

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

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

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 2021

Released: January 14, 2021

By the Chief, Enforcement Bureau:

1. In this Memorandum Opinion and Order, we take further action to resolve the Complaint filed by BellSouth Telecommunications, LLC d/b/a AT&T Florida, an incumbent local exchange carrier (LEC) in Florida (AT&T), against Florida Power and Light Company, an electric utility (FPL).¹ In its Complaint, AT&T alleges that the rate it pays to attach its facilities to FPL's electric poles is unjust and unreasonable under Commission rules and orders issued pursuant to section 224 of the Communications Act of 1934, as amended (Act).² A prior order in this proceeding granted the Complaint in part, finding that AT&T was entitled to a reduced rate for the period ending December 31, 2018 (*Bureau Order*).³ The parties were not able to settle the case based on the guidance in the *Bureau Order*. Consequently, we now resolve the parties' disputes as to proper calculation of the reduced rate and find that AT&T is entitled to a refund of any overpayments for the period July 1, 2014 to December 31, 2018.

I. 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 Section 224(e) establishes a formula to calculate the maximum attachment rate to be paid by competitive LECs.⁵

¹ See Pole Attachment Complaint, Proceeding No. 19-187 (filed July 1, 2019); Amended Pole Attachment Complaint, Proceeding No. 19-187 (filed July 12, 2019) (Complaint).

² 47 U.S.C. § 224.

³ See *BellSouth Telecommunications, LLC v. Florida Power & Light*, Memorandum Opinion and Order, 35 FCC Rcd 5321 (EB 2020) (*Bureau Order*).

⁴ 47 U.S.C. § 224(b)(1).

⁵ 47 U.S.C. § 224(e).

3. In its *2011 Pole Attachment Order*, the Commission reinterpreted the formula for calculating the section 224(e) competitive LEC attachment rate so that the resulting rate (New Telecom Rate) is lower than the competitive LEC rate that applied under earlier Commission orders (Old Telecom Rate).⁶ The Commission also concluded that section 224 authorized it to regulate the rates, terms, and conditions of incumbent LEC pole attachments, but emphasized that it would do so in a way that recognized the differences between incumbent LECs and other attachers.⁷ The Commission noted that incumbent LECs often obtained access to electric utility poles through “long-standing” joint use agreements that provide the incumbent LEC advantages not found in competitive LEC or cable operator attachment agreements.⁸ The Commission decided that it would review the rates, terms, and conditions of joint use agreements entered into before the *2011 Pole Attachment Order* only if the incumbent LEC could show that it was unable to terminate the agreement and “obtain a new arrangement.”⁹ The Commission did not specify the rate that would apply where the incumbent LEC made such a showing. However, it explained that an incumbent LEC should be charged a rate approximating the Old Telecom Rate if its attachment agreement was entered into after the effective date of the *2011 Pole Attachment Order* and provides benefits not afforded cable and competitive LEC attachers.¹⁰

B. Factual Background

4. AT&T and FPL entered into an agreement for the joint use of each other’s poles (JUA) in 1975.¹¹ In March 2018, FPL submitted an invoice for approximately \$9 million for the 2017 pole rental year, which ended December 31, 2017, and in February 2019, FPL submitted an invoice for approximately \$10 million for the 2018 pole rental year. AT&T refused to pay either invoice, asserting that it was entitled to a lower rate under the *2011 Pole Attachment Order*. Citing, *inter alia*, a payment default provision in the JUA, FPL sent AT&T a Notice of Termination on March 25, 2019, stating that it was terminating AT&T’s right to attach to FPL’s existing poles “effective immediately,” and terminating AT&T’s right to attach to new poles effective August 26, 2019.¹²

5. On July 1, 2019, the day it filed its Complaint, AT&T paid the two invoices, though it did not pay interest. On the same day, FPL filed a complaint in Florida state court asserting that its Notice of Termination was valid, that AT&T was in breach of the JUA and asking the court to declare AT&T a trespasser on FPL’s poles. AT&T removed the case to the United States District Court for the Southern District of Florida, which then stayed the proceeding under the doctrine of primary jurisdiction.¹³

⁶ See *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (*2011 Pole Attachment Order*) at 5224, para. 8, *aff’d Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 1183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013).

⁷ *2011 Pole Attachment Order*, 26 FCC Rcd at 5333, para. 214.

⁸ *2011 Pole Attachment Order*, 26 FCC Rcd at 5334, para. 216 & n.651.

⁹ *2011 Pole Attachment Order*, 26 FCC Rcd at 5334, para. 216.

¹⁰ *2011 Pole Attachment Order*, 26 FCC Rcd at 5336, para. 218. The Commission subsequently established a rebuttable presumption that an incumbent LEC that is a party to new or “newly-renewed” joint use agreement is “similarly situated” to competitive LEC attachers and therefore entitled to the same rate (i.e., the New Telecom Rate). See *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*) at 7769, para. 126. Because the *2018 Pole Attachment Order*’s rebuttable presumption became effective on March 11, 2019, it does not apply to the period we address here – July 1, 2014 to December 31, 2018.

¹¹ See *Bureau Order*, 35 FCC Rcd at 5323, para. 5.

¹² See *Bureau Order*, 35 FCC Rcd at 5322, para. 8.

¹³ See *Bureau Order*, 35 FCC Rcd at 5325, para. 9; Amended Answer of Florida Power & Light Company, Proceeding No. 19-187 (filed Mar. 6, 2020) (Answer) at 3, para. 6.

6. In the *Bureau Order*, we granted the Complaint in part, finding that AT&T was entitled to relief under the *2011 Pole Attachment Order*. Specifically, we found that AT&T was unable to end the JUA and obtain a new arrangement and that, although the JUA provided AT&T benefits not afforded other attachers, the rate AT&T paid to attach to FPL's distribution poles was excessive.¹⁴ We concluded that AT&T's rate should be reduced to the Old Telecom Rate, citing the Commission's findings with respect to incumbent LEC agreements entered into after the *2011 Pole Attachment Order*.¹⁵ The *Bureau Order* was limited to the period ending December 31, 2018, which is the end of the 2018 pole rental year, in the belief that its guidance would enable the parties to settle the case.¹⁶ The *Order* explained that, because AT&T and FPL attach to each other's poles, their relationship consists of numerous reciprocal rights and responsibilities, so that their dispute is best resolved by settlement.¹⁷ The *Bureau Order* also did not address the period after 2018 because FPL's Notice of Termination purports to end AT&T's right to attach to existing JUA poles in early 2019. "The validity of the Notice of Termination...is squarely before the district court and is purely a matter of state contract law, as AT&T does not argue that the provision under which FPL gave notice is unjust or unreasonable under section 224 of the Act."¹⁸

7. Approximately a month after release of the *Bureau Order*, the parties informed staff that they were unable resolve their differences.¹⁹ AT&T then filed a second complaint against FPL with the Commission asserting that the JUA provisions invoked by FPL in its Notice of Termination are unjust and unreasonable under section 224 of the Act and requesting that they be amended "effective consistent with the applicable statute of limitations."²⁰

II. DISCUSSION

8. With this Order, we resolve AT&T's claims through December 31, 2018 (the end of the 2018 pole rental year). Resolution of AT&T's post-2018 claims turns on the validity of FPL's Notice of Termination. AT&T's Second Complaint challenges the JUA provisions invoked by FPL in its Notice and asks us to amend them retrospectively. In the unusual circumstances present here, consideration of AT&T's claims for the period after 2018 must wait until, at a minimum, we have addressed the Second Complaint.

A. AT&T is entitled to a refund of overpayments for the period July 1, 2014 to December 31, 2018.

9. 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 "order a refund." The refund "will normally be the difference between the amount paid under the unjust and/or unreasonable rate" and "the

¹⁴ See *Bureau Order*, 35 FCC Rcd at 5326-31, paras. 11-17 (citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5336, para. 218).

¹⁵ *Bureau Order*, 35 FCC Rcd at 5328, para. 14.

¹⁶ *Bureau Order*, 35 FCC Rcd at 5326, para. 10.

¹⁷ *Bureau Order*, 35 FCC Rcd at 5328, para. 14. In particular, any reduction in AT&T's rate further to the *2011* or *2018 Pole Attachment Orders* would require a proportionate reduction in FPL's rate. See *id.* at 5330 n.61 (citations omitted). See also *Verizon Maryland, LLC v. The Potomac Edison Co.*, Memorandum Opinion and Order, 35 FCC Rcd 13607, 13629, para. 51 (2020) (incumbent LEC's entitlement to a reduced rate under the *2011* and *2018 Pole Attachment Orders* also entitles the electric utility to "a proportional reduction in its rate").

¹⁸ *Bureau Order*, 35 FCC Rcd at 5326, para. 10 n.32. The *Bureau Order* also noted that the parties agree that the Notice of Termination terminated the JUA as to new poles. *Id.*

¹⁹ See Joint Status Report, Proceeding No. 19-187 (filed June 19, 2020).

²⁰ Pole Attachment Complaint, Proceeding No. 20-214, Bureau ID Number EB-20-MD-002 (filed July 6, 2020) at 32, para. 58 (Second Complaint). FPL answers that AT&T is engaged in improper claim-splitting and that, in any event, the JUA provisions at issue are not unjust and unreasonable. See Florida Power & Light Company's Answer to the Complaint of Bell Telecommunications, LLC, Proceeding No. 20-214 (filed Oct. 21, 2020).

amount that would have been paid under the rate . . . established by the Commission, plus interest, consistent with the applicable statute of limitations.”²¹ Neither the Act nor Commission rules specifies a limitations period for incumbent LEC pole attachment complaints.²² As a result, the Commission has decided to adopt the federal court practice, applied when adjudicating a federal claim with no federal statute of limitations, of “borrowing” a state statute of limitations.²³ Thus, 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.²⁴

10. Applying Commission precedent to the facts here, we find that we should look to Florida law because this dispute involves poles located in Florida and subject to Florida state and local regulation.²⁵ Further, we agree with AT&T that Florida’s five-year statute of limitations for a “legal or equitable action on a contract” should apply.²⁶ AT&T’s claims are analogous to a breach of contract action because the JUA is an individually-negotiated contract subject to claims for breach of contract under state law.²⁷ In addition, resolution of AT&T’s claims here required us, in the *Bureau Order*, to analyze the JUA’s rates, its term of years and termination provisions (to determine whether AT&T could end the agreement), and numerous other provisions (to determine whether the JUA provides AT&T benefits not afforded other attachers).²⁸

11. FPL does not agree that we should borrow Florida’s contract statute of limitations, arguing that, to the extent AT&T is entitled to a refund, the two-year limitations period in section 415(b)

²¹ 47 CFR § 1.1407(a).

²² The federal four-year catch-all statute of limitations, 28 U.S.C. § 1658(a), “governs court actions, not agency proceedings . . .” *Sandwich Isles Comm’ns, Inc.*, Order on Reconsideration, 34 FCC Rcd 577, 626, para. 131 (2019).

²³ See *Verizon Maryland*, 35 FCC Rcd at 13626, paras. 41-42 (citing *Reed v. Transp. Union*, 488 U.S. 319, 323-34 (1989) (claim under federal statute prohibiting unions from restricting members’ speech on union matters is analogous to state personal injury actions and therefore is governed by state limitations statutes governing such actions)).

²⁴ See *Verizon Maryland*, 35 FCC Rcd at 13626-28, para. 43-46 (“borrowing” Maryland’s statute of limitations for breach of contract actions to supply the “applicable statute of limitations” under rule section 1.1407).

²⁵ See Fla. Stat. §§ 337.401 (authorizing certain state and local governmental entities to regulate the placement and maintenance of utility poles located in “the right-of-way limits of any road”), 337.402 (public utility must repair damage to public road caused by pole “installation, inspection or repair”); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16072-73, para. 1154 (1996) (“even where a state has not asserted preemptive authority in accordance with section 224(c) [of the Act], state and local requirements affecting pole attachments remain applicable, unless a complainant can show a direct conflict with federal policy”); *2011 Pole Attachment Order*, 26 FCC Rcd at 5292, para. 116 (a utility may bring an action in state court for trespass where an attacher who has made unauthorized attachments without any contract with the utility refuses to enter into a pole attachment agreement).

²⁶ See Complaint at 19-20, para. 32; Fla. Stat. § 95.11(2)(b) (five-year limitations period applies to a “legal or equitable action on a contract”).

²⁷ See *Verizon Maryland*, 35 FCC Rcd at 13626, para. 43 (Maryland statute of limitations governing breach of contract actions governs incumbent LEC pole attachment complaint because “[t]he Commission has long recognized that pole attachment agreements are individually-negotiated contracts . . . subject to claims for breach of contract under state law”) (citing *Ala. Cable Telecomm’s Ass’n v. Ala. Power Co.*, Order, 16 FCC Rcd 12209, 12217, para. 18 (2001) (“certain remedies for breach of contract may be pursued in forums other than the Commission”); *Marcus Cable Assocs., L.P. v. Texas Utilities Elec. Co.*, Order on Review 18 FCC Rcd 15932, 15935, para. 6 (2003) (“The Commission’s authority does not supplant that of the local jurisdiction when the issue between the parties is limited to a breach of contact claim . . .”).

²⁸ See *Bureau Order*, 35 FCC Rcd at 5326-31, paras. 11-17.

of the Act is the most appropriate.²⁹ But the Commission has recently concluded that section 415(b) should not apply to incumbent LEC pole attachment complaints because the section governs complaints against a “carrier” for the recovery of damages and an electric utility is not a “carrier” under the Act.³⁰ FPL is a defendant in this proceeding because it is a “utility” under section 224(a)(1) of the Act that has entered into an agreement with a “provider of telecommunications service” (AT&T) concerning the rates, terms, and conditions of attachments to its poles.³¹

12. FPL’s principal contention, however, is that AT&T should receive no refund whatsoever, and that any remedy should begin no sooner than an order finding the JUA rate unjust and unreasonable.³² FPL makes three arguments in support of its position. First, FPL points to the Commission’s statement in the *2018 Pole Attachment Order* that “we decline to . . . give incumbent LECs the right to refunds for overpayments as far back as the statute of limitations allows.”³³ Read in context, that language does not mean what FPL claims it does. The *2018 Pole Attachment Order* established a rebuttable presumption that incumbent LECs that are parties to new or “newly-renewed” attachment agreements should be charged no more than the New Telecom Rate. In the language cited by FPL, the Commission merely clarified that refunds under the *2018 Pole Attachment Order* could only begin on the date, after the order’s effective date, that the agreement is entered into or newly-renewed, and therefore could not necessarily extend “as far back as the statute of limitations allows.” Thus, the Commission’s statement applies only to claims brought under the *2018 Pole Attachment Order*, and does not apply here, because we only address AT&T’s claims under the *2011 Pole Attachment Order*.

13. Second, FPL argues that awarding a refund would violate the prohibition in the Fifth Amendment to the Constitution against taking property without “just compensation.”³⁴ FPL maintains that, under the terms of the JUA, it installed taller poles for AT&T and that, if the Old Telecom Rate applies, it will not recoup its investment. “The Commission’s calculation of its regulated rates presumes either pre-existing capacity or [that] additional compensation will be provided to the utility for the expansion of capacity through make-ready and other charges.”³⁵ We disagree. FPL will be compensated for its investment because the Old Telecom Rate formula requires the attacher to pay its share of the utility’s “net cost of a bare pole,”³⁶ which is derived from FERC account 364. FERC account 364, in turn, “include[s] the cost installed of poles,” regardless of height.³⁷

²⁹ See Answer at 21-22, para. 32, 35 (Affirmative Defense J). Section 415(b) states, “[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues . . .” 47 U.S.C. § 415(b).

³⁰ See *Verizon Maryland*, 35 FCC Rcd at 13627, para. 45 & n.158 (citing 47 U.S.C. § 153(11), which defines “carrier” in pertinent part as “any person engaged as a common carrier for hire . . .”).

³¹ See *Verizon Maryland*, 35 FCC Rcd at 13627, para. 45 & n.159 (citing 47 U.S.C. § 224(a)(1) (defining “utility” to include “an electric . . . utility”), (a)(4) (defining “pole attachment” as “any attachment by a . . . provider of telecommunications service to a pole . . .”), (b)(1) (the Commission “shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable . . .”).

³² See Answer at 27 (Affirmative Defense A), 36-9 (Affirmative Defenses K and L).

³³ Answer at 21, para. 32 (citing *2018 Pole Attachment Order*, 33 FCC Rcd at 7769, para. 126 n.478) (interior quotations omitted).

³⁴ See Answer at 36-37 (Affirmative Defense K) (citing U.S. Const. amend. V)

³⁵ Answer at 37.

³⁶ 47 CFR § 1.1406(d)(2).

³⁷ 18 CFR § 101. FPL misunderstands the standard applicable to its takings claim. See Answer at 36 (arguing that, under *U.S. v. Reynolds*, 397 U.S. 14, 16 (1970), FPL is entitled to the “full monetary equivalent of the property taken”). FPL voluntarily granted AT&T access to its poles, so the takings clause is violated only if the Old Telecom Rate is “confiscatory.” See *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987). Moreover, even where access

(continued....)

14. Finally, FPL invokes the doctrines of estoppel, unclean hands and laches to support its assertion that AT&T should not receive a refund.³⁸ FPL notes that the JUA had been in effect for 43 years before AT&T first objected to its rate, that AT&T refused for 18 months to pay FPL's \$9 million invoice for the 2017 pole rental year, refused for four months to pay FPL's \$10 million invoice for 2018, and has yet to pay interest on either sum.³⁹ We are not persuaded. If its equitable defenses are to succeed, FPL must show prejudice.⁴⁰ Yet, far from being harmed, FPL benefitted from the fact that AT&T did not challenge the JUA rates at an earlier time, as FPL's liability for refunds is limited by the applicable statute of limitations.⁴¹ Further, FPL's action against AT&T for failing to pay the invoices is before the Florida district court; if AT&T's withholding of payments was improper, the court presumably will make FPL whole.⁴²

15. In sum, we find that the applicable statute of limitations under Commission rule section 1.1407(a)(3) is Florida's five-year limitations period for an "action on a contract." AT&T is entitled to a refund for the period beginning July 1, 2014, which is five years from the date it filed its Complaint.

B. Calculating the Old Telecom Rate

16. The parties' calculations of the Old Telecom Rate for purposes of AT&T's payments to FPL are identical other than their inputs for (i) the average number of attachers and space occupied by AT&T; (ii) the rate of return; and (iii) the accumulated depreciation applicable to certain FPL accounts. We now resolve the parties' disputes as to these three inputs, so that the parties may calculate the exact amount AT&T was obligated to pay FPL for the period at issue.

17. Average number of attachers and space occupied: Calculating the Old Telecom Rate requires inputs as to the average number of attachers per pole and as to the space occupied by the attacher

is mandatory, a utility seeking "compensation above marginal cost . . . must show with regard to each pole that . . . the pole is at full capacity and . . . another buyer of the space is waiting in the wings . . ." *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370 (11th Cir. 2002). We reject FPL's assertion, *see* Answer Br. at 32-33, that reducing the JUA rate is unlawful retroactive ratemaking for the reasons set forth in *Verizon Florida LLC v. Florida Power and Light Co.*, 30 FCC Rcd 1140, 1145-6, paras. 17-19 (2015) and *Verizon Maryland*, 35 FCC Rcd at 13628, para. 47.

³⁸ *See* Answer at 27 (Affirmative Defense A), 37-38 (Affirmative Defense L).

³⁹ FPL also alleges that AT&T did not notify it that it was seeking a lower rate under Commission rules and orders. *See* Answer at 27, 38. Yet AT&T informed FPL almost a year before filing the Complaint that it believed it was entitled to a lower rate under the *2011 Pole Attachment Order*. *See* Complaint Exh. 5 (email from K. Hitchcock, AT&T, to T. Kennedy, FPL dated Aug. 21, 2018). While FPL also contends that AT&T did not negotiate in good faith, *see* Answer at 27, 38, it establishes only that the parties simply could not agree. The parties engaged in the JUA's dispute resolution process, consisting of an executive-level meeting and a day of mediation. *See* Complaint Exh. A (Rhinehart Aff.) at 2, para. 4. FPL maintained throughout that the *2011 Pole Attachment Order* did not apply. *See, e.g.*, Amended Complaint Exhs. 10 (email from M. Jarro, FPL, to D. Miller, AT&T, sent Dec. 4, 2018) ("[FPL is] not aware of any federal law that requires FPL to take affirmative action to change an agreed-upon contract rate") and 22 (email from D. Bromley, FPL, to D. Miller, AT&T, sent Jan. 8, 2019) ("as we have previously communicated, there is nothing in the 2011 [Pole Attachment] Order that affirmatively requires the parties to modify an existing agreed upon contract rate").

⁴⁰ *See, e.g., Holt v. Winpisinger*, 811 F.2d 1532, 1541-42 (D.C. Cir. 1987) (defendant's failure to show prejudice defeats its laches, estoppel and unclean hands defenses).

⁴¹ FPL ignores that AT&T could not have requested a reduction under the *2011 Pole Attachment Order* before its effective date.

⁴² Though not in the context of incumbent LEC complaints asserting equitable defenses, the Commission has already considered and rejected the suggestion that an attacher should receive no refund for the period before it disputes its rate. "[W]e decline . . . to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge. Such a rule modification runs counter to the very idea of a statute of limitations, which permits complaints to be filed up until the last day of the limitations period." *2011 Pole Attachment Order*, 26 FCC Rcd at 5290, para. 112.

at issue. In order to avoid excessive cost and burden, the Commission has established rebuttable presumptions of three to five attachers (for rural and urban areas, respectively) and one foot of space occupied.⁴³ These presumptions may be rebutted by “probative direct evidence,”⁴⁴ which may include, “[w]here the number of poles is too large, and/or complete inspection impractical . . . a statistically sound survey.”⁴⁵

18. We find that FPL has rebutted the Commission’s presumptions by providing survey results establishing that AT&T occupies 1.18 feet of space and that the average number of attachers on its JUA distribution poles is 2.99. FPL explains that, since the 1990s, it has administered annual surveys of all poles to which it and any other telephone company, including AT&T, is attached. The surveys are conducted on a five-year cycle; that is, each survey covers approximately 20% of FPL’s service territory, so that over any five-year period, all the poles (including the JUA poles) have been surveyed. All parties to the surveys, including AT&T, contribute to the cost of the surveys, and the data from the surveys is owned by and available to all. Prior to each survey, all parties agree to the parameters of the survey and agree to participate in the post-survey field check. When the field-check is complete, each party confirms that the survey results are accurate.⁴⁶ AT&T has approved all the survey results at issue.⁴⁷ Data collected in the surveys includes the number of poles, ownership of each pole, and, for each pole, the number of regulated entities attached (i.e., utilities, telephone companies and cable operators).⁴⁸ FPL’s most recent surveys found 2.96 regulated entities attached to FPL’s JUA distribution poles.⁴⁹

19. While FPL’s annual surveys conducted prior to 2019 did not include data as to the number of governmental (that is, non-regulated) attachers, FPL collected that data for the first time in its 2019 annual survey.⁵⁰ That survey found that 2.8% of FPL’s JUA distribution poles had a governmental attachment (or 0.028 governmental attachers per pole).⁵¹ In addition, in July 2019, in response to AT&T’s Complaint, FPL conducted a random survey of 2,000 of its JUA distribution poles to gather data as to (i) the number of governmental attachers per pole; and (ii) the amount of space occupied by AT&T. FPL’s random survey found that only 1.02% of the poles surveyed had governmental attachments (or 0.0102 governmental attachers per pole) and that the average amount of space occupied by AT&T was 1.18 feet.⁵² FPL uses the results of the 2019 annual survey to calculate the number of governmental attachers in its calculations of the Old Telecom Rate.⁵³ Thus, applying the results of FPL’s annual

⁴³ See 47 CFR §§1.1409(c), 1.1410.

⁴⁴ *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).

⁴⁵ *Amendment of Commission’s Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12135, para. 63 (2001).

⁴⁶ See Answer Exh. A (Kennedy Decl.) at 14, para. 28, Exh. E (Murphy Decl.) at 2, paras. 4-5.

⁴⁷ Answer Exh. E (Murphy Decl.) at para. 5.

⁴⁸ See Answer Exh. A (Kennedy Decl.) at 14, para. 28.

⁴⁹ See Answer Ex. A (Kennedy Decl.) at 14, para. 28 (table).

⁵⁰ See Answer Exh. A (Kennedy Decl.) at 14, paras. 28-29; Exh. E (Murphy Decl.) at 2, para. 7.

⁵¹ See Answer Exh. E (Murphy Decl.) at 6, para. 23 (table). FPL’s annual surveys establish an average pole height of 40.4 feet; usable space of 15.9 feet and unusable space of 24.5 feet. See Answer Exh. A (Kennedy Decl.) at 14, para. 28 (table). AT&T does not challenge these figures.

⁵² See Answer Exh. A (Kennedy Decl.) at 14, para. 29; Exh. D (Murphy Decl.) at 3, para. 9, 4, para. 16, 5, para. 21, and 6, para. 23 (table).

⁵³ See Answer Ex. A (Kennedy Decl.) at 14, para. 29 (table).

surveys with the July 2019 random survey of governmental attachers, the total number of attachers (regulated and governmental) is 2.99 (2.96 regulated attachers plus 0.028 non-governmental attachers).

20. AT&T contends that FPL has not rebutted the Commission's presumptions, arguing that FPL's random survey of 2,000 poles was too small given the approximately 400,000 poles at issue.⁵⁴ But FPL's witness, an expert in statistical analysis, provides a detailed and valid analysis explaining why a random sample of 2,000 poles would provide accurate results, and AT&T does not address that testimony.⁵⁵ AT&T protests that FPL's data as to the number of regulated attaching entities, drawn from FPL's annual surveys, is outdated because it was gathered over a five-year period, and adds that Florida's population is growing, so that the number of attachers can be expected to have increased.⁵⁶ Yet AT&T approved these surveys for purposes of calculating the parties' rental payments under the JUA. Further, although AT&T was a party to the surveys and possesses their results, it provides no evidence that the number of attachers has grown over time (for example, by comparing the number of attachers in a region surveyed in 2018 to the number of attachers in that same region surveyed five years earlier).

21. Finally, AT&T asserts that "FPL's proposed input for the average number of attaching entities . . . reflects a mishmash of selective data – some collected this year about 2,000 poles [i.e., the two 2019 surveys] and some collected up to 4 years ago about different poles [i.e., the data collected in the earlier annual surveys]. None of it reflects the 'actual' number of entities on any specific pole."⁵⁷ We disagree. FPL is not required to provide the actual number of attachers on specific poles in order to rebut the presumption; it need only provide "probative direct evidence," which may include "a statistically sound survey." As discussed, FPL's annual surveys establish that the number of regulated attachers is 2.96. Further, FPL's July 2019 survey of 2,000 randomly selected poles indicates that as few as 1.02% of FPL's JUA poles have governmental attachments. Nevertheless, in an excess of caution, and at FPL's urging, we apply the results of FPL's 2019 annual survey, which found that a greater number of the poles – 2.8% – have governmental attachments. Therefore, it is unlikely that the number of governmental attachers is overstated, and AT&T is not prejudiced.

22. Rate of Return: The parties also dispute the appropriate input for the rate of return, which is an element of the Carrying Charge Rate. The Commission has explained that the rate of return authorized by the relevant state for the utility's intrastate services should be used for this input "when available."⁵⁸ Otherwise, "when a state has not prescribed a rate of return for a utility," the Commission adopted a default rate of return, namely, its authorized rate of return for interstate access services provided by LECs subject to rate-of-return regulation.⁵⁹

23. FPL argues that the Commission's default rate of return should apply because FPL operates under a settlement agreement approved by the Florida Public Service Commission (PSC) that

⁵⁴ See Reply Legal Analysis in Support of Pole Attachment Complaint, Proceeding No. 19-187 (filed Nov. 6, 2019) (Reply Legal Analysis) at 54-55, Exh. F (Peters Aff.) at 14, para. 27.

⁵⁵ See Answer Exh. F (Davis Decl.) at 1, para. 2, 3, para. 8. AT&T mistakenly asserts that the Cable Services Bureau found data from a utility's pole database insufficient to rebut the Commission's usable space presumption because the database included only 45% of the poles at issue. See Reply Legal Analysis at 55 (citing *Nevada State Cable TV Ass'n v. Nevada Bell*, Order, 13 FCC Rcd 16774 (Cable Bur. 1998)). But the Bureau rejected the utility's attempt to rebut the presumption because, in violation of Commission rules then in effect, it provided no evidence as to how it determined the total number of poles at issue and applied an incorrect formula to calculate usable space. *Id.* at para. 13.

⁵⁶ See Reply Legal Analysis at 55-56.

⁵⁷ Reply Legal Analysis at 55.

⁵⁸ *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453 (2000) (*Fee Order*) at 6491, para. 76.

⁵⁹ See *Fee Order*, 15 FCC Rcd at 6491, paras. 74-76.

does not establish a rate of return.⁶⁰ We agree. While AT&T argues that FPL's rate of return may be calculated more accurately using data filed by FPL with the Florida PSC, we may not ignore the Commission's decision to adopt a default rate where the state has not prescribed a rate of return.

24. Accumulated Depreciation: Finally, the parties disagree as to the source of the accumulated depreciation numbers to be used to calculate net pole investment (which, in turn, is used to calculate the Net Cost of a Bare Pole) and to calculate net investment related to FERC accounts 364 (Poles, Towers and Fixtures), 365 (Overhead Conductors and Devices), and 369 (Services), the denominator of the Maintenance Factor. We find that the parties should use the accumulated depreciation figures provided in Schedule II of the annual status reports filed by FPL with the Florida PSC, as that data is specific to the assets for which investment is reflected in these accounts and thus more likely to be accurate than data developed from allocators applied to the more highly aggregated accumulated depreciation account used by AT&T.⁶¹

25. In sum, we find that AT&T is entitled to a refund, plus interest, of any overpayments for the period beginning July 1, 2014, which is five years from the date it filed its Complaint, and direct the parties to calculate and apply new pole attachment rates in accordance with the guidance provided in the *Bureau Order* and this Order.

III. ORDERING CLAUSE

26. Accordingly, pursuant to sections 4(i), 4(j) and 224 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), and 224, and sections 0.111, 0.311, 1.723(g), 1.1401, 1.1402, and 1.1404, and 1.1407 of the Commission's rules, 47 CFR §§ 0.111, 0.311, 1.723(g), 1.1401, 1.1402, 1.1404 and 1.1407, the Complaint is **GRANTED IN PART** and **STAYED IN PART**.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Chief
Enforcement Bureau

⁶⁰ See Answer Exh. A (Kennedy Decl.) at 16, para. 31, and Exh. D (Deaton Decl.) at 5, para. 10.

⁶¹ See Complaint Exh. A (Rhinehart Aff.) at Exh. R-1 (relying on total distribution plant accumulated depreciation as inputs into its calculation of net pole investment and FERC accounts 364, 365 and 369).