include equipment transfer costs. [158] 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. [159] 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. [160]

47. For all of these reasons, 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 January 1, 2020 that does not exceed the Old Telecom Rate. [161]

E. Calculating the Old Telecom Rate

48. The parties disagree about several inputs for calculating the Old Telecom Rate. [162] The parties dispute two facts regarding Duke's poles: (1) how much space AT&T occupies, and (2) how many

[153] *See*, *e.g.*, Answer at 5, para. 8 & n.10 (citing JUA, Art. III.A; 1977 JUA, Art. III.A) (noting that under the 1977 JUA and the current JUA, both parties may "utilize as much space as needed 'so long as such use does not unreasonably interfere with the use being made by the other party.'"); *see also id.* at 35-36, para. 25 (arguing that the safety space on joint use poles "inure[s] equally to the parties' benefit").

[154] *See supra* paragraph 20.

[155] *See infra* Part III.E (discussing space occupied input in calculating Old Telecom Rate).

[156] *See*, *e.g.*, Answer at 35-36, 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).

[157] Answer at 29, para. 20 (emphasis omitted).

[158] *See supra* paragraph 26.

[159] *See, e.g.*, JUA, Arts. VII., VIII; Peters Reply Aff. at 17-20, paras. 29-32.

[160] *See id.*; *see also* Reply Legal Analysis at 17-18; Dalton Reply Aff. at 3-4, paras. 6-8.

[161] *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]"); *see also AT&T v. DEF*, DA 21-1008, at 23, para. 45.

[162] AT&T alleges Duke has charged rates averaging {[ ]} times the Old Telecom Rate. Complaint at 15, para. 22.

attachers are on the poles. The parties also dispute the methodology for calculating the net cost of a bare pole and the carrying charge rate in the Old Telecom Rate formula. We resolve these disputes below.

49. Space Occupied by AT&T. The Commission has established a rebuttable presumption of one foot of space occupied.[163] This presumption may be rebutted by "probative direct evidence,"[164] which may include, "[w]here the number of poles is too large, and/or complete inspection impractical … a statistically sound survey."[165] 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.[166]

50. Duke seeks to charge AT&T for approximately {[ ]} feet of space per Duke pole.[167] 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 average space AT&T's attachments actually occupy on the pole.[168] 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 {[ ]}.[169] Duke subtracts the Commission's presumed 18-foot minimum ground clearance from the {[ ]} feet average height of AT&T's attachments to arrive at a space occupied figure of {[ ]} feet.[170] Duke's space calculation has several flaws.

51. First, as explained in *AT&T v. DEF*, because AT&T's attachments do not occupy the safety space, Duke may not charge AT&T for that space.[171] Second, we find that the make-ready survey Duke offers to support the {[ ]} feet figure does not provide reliable data regarding the physical space that AT&T occupies on Duke's poles. Like the make-ready survey data addressed in *AT&T v. DEF*, the survey Duke relies on here does not provide a representative, random sample of Duke poles with AT&T attachments distributed throughout the Duke territory with AT&T attachments.[172] Rather, the data encompasses {[ ]} Duke poles with AT&T attachments that were the subject of make-ready surveys between 2019 and 2020.[173] Because the data comes from make-ready surveys, it tends to provide

[163] *See* 47 CFR § 1.1410. *See also* 47 CFR § 1.1406(d)(2) (calculating new telecom rates based on "Space Occupied"); 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").

[164] *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).

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

[166] *See* 47 CFR § 1.1410; *AT&T v. DEF*, DA 21-1008, at 24-25, para. 47. *See also* Rhinehart Complaint Aff. at 3, para. 6; AT&T Initial Brief at 17-20; AT&T Reply Brief at 11.

[167] Answer at 13-14, para. 12; Duke Initial Brief at 19-22, 31.

[168] Answer at 13, para. 12.

[169] Answer at 13, para. 12; Freeburn Answer Decl. at 4, 6-7 paras. 9, 13.

[170] Freeburn Answer Decl. at 4, para. 9

[171] *See AT&T v. DEF*, DA 21-1008, at 25, para. 49; *see also 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"); *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)).

[172] *AT&T v. DEF*, DA 21-1008, at 26-27, para. 50.

[173] Freeburn Answer Decl. at 6-7, para. 13; DEP Reply Brief at 8-9.

information from lines of adjacent poles in places where pole attachment build-out projects were active, rather than information from a random sample of poles with AT&T attachments in the territory covered by the JUA. [174] We therefore cannot rely on this data to determine the height of AT&T's attachments or the space the attachments occupy on Duke's poles. [175] For all of these reasons, we find that Duke has failed to rebut the one-foot presumption.

52. Average number of attachers. Calculating the Old Telecom Rate requires a determination of the average number of attachers per pole. [176] The Commission has established rebuttable presumptions of three or five attachers (for rural and urban areas, respectively). [177] As with the one-foot space presumption, the presumption as to number of attachers may be rebutted by "probative direct evidence," [178] including "a statistically sound survey." [179]

53. We accept Duke's average number of attaching entities of {[} because this figure is based on an audit of all of the utility's poles to which the incumbent LEC is attached. [180] AT&T argues that Duke's data should be rejected because Duke produced an inaccurate table summarizing the data. [181] AT&T does not, however, explain how any alleged errors in the table would affect the {[ ]} figure. Further, although Duke provided AT&T all of the underlying data supporting this table, AT&T did not provide an alternative calculation based on the data. [182] We thus are unpersuaded by AT&T's claim that Duke's data is unreliable. Accordingly, we find that Duke has rebutted the presumption and we accept Duke's {[ ]} average attacher figure.

54. Cost Inputs. The parties disagree on the methodology for calculating the net cost of a bare pole and the carrying charge rate in the Old Telecom Rate formula. In particular, the parties disagree as to the gross plant investment used as an input in the denominator of the taxes and administrative elements of the carrying charge rate. [183] They also disagree as to gross plant investment as used to calculate the net cost of a bare pole, and the maintenance and depreciation elements in the Old Telecom Rate formula. [184] As explained below, we accept Duke's use of a gross plant investment figure that includes nuclear fuel, materials, and assemblies as gross plant investment in the denominator of the taxes

[174] *See* AT&T Initial Brief at 12-14, Exhs. 5-6; AT&T Reply Brief at 13, Exh. 1.

[175] *See AT&T v. DEF*, DA 21-1008, at 26-27, para. 50.

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

[177] *See* 47 CFR § 1.1409(c). AT&T states that the urban presumption of five attaching entities applies because the parties' service areas include service areas with a population greater than 50,000. Rhinehart Complaint Aff. at 3-4, para. 7 ("The use of the urbanized area presumption of 5 attaching entities is appropriate because the parties' overlapping service areas include Raleigh, North Carolina and Florence County, South Carolina, each of which is an urbanized area with a population greater than 50,000.").

[178] *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.

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

[180] *See AT&T v. DEF*, DA 21-1008, at 26-27, para. 52; *see also* Duke Initial Brief at 22; Duke Reply Brief at 13-15.

[181] AT&T Initial Brief at 20-22.

[182] Duke Reply Brief at 14-15.

[183] Duke Initial Brief, Exh. B (Disputed Telecom Rate Inputs).

[184] *See id*. Accumulated deferred income taxes are not reported at a level lower than the utility's electric operations on FERC Form 1 and thus must be allocated. The Commission's pole attachment formula does not specify how to allocate accumulated deferred income taxes.

element. We also find that the gross plant investment figure should be based on plant in service, in particular, including nuclear fuel, materials, and assemblies in service, and that gross plant in service including these nuclear fuel plant items should be used consistently throughout the Old Telecom Rate formula to calculate the net cost of a bare pole and the depreciation, maintenance, administrative, and taxes elements.

55. *Use of Gross Plant Investment Including Nuclear Fuel, Materials, and Assemblies in the Denominator of the Taxes Element and Throughout the Old Telecom Rate Formula*. As explained in *AT&T v. DEF*, the denominator for Commission's tax element formula does not specify a FERC Form 1 account for gross plant investment.[185] We accept Duke's calculation in the denominator of the taxes element here because it reasonably includes nuclear fuel, materials, and assemblies as part of its gross plant investment in the denominator (along with Duke's appropriate use of accumulated amortization relative to nuclear fuel assemblies). This allows consistent treatment of denominator and numerator because, as Duke explains, deferred income tax expense attributable to these nuclear fuel plant items is reflected in the numerator (through Commission-prescribed accounts 410.1 and 411.1), and accumulated deferred income taxes attributable to these items are reflected in the denominator (through Commission-prescribed account 282).[186] AT&T incorrectly asserts that because this expense is not included on Duke's FERC Form 1 as gross plant investment, it cannot be included in the denominator here. But as explained in *AT&T v. DEF*, the mathematical expression for the taxes element (and the administrative element) in the Commission's Old Telecom Rate formula for poles owned by an electric utility does not specify a particular FERC Form 1 account for gross plant investment.[187] Moreover, nuclear fuel, materials, and assemblies (recorded in accounts 120.2, 120.3, 120.4, and 102.6) are in fact reflected on FERC Form 1.[188] Accordingly, we find that when the tax element as Duke calculates here is applied to net pole investment, the resulting annual cost of a pole more accurately reflects the effective tax rate for Duke as a whole, and we therefore accept Duke's methodology as to including nuclear fuel, materials, and assemblies.

56. We agree with AT&T, however, that one definition of gross plant investment should be used throughout the Old Telecom formula, and Duke has not done so.[189] We therefore find that the denominator of the administrative element should be calculated in the same manner and thus should be equal to the denominator of the taxes element to be consistent as to the use of gross plant investment. For the same reason, we find that the allocator used to allocate accumulated deferred income taxes to poles in order to calculate (a) the net cost of a bare pole and (b) the denominator of the depreciation element should be the ratio of gross pole investment to gross plant investment including nuclear fuel, materials, and assemblies. And we find that the allocator used to allocate accumulated deferred income taxes to poles, overhead conductors and devices, and distribution-related services to calculate the denominator of the maintenance element should be the ratio of gross pole investment in poles, overhead conductors and

[185] *AT&T v. DEF*, DA 21-1008, at 27, para. 55.

[186] Answer, Exh. D, Declaration of Dana M. Harrington, at 6 and Exh. D-3 (Harrington Answer Decl.); Duke Initial Brief at 17-18. Duke nets accumulated amortization of nuclear fuel assemblies (recorded in account 102.5) from nuclear fuel, materials, and assemblies recorded in accounts (120.2, 120.3, 120.4, and 102.6) as part of its calculation of the denominator of the taxes element. It nets depreciation and amortization related to plant in service (other than nuclear fuel, materials, and assemblies) from plant in service (other than these nuclear fuel items). It adds these two net amounts and then subtracts accumulated deferred income taxes to complete the denominator. Duke Initial Brief at 17-18.

[187] *AT&T v. DEF*, DA 21-1008, at 28, para. 55.

[188] Duke's calculation of the denominator reflects gross investment in nuclear fuel, materials, and assemblies recorded on FERC Form 1 at p. 110, line 8, 9, 10, and 11 column (c), and amortization attributable to these items recorded on FERC Form 1 at p. 110 line 12, column (c). Harrington Answer Decl., Exh. D-3 at 2.

[189] AT&T Initial Brief at 23.

devices, and distribution-related services (recorded in accounts 364, 365, and 369) to gross plant investment including nuclear fuel, materials, and assemblies, again to be consistent as to the use of gross plant investment.

57. *Use of Gross Plant Investment in Service in the Denominator of the Administrative and Taxes Elements and to Allocate Accumulated Deferred Income Taxes to Calculate the Net Cost of a Bare Pole and the Depreciation and Maintenance Elements*. For the same reasons explained in *AT&T v. DEF*, we accept Duke's use of gross plant investment in service, in particular, in (a) the denominator of the administrative and taxes elements (along with Duke's appropriate use of accumulated depreciation and amortization relative to plant in service in the denominators of these elements) and (b) the denominators of the ratios used to allocate accumulated deferred income taxes to calculate the net cost of a bare pole and the denominators of the depreciation and maintenance elements. [190] As in *AT&T v. DEF*, AT&T argues here that Duke improperly excludes portions of plant investment, including plant leased to others, held for future use, construction work in progress, and acquisition adjustments. [191] The Commission in *AT&T v. DEF*, however, accepted the electric utility's methodology because the administrative and taxes elements in the Commission's Old Telecom Rate formula for poles owned by an incumbent LEC specify a Part 32 account (Account 2001 – Telecommunications plant in service) for the gross plant investment input and that account is limited to plant in service. [192] AT&T provides no basis for departing from the Commission's rationale in *AT&T v. DEF*, 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 is Three Years

58. 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." [193] 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." [194] 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. [195] 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. [196]

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[190] *AT&T v. DEF*, DA 21-1008, at 28-29, para.55.

[191] *See id*. at 28, para. 55; AT&T Initial Brief at 22. AT&T's expert argues, without support or explanation, for including these portions of plant investment because this would be consistent with North Carolina and South Carolina ratemaking. Rhinehart Reply Aff. at 5, n.20 (citing as support, "my team's research"). Without further explanation, we are unable to credit this argument, which AT&T's expert concludes by acknowledging that the "difference in ultimate rates [between the parties' positions is] minimal." *Id.* at 6, para. 8; *see also* Duke Initial Brief at 17.

[192] *AT&T v. DEF*, DA 21-1008, at 28, para. 55 & n. 198 (citing *Amendment of the Commission's Rules and Policies Concerning Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd at 12175 (App. E-1)).

[193] 47 CFR § 1.1407(a).

[194] 47 CFR § 1.1407(a)(3).

[195] *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.

[196] *See Verizon Maryland*, 35 FCC Rcd at 13626-28, para. 42 (application of a state limitations period is appropriate in Commission pole attachment complaint proceedings because "they involve utility poles affixed to real property

(continued….)

59. In this case, the poles at issue are located in two states: North Carolina and South Carolina. [197] The Commission has 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." [198] Applying this precedent, we find that the most closely analogous state statutes of limitations here are for actions involving a breach of contract. Thus, in North Carolina, the most analogous limitations period is for an action "[u]pon a contract, obligation or liability arising out of a contract[,]" and, in South Carolina, the comparable limitations period is for an action "upon a contract, obligation, or liability, express or implied." [199] The limitations period for breach of contract actions in both states is three years. [200] We therefore find that this action is governed by a three-year statute of limitations.

60. For the same reasons discussed in *AT&T v. DEF*, we reject Duke's argument that we should instead apply the two-year limitations period in section 415(c) of the Act which governs a "complaint filed with the Commission against carriers" for recovery of "overcharges" assessed under a tariff. [201] As in *AT&T v. DEF*, Duke here fails to show that application of section 415(c) is warranted under a narrow exception to the borrowing rule that allows application of a federal, rather than a state, statute of limitations where the federal statute "provides a closer analogy than available state statutes and

(Continued from previous page)
located in particular states" that are subject to laws and regulations at the state and local level"); *see also AT&T v. FPL II*, 36 FCC Rcd at 256, para. 10 & n.25.

[197] Because the applicable statute of limitations is three years in both North Carolina and South Carolina, as explained below, we do not need to address a situation involving different state statutes of limitation for different poles subject to the same agreement.

[198] *See Verizon Maryland*, 35 FCC Rcd at 13626-27, para. 43 & n.155 (applying Maryland statute of limitations governing breach of contract actions to pole attachment complaint challenging rates in a joint use agreement) (citing *Ala. Cable Telecomms. Ass'n v. Ala. Power Co.*, Order, 16 FCC Rcd 12209, 12217, para. 18 (2001)); *see also AT&T v. FPL II*, 36 FCC Rcd at 256, para. 10 & n.26 (applying Florida's five-year limitations period applicable to a "legal or equitable action on a contract" to a pole attachment complaint challenging rates in joint use agreement covering poles located in Florida); *AT&T v. DEF*, DA 21-1008, at 28-29, para. 57 (same).

[199] *See* N.C. Gen. Stat. § 1-52(1); S.C. Code Ann. § 15-3-530(1). For the reasons explained in *AT&T v. DEF*, we reject Duke's argument that application of a state 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.'" *See* Answer at 54, para. 32 & n.150; *AT&T v. DEF*, DA 21-1008, at 29, para. 58. We also reject Duke's argument that even if AT&T's cause of action could be construed as sounding in contract—which Duke disputes—the most analogous cause of action is one to rescind a contract. *See* Answer at 53-54, para. 32 & n.148. We do not agree that AT&T's complaint here is analogous to an action for recission. AT&T's complaint 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.

[200] *See* N.C. Gen. Stat. § 1-52(1); S.C. Code Ann. § 15-3-530(1). Duke's suggestion that AT&T's claim for a refund here is time-barred under the relevant state three-year limitations period for contract actions because it accrued no later than the July 12, 2011 effective date of the *2011 Order* is unpersuasive. Answer at 54, para. 32 & n.148. Even assuming that state claim accrual rules apply, a finding we do not make here, Duke fails to cite a single 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 three years before.

[201] *AT&T v. DEF*, DA 21-1008, at 30-31, paras. 60-61. *See also* 47 U.S.C. § 415(c); *id.* at § 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.").

when the federal policies at stake and the practicalities of litigation" make the federal statute "significantly more appropriate" than the state statute. [202]

61. Duke asserts additional grounds to limit or bar AT&T's recovery of a refund. None have merit. Duke asserts the equitable defenses of estoppel, [203] unjust enrichment, [204] waiver, [205] and laches [206] as well as other affirmative defenses, including accord and satisfaction, [207] and ratification. [208] 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. [209] Further, Duke has failed to show prejudice, which is an essential element of its equitable defenses. [210] 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. [211] 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. [212]

[202] *AT&T v. DEF*, DA 21-1008, at 30, para. 60 & nn.215-16 (citing *Verizon Maryland*, 35 FCC Rcd at 13626, para. 41 and *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 356 (1991)).

[203] Answer at 51-52, para. 32; *id*. at 64 (Affirmative Defense 1).

[204] Answer at 64 (Affirmative Defense 8).

[205] Answer at 64 (Affirmative Defenses 2, 7).

[206] Answer at 65 (Affirmative Defense 14).

[207] Answer at 64 (Affirmative Defense 5).

[208] Answer at 64 (Affirmative Defense 6).

[209] *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 at 12336, para. 52 & n.154 (2001) (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)); *AT&T v. DEF*, DA 21-1008, at 31, para. 62 & n.229.

[210] *See*, *e.g., AT&T v. DEF*, DA 21-1008, at 32, para. 62; *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, para. 52 (2001) ("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)). *See also AT&T v. DEF*, DA 21-1008, at 31, para. 62 & n.230.

[211] Answer at 51-52, para. 32; *id*. at 64 (Affirmative Defenses 1, 2 and 7).

[212] *See AT&T v. FPL II*, 36 FCC Rcd at 258, para. 14; *see also AT&T v. DEF*, DA 21-1008, at 31, para. 62 & n.232.

62. 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 [213] or exercise its authority under rule 1.3 to suspend or waive the applicability of rule 1.1413 (and its predecessor rule). [214] 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. [215] 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. [216] For similar reasons, we reject Duke's request, under section 1.3 of the rules, for a waiver or suspension of rule 1.1413. [217] Rule 1.3 requires a showing of "good cause." [218] Duke's request for waiver or suspension is not supported by the showing of good cause that rule 1.3 requires. [219] 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. [220]

63. In sum, we apply the most closely analogous statute of limitations borrowed from state law [221] and conclude that the applicable limitations period under Commission rule section 1.1407(a)(3) is three years. AT&T is entitled to a refund for the period beginning September 1, 2017, which is three years from the date it filed its Complaint.

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[213] Answer at 59-60, para. 35 & n.163; *id*. at 2, 9-10 paras. 4, 10 & n.26; *id.* at 64-65 (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 59, para. 35.

[214] Answer at 59-60, para. 35 and n.164 (citing 47 CFR §§ 1.3 and 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.

[215] *See supra* at Parts III.B and III.D; *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; *AT&T v. DEF*, DA 21-1008, at 32, para. 63 & n.235.

[216] *See 2011 Pole Attachment Order* 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."); *AT&T v. DEF*, DA 21-1008, at 32, para. 63 & n.236.

[217] Answer at 59-60, para. 35 & n.164.

[218] 47 CFR § 1.3.

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

[220] *See AT&T v. DEF*, DA 21-1008, at 32, para. 63.

[221] *See* N.C. Gen. Stat. § 1-52(1); S.C. Code Ann. § 15-3-530(1).

IV. ORDERING CLAUSES

64. 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:

(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 three 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 {[ ]}
CATV-7 {[ ]}
CATV-8 {[ ]}
CATV-9 {[}
CATV-10 {[ ]}
CLEC-1 {[ ]}
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Wireless-1 {[ ]}
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Wireless-6 {[ ]}
Wireless-7 {[}