Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Southwestern Bell Telephone Company	)	Proceeding No. 22-357
d/b/a AT&T Texas,	)	Bureau ID No. EB-22-MD-004
	)	
Complainant,	)	
	)	
v.	)	
	)	
AEP Texas, Inc.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 2023 **Released: July 26, 2023**

By the Chief, Enforcement Bureau:

TABLE OF CONTENTS

I. INTRODUCTION

1. In recent years, the Federal Communications Commission (FCC or Commission) has acted to ensure 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 formal complaint filed

[1] *See* 47 U.S.C. § 224(b)(1); *Implementation of Section 224 of the Act*, WC Docket No. 07-245, 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) (*2011 Pole Attachment Order* or *2011 Order*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Development*, WC Docket No. 17-84, Third Report and Order and Declaratory

(continued….)

by Southwestern Bell Telephone Company d/b/a AT&T Texas (AT&T), an incumbent LEC, against AEP Texas, Inc. (AEP), an electric utility, in which AT&T alleges that the rates it pays to use AEP's poles are unjust and unreasonable under section 224 and the Commission's rules and orders.[2] After careful consideration of the record, we resolve several issues disputed by the parties to assist them in negotiating a just and reasonable pole attachment rate and calculating any refund that may be due consistent with this *Order*.[3]

II. BACKGROUND

A. Legal Framework

2. Section 224(b)(1) 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) requires the Commission to establish a methodology to calculate the pole attachment rates to be paid by telecommunications carriers when parties fail to resolve rate disputes and specifies that such regulations ensure that the rates a utility charges are "just, reasonable, and nondiscriminatory."[5]

(Continued from previous page)
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); *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*); *Verizon Maryland LLC v. The Potomac Edison Co.*, Proceeding No. 19-355, Order on Reconsideration, FCC 22-26, 2022 WL 990572 (2022) (*Verizon Maryland Recon Order*); *BellSouth Telecomms., LLC v. Florida Power & Light Co.*, 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 Co.*, Proceeding No. 19-187, Memorandum Opinion and Order, 36 FCC Rcd 253 (EB 2021) (*AT&T v. FPL II*); *BellSouth Telecomms., LLC v. Florida Power & Light Co.*, Proceeding No. 19-187, Order on Review, FCC 22-45, 2022 WL 2104259 (2022) (*AT&T v. FPL Order on Review*); *BellSouth Telecomms., LLC v. Duke Energy Progress, LLC*, Proceeding No. 20-293, Memorandum Opinion and Order, 36 FCC Rcd 13684 (EB 2021) (*AT&T v. DEP*); *BellSouth Telecomms., LLC v. Duke Energy Progress, LLC*, Proceeding No. 20-293, Order on Reconsideration and Review, FCC 22-90, 2022 WL 17100973 (2022) (*AT&T v. DEP Recon Order*); *BellSouth Telecomms., LLC v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Memorandum Opinion and Order, 36 FCC Rcd 18252 (EB 2021) (*AT&T v. DEF*).

[2] Pole Attachment Complaint of Southwestern Bell Telephone Company d/b/a AT&T Texas, Proceeding No. 22-357 (filed Oct. 4, 2022) (Complaint); *see also* AEP Texas Inc.'s Answer and Affirmative Defenses to AT&T's Pole Attachment Complaint, Proceeding No. 22-357 (filed Dec. 2, 2022) (Answer); AT&T's Reply to AEP Texas Inc.'s Answer, Proceeding No. 22-357 (filed Jan.. 13, 2023) (Reply); AT&T's Reply Legal Analysis in Support of Pole Attachment Complaint, Proceeding No. 22-357 (filed Jan. 13, 2023) (Reply Legal Analysis); Joint Statement, Proceeding No. 22-357 (filed Jan. 31, 2023) (Joint Statement); Supplement to Joint Statement, Proceeding No. 22-357 (filed March 10, 2023) (Suppl. Joint Statement); AT&T Initial Supplemental Brief, Proceeding No. 22-357 (filed Mar. 31, 2023) (AT&T Initial Brief); AEP Texas Inc.'s Initial Supplemental Brief, Proceeding No. 22-357 (filed March 31, 2023) (AEP Initial Brief); AT&T Reply Supplemental Brief, Proceeding No. 22-357 (filed Apr. 7, 2023) (AT&T Reply Brief); AEP Texas Inc.'s Reply to AT&T's Initial Supplemental Brief, Proceeding No. 22-357 (filed Apr. 7, 2023) (AEP Reply Brief).

[3] AEP concedes that Texas has not reverse-preempted the Commission's jurisdiction under 47 U.S.C. § 224(c), yet denies that Texas "lacks jurisdiction over this particular dispute." Answer at 3, para. 5 & n.12 (citing general authority of Public Utilities Commission of Texas to regulate utilities and incumbent LECs within Texas). Because Texas has not certified to the Commission that it regulates the rates, terms, and conditions for pole attachments in that state, jurisdiction of this dispute remains with the Commission. *See* 47 U.S.C. § 224(c)(2), (c)(3).

[4] 47 U.S.C. § 224(b)(1). We briefly summarize here section 224 and the Commission's pole attachment rules and orders as they relate to the rates that electric utilities may charge incumbent LECs, and we incorporate by reference the fuller description of this legal framework set forth in the Commission's *AT&T v. DEP Recon Order*. *See AT&T v. DEP Recon Order*, 2022 WL 17100973, at *2-3, paras. 2-8.

[5] 47 U.S.C. § 224(e)(1).

3. In the *2011 Pole Attachment Order*, the Commission reexamined the pre-existing formula for calculating the maximum pole attachment rate to be paid by telecommunications carriers and adopted a revised rate (the New Telecom Rate) that is lower than the pre-existing rate (the Old Telecom Rate)[6] and more closely approximates the rate that cable operators pay (the Cable Rate).[7] The Commission also concluded that section 224(b) authorized it to regulate the rates, terms, and conditions of incumbent LEC pole attachments.[8] In doing so, the Commission noted that incumbent LECs frequently obtain access to electric utility poles through joint use agreements, which differ from cable company and competitive LEC pole attachment agreements in that they are typically "structured as cost-sharing arrangements" and arguably provide incumbent LECs advantages not found in competitive LEC and cable company agreements.[9] Thus, the Commission "question[ed] the need to second guess" such arrangements and opined that it would be "unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable."[10] Noting that the record indicated that incumbent LECs and other utilities have the ability to terminate existing agreements and seek new arrangements, the Commission stated, however, that if an incumbent LEC demonstrated that it "genuinely lacks the ability to terminate an existing agreement [i.e., one entered into before the *2011 Order*] and obtain a new arrangement[,]" it could take such evidence into consideration in a complaint proceeding examining the rates, terms, and conditions in that agreement.[11]

4. In the *2018 Pole Attachment Order*, the Commission cited evidence of declining levels of incumbent LEC pole ownership and rising incumbent LEC pole attachment rates while pole attachment rates for cable and telecommunications attachers were decreasing.[12] In view of these facts, the

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[6] *See 2011 Order*, *supra* note 1, at 5244, para. 8. In the *2011 Order*, the Commission referred to the competitive LEC rate in effect prior to that order as the "pre-existing, high-end telecom rate." *See id.*, at 5337, para. 218 & n.661. For ease of reference, we refer to that rate as the "Old Telecom Rate." The New Telecom Rate, like the Old Telecom Rate, governs pole attachments by competitive LECs and by cable operators providing telecommunications services. 47 CFR § 1.1406(d)(2) (New Telecom Rate formula); 47 CFR § 1.1409(e)(2) (2010) (Old Telecom Rate formula).

[7] *2011 Order*, *supra* note 1, at 5244, para. 8. The Cable Rate applies to pole attachments by cable operators providing cable services. *See* 47 U.S.C. § 224(d)(3); 47 CFR § 1.1406(d)(1). The Commission took further steps in 2015 to harmonize the Old Telecom Rate and the Cable Rate. *See Implementation of Section 224 of the Act*, WC Docket No. 07-245, Order on Reconsideration, 30 FCC Rcd 13731 (2015) (*2015 Implementation Recon Order*); *Erratum*, FCC 15-151 (Feb. 8, 2016).

[8] *See 2011 Order*, *supra* note 1, at 5327-33, paras. 199-213; *Am. Elec. Power Serv. Corp. v. FCC*, *supra* note 1, at 188 (affirming the *2011 Order*'s conclusion that section 224(b) authorized it to regulate the rates, terms, and conditions of incumbent LECs); *see also AT&T v. DEP Recon Order*, *supra* note 1, at *2, para. 3 n.13.

[9] *See 2011 Order*, *supra* note 1, at 5334, 5335, 5337, paras. 216, 218 & nn.651, 654; *see also id.* at 5337, para. 218 (noting that the Old Telecom Rate is "a higher rate than the regulated rate available to telecommunications carriers and cable operators" and therefore "it helps account for particular arrangements that provide net advantages to incumbent LECs relative to cable operators or telecommunications carriers"). We use the term "competitive LEC" as a shorthand for the statutory term "telecommunications carrier," defined in section 224(a)(5), which excludes incumbent LECs. We note that the definition of "telecommunications carrier" in section 224(a)(5) includes carriers other than competitive LECs (*e.g.*, interexchange carriers and CMRS providers). The shorthand notation used here should not be construed as limiting the statutory rights available to all providers that qualify as telecommunications carriers under section 224(a)(5). *See* 47 U.S.C. § 224(a)(5).

[10] *2011 Order*, *supra* note 1, at 5335, para. 216.

[11] *Id.* at 5335-36, para. 216 & n.655. *See also 2018 Order*, *supra* note 1, at 7768, para. 124 & n.466 (the *2011 Order* "placed the burden on incumbent LECs to rebut the presumption that they are not similarly situated to an existing telecommunications attacher in order to obtain access on rates, terms, and conditions that are comparable to the existing telecommunications attacher") (citing *2011 Order*, *supra* note 1, at 5336, para. 217).

[12] *2018 Order*, *supra* note 1, at 7769, para. 126; *see also id*. at 7767-69, paras. 123-26; *id.* at 7769, para. 125.

Commission determined that "for new and newly-renewed pole attachment agreements" between incumbent LECs and utilities,[13] incumbent LECs are presumed to be "similarly situated" to "telecommunications attachers" and thus entitled to "comparable" rates that are no higher than the New Telecom Rate.[14] The Commission held that a utility can rebut this presumption "with clear and convincing evidence that [an] incumbent LEC receives net benefits under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers."[15] If a utility rebuts this presumption, the Commission designated the Old Telecom Rate as "the maximum rate that the utility and incumbent LEC may negotiate."[16] The *2018 Order* made this rate a "hard cap" in order to "provide further certainty within the pole attachment marketplace" and "limit pole attachment litigation."[17]

B. The Parties' Joint Use Agreement

5. AT&T and AEP are parties to a joint use agreement (JUA) between Southwestern Bell Telephone Company and Central Power and Light Company that was executed in 1992 and amended in 2001 and 2005.[18] The JUA, as amended, contains the rates, terms, and conditions for each party's use of the other's utility poles in parts of Texas.[19]

6. The 2001 Amendment extended the initial term of the JUA until December 31, 2008, and the 2005 Amendment further extended the JUA's term until December 31, 2010.[20] Both Amendments specify that the JUA "shall automatically renew for successive one year terms" after the expiration of their respective terms "unless either Party provides advance written notice of its intention to terminate the [JUA] twelve months in advance of the proposed termination."[21] Neither party has provided written notice of termination.[22]

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

[14] *Id.* at 7769, para. 126 (establishing a rebuttable presumption that an incumbent LEC that is a party to a new or "newly-renewed" agreement is "similarly situated" to competitive LEC attachers and therefore entitled to the same rate (i.e., the New Telecom Rate)); *see also* 47 CFR § 1.1413(b). This presumption became effective on March 11, 2019. *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 84 Fed. Reg. 2460, 2460 (Feb. 7, 2019) (establishing effective date of rate presumption rule revisions).

[15] *2018 Order*, *supra* note 1, at 7768, para. 123; *see also* 47 CFR § 1.1413(b).

[16] *2018 Order*, *supra* note 1, at 7771, para. 129; *see also 2011 Order*, *supra* note 1, at 5300, para. 141 (stating that the Old Telecom Rate formula serves as the "upper bound" of the range of reasonable rates).

[17] *2018 Order*, *supra* note 1, at 7771, para. 129.

[18] *See* Complaint, Exh. 1 at ATT89-114 ("Agreement between Southwestern Bell Telephone Company and Central Power and Light Company for the Joint Use of Wood Poles") (JUA); *id.*, Exh. 1 at ATT115-18 ("Master Addendum") (JUA, 2001 Amendment); *id.*, Exh. 1 at ATT119-21 ("Second Master Addendum") (JUA, 2005 Amendment) (collectively referred to herein as the JUA unless otherwise specified). *See also* Joint Statement at 2, paras. 3, 6. For the sake of brevity, we omit the leading zeros from all Bates-numbered pages cited herein.

[19] *See, e.g.*, JUA at ATT91 (stating that the JUA "set[s] forth the mutual rights, duties and obligations concerning the joint use of wood poles"); *id.* at ATT89-121. Although AT&T and AEP are also parties to a joint use agreement covering a different area of Texas, that agreement is not at issue in this proceeding. Joint Statement at 2, para. 3.

[20] JUA, 2001 Amendment, § 1(a) at ATT116; JUA, 2005 Amendment, § 1(a) at ATT120.

[21] *Id.*

[22] Joint Statement at 3, para. 8.

7. At all times since 1992, the pole attachment rates specified in the JUA have been reciprocal, such that each party pays the same rate for the use of space on the other's poles irrespective of the actual amount of space that each party occupies.[23] The JUA also includes an annual rate escalator, which provides that, "during any renewal term" after 2008, the JUA rate {[ ]} unless otherwise agreed by the parties.[24]

C. The Complaint

8. AT&T challenges the lawfulness of the pole attachments rates AEP charges, claiming they exceed both the New and Old Telecom Rates.[25] AT&T argues that, under the rate presumption adopted in the *2018 Order* and the principle of competitive neutrality adopted in the *2011 Order*, the lawful rate for its attachments to AEP's poles is the New Telecom Rate.[26] AT&T asserts that the JUA does not provide material benefits not afforded other telecommunications carrier attachers, and that AEP thus cannot rebut the presumption in the *2018 Order*.[27] However, according to AT&T, should AEP prove the existence of a net material advantage over AT&T's competitors, it would be entitled to a rate no higher than the Old Telecom Rate.[28]

9. Applying the New Telecom Rate formula to the 2018 through 2022 rental years (based on a four-year limitations period under Texas law), AT&T calculates that it is entitled to a refund of nearly ${[ ]}.[29] If the Commission instead applies the Old Telecom Rate formula, AT&T calculates that it would be entitled to a refund of more than ${[ ]} for overcharges over that same time period.[30] AT&T asks the Commission to (i) "set the just and reasonable rate that AEP may charge AT&T," (ii) "order AEP to charge AT&T no greater than that rate," and (iii) "order AEP to refund AT&T the amounts unlawfully collected during the [four-year] limitations period [] in Texas."[31]

III. DISCUSSION

10. As explained below, we conclude that the rates AT&T pays under the JUA to attach to AEP's poles are unjust and unreasonable. In reaching that conclusion, we find that (1) the JUA automatically renewed and extended on January 1, 2020, after the March 11, 2019 effective date of the

[23] *See* JUA, Art. XVII at ATT108; JUA, 2001 Amendment, § 1(b) at ATT116; JUA, 2005 Amendment, § 1(b) at ATT120; *see also* Complaint, Exh. D, Affidavit of Christian M. Dippon at ATT44, para. 11 (Dippon Complaint Aff.) ("regardless of which party attached facilities to the other's poles, [under the 1992 Agreement,] both parties paid the same [] per pole rate").

[24] JUA, 2001 Amendment, § 1(b) at ATT116; *accord* JUA, 2005 Amendment, § 1(b) at ATT120-21 (describing {[ ]} rate escalator in effect after 2010). Material set off by double brackets {[ ]} is confidential and is redacted from the public version of this document.

[25] Complaint at 6, 7, paras. 11-12. AT&T contends that, since 2018, the New Telecom Rate for the use of AEP's poles has averaged about ${[ ]} per pole and the Old Telecom Rate has averaged about ${[ ]} per pole, compared to the average JUA rate over that period of about ${[ ]} per pole. Complaint at 6, para. 11 (citing Complaint, Exh. A, Affidavit of Daniel P. Rhinehart at ATT7-8, paras. 15, 20 (Rhinehart Complaint Aff.)).

[26] *See, e.g.*, Complaint at 7-8, 20, paras. 13-15, 38.

[27] *See id*. at 8-9, 14-17, 20, paras. 16-17, 24-30, 38.

[28] *See, e.g.*, *id*. at 21, para. 39.

[29] *Id*. at 20, para. 38 (citing Rhinehart Complaint Aff. at ATT7, ATT13-14, para. 14, Exh. R-1).

[30] *Id*. at 21, para. 39 & n.102 (citing Rhinehart Complaint Aff. at ATT11, ATT15, para. 21, Exh. R-2).

[31] *Id*. at 2; *see also id.* at 21-22, paras. 40-44. AT&T also asks the Commission to (1) calculate the lawful rate to avoid further "protracted [rate] negotiations" between the parties following the release of this *Order*, and (2) require the parties to file a joint status report 30 days following release of this *Order* to ensure AEP's compliance with the *Order*. *Id.* at 2 n.6.

2018 Order, and the JUA rates are thus reviewable under the *2018 Order* for the period starting January 1, 2020; (2) AT&T is entitled to a pole attachment rate that does not exceed the Old Telecom Rate as of January 1, 2020; and (3) any relief due AT&T in this case must be based solely on the standards and presumptions established in the *2018 Order* and extend no earlier than January 1, 2020, as AT&T has not shown that it is entitled to relief under the *2011 Order* for any period prior to that date.

A. The JUA was "Newly-Renewed" on January 1st of Every Year Since 2011 and Is Thus Subject to Rules Adopted in the *2018 Order* for the Period Beginning January 1, 2020

11. We conclude that the JUA is reviewable under the framework of the *2018 Order* because it was renewed after the *2018 Order*'s March 11, 2019 effective date. The standards and presumptions established in section 1.1413(b) of the Commission's rules, which governs incumbent LEC pole attachment complaints, apply to incumbent LEC agreements "entered into or renewed after the effective date of this section."[32] Although the term "renewed" is not defined in section 1.1413, the *2018 Order* indicated 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 [or] extended.*"[33] In this case, the 2001 Amendment to the JUA extended the term of the JUA to December 31, 2008, and the 2005 Amendment further extended its term to December 31, 2010.[34] The 2005 Amendment also specified that the JUA "shall automatically renew for successive one year terms thereafter [i.e., after December 31, 2010] unless either Party provides advance written notice of its intention to terminate the [JUA] twelve months in advance of the proposed termination."[35] Thus, by its express terms, the JUA has automatically renewed and extended annually since January 1, 2011, including on January 1, 2020, marking the first automatic renewal after the *2018 Order* effective date.[36] "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*[,]"[37] and those authorities provide the relevant standard for reviewing the JUA as of January 1, 2020.[38]

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[32] 47 CFR § 1.1413(b).

[33] *2018 Order*, *supra* note 1, at 7770, para. 127 & n.475 (emphasis added).

[34] JUA, 2001 Amendment, § 1(a) at ATT116; JUA, 2005 Amendment, § 1(a) at ATT120.

[35] JUA, 2005 Amendment, § 1(a) at ATT120; *see also* JUA, 2001 Amendment, § 1(a) at ATT116 (stating that the JUA "shall automatically renew for successive one year terms thereafter [i.e., after December 31, 2008] unless either Party provides advance written notice of its intention to terminate the [JUA] twelve months in advance of the proposed termination"); JUA, Art. I.D at ATT91-92 (stating that "[The JUA] shall continue in force and effect from year to year [after the effective date] until terminated by either Party giving at least one year's advance notice of termination in writing to the other Party").

[36] *See* JUA, 2005 Amendment, § 1(a) at ATT119-121; *see also Verizon Maryland*, *supra* note 1, at 13613, para. 15 (where joint use agreement stated that it "shall continue in force" until terminated upon one year's notice, agreement was determined to have been "automatically renewed and extended" after the *2018 Order* effective date "because 'continue' and 'extend' are synonymous in this context").

[37] *See AT&T v. DEP*, *supra* note 1, at 13689, para. 14; *see also Verizon Maryland*, *supra* note 1, at 13614, para.18.

[38] AEP concedes this point. *See* Answer at 18-19, para. 14 & n.47 ("AEP admits that [the JUA] likely would be considered a 'newly-renewed agreement' as of January 1, 2020, under the Commission's current authority . . . . [and] admits that, under the Commission's current authority, the contractual rates for periods beginning January 1, 2020, are subject to review under the standard adopted in the [*2018 Order*.]") (citing *AT&T v. DEP Recon Order*, *supra* note 1, at *5, para. 12). AEP nevertheless claims that "[i]f AT&T has a contractual right to remain attached to AEP's poles" after termination of the JUA, then the JUA, at least with respect to "existing" attachments at the time of termination, "cannot be said to 'renew' given the absence of a right to terminate." Answer at 18, para. 14 n.47. We need not address this argument because neither party has alleged that the JUA accords AT&T the right to keep

(continued….)

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

12. Having determined that the JUA is subject to review under the *2018 Order* and section 1.1413(b) from January 1, 2020, on, we consider whether AEP has met its burden to establish, by clear and convincing evidence, that AT&T "receives benefits under [the JUA] that materially advantage[] [it] over" competitive attachers on the same poles.[39] We find that AEP has met this burden, having demonstrated that the JUA provides AT&T a number of important benefits not accorded competitive attachers.[40] These benefits include the right to have AEP replace a pole under a 60-day deadline, along with a self-help right allowing AT&T to replace the pole itself if that deadline is not met; the right to occupy an unlimited amount of space on AEP's poles for one rental fee; the absence of various fees imposed on competitive attachers; and payment of pole rents in arrears, rather than in advance. Each of these benefits is discussed below.

13. *Right to Pole Replacements*. The JUA requires AEP to replace a Joint Pole at AT&T's request whenever a pole "is insufficient in height or strength," for AT&T's "existing attachments" or "proposed additional attachments."[41] The JUA requires AEP to make the requested "replacement" "within 60 days" after receiving AT&T's notice seeking replacement,[42] and it states that AT&T "shall have the right to do such work" if AEP fails to do it in 60 days.[43] Competitive attachers do not enjoy this important right to expand capacity. Indeed, their license agreements disclaim any right to a pole replacement, and specify that any right under the agreement to do self-help, make-ready work excludes pole replacements.[44] Additionally, the JUA permits AT&T to "replace a damaged or otherwise

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its attachments on AEP's poles following termination of the agreement. *See infra* note 95. In any event, as AEP admits, the Commission has squarely rejected the argument that renewal of a JUA is not possible where a party retains the right to keep its attachments on the other party's poles following termination of the agreement. *See* Answer at 18-19, para. 14 n.47 (citing *AT&T v. DEP Recon Order*, *supra* note 1, at *5, para. 12).

[39] 47 CFR § 1.1413(b); *see 2018 Order*, *supra* note 1, at 7769-71, paras. 126-28. We use the shorthand term "competitive attachers" to refer to competitive LECs and cable operators, entities covered by section 224. 47 U.S.C. § 224.

[40] *Infra* paras.13-19; *see also* Answer at 14, 21-22, 23, 31-32, 48-49, 51, paras. 11 n.39, 16, 21, 27, 28; *see also generally* JUA; Answer, Exh. A, Declaration of Pamela F. Ellis (Ellis Answer Decl.); Complaint, Exh. 2, Pole Attachment License Agreement (AEP Model License Agreement); AEP Texas, Inc's Responses to AT&T's First Set of Interrogatories, Exh. 2, Proceeding No. 22-357 (filed Nov. 10, 2022) (License Agreements).

[41] JUA, Art. IV.B at ATT94. A "Joint Pole" is "a pole used by both Parties or a pole that has been reserved by either Party for joint use as provided [by the JUA]." *Id.*, Art. II.A at ATT92.

[42] *Id.*, Art. IV.B at ATT94. *See also* Answer at 21, para. 16.

[43] *Id.*, Art. IV.C at ATT94.

[44] Answer at 21-22, para. 16; AEP Model License Agreement, § 7 at ATT127 ("Self-Help Make-Ready shall not be available for pole replacements"). *E.g.*, License Agreements at AEP1239 ({[ ]}), AEP380 ({[ ]}), AEP408 (same), AEP492 (same), AEP514 (same), AEP898 (same); AEP Model License Agreement, § 1 at ATT125 ("Nothing in this Agreement shall be construed to compel Owner to construct, reconstruct, retain, extend, repair, place, replace or maintain any pole which, in Owner's sole discretion, is not needed for its own purposes."); *see also, e.g.*, License Agreements at AEP62, AEP112, AEP376, AEP894 ({[ ]}). *See 2018 Order*, *supra* note 1, at 7771, para. 128.

unserviceable" AEP pole in an emergency,[45] thereby protecting AT&T's ability to provide service to its customers when service may be at its most vital. Competitive attachers have no comparable right.[46]

14. AT&T does not deny that the JUA requires AEP to replace a Joint Pole at AT&T's request when the pole has insufficient height or strength to accommodate AT&T's existing or additional attachments.[47] AT&T asserts, however, that the 60-day timeframe[48] and the "self-help" remedy[49] in JUA Articles IV.B and IV.C apply only to work performed with respect to attachments, and it disputes AEP's contention that these provisions also apply to pole replacements. We find AT&T's construction of the relevant language unpersuasive and conclude that AEP has the more reasonable interpretation.[50] The structure and language of Article IV describes changes to attachments in terms of "placing," "transferring," and "rearranging" the attachments,[51] whereas the terms "replace" or "replacement" are only used in reference to changing out an existing pole and putting a new one in its place.[52]

15. When Article IV.B is reasonably read to require Joint Pole replacement within the 60-day timeframe, AT&T's argument regarding the "self-help" remedy in Article IV.C necessarily fails. Article IV.C specifies that AEP's failure "to timely perform any work as obligated under this Article"—which would include pole replacement work—triggers AT&T's right to "do such work."[53] Moreover, wholly

[45] JUA, Art. VII at ATT99.

[46] *See generally* AEP Model License Agreement; License Agreements.

[47] Reply at 33, para. 16; Reply Legal Analysis at 20.

[48] Reply at 33 ("Article IV.B of the JUA . . . states, in relevant part, that '*Replacement or changes to attachments* shall be made by the OWNER within 60 days following receipt of written notice.['] AT&T therefore denies that 'the JUA essentially requires AEP to replace poles (i.e., expand capacity) within 60 days as needed to accommodate AT&T's needs' because the provision does not include a deadline for pole replacements.") (emphasis in original; close single quote added).

[49] Reply at 33-34 ("Instead, Article IV.C of the JUA limits the self-help remedy to 'replacements or changes to attachments' subject to the deadline in Article IV.B, stating that '[s]hould either Party fail to *timely* perform any work as *obligated* under this Article, the other Party shall have the right to do such work or have such work performed.'") (emphases in original); Reply Legal Analysis at 20.

[50] Answer at 21-22, para. 16.

[51] JUA, Art. IV.B at ATT94 ("requires transferring or rearrangement of OWNER's attachments," "ACTUAL COST incurred in connection with establishing joint use of existing poles including any necessary pole replacements, extensions and transferring or rearranging of attachments"). If the sentence at issue intended "replacement" to refer to attachments, it would most naturally be drafted to state "replacement of," not as AT&T's interpretation reads, "replacement to attachments." *Id.* ("Replacement or changes to attachments shall be made by the OWNER within 60 days following receipt of written notice.").

[52] *Id.*, Art. IV.B at ATT94 ("OWNER, after receipt of written notice from the JOINT USER shall replace such pole" and "ACTUAL COST incurred in connection with establishing joint use of existing poles including any necessary pole replacements"). We also note that throughout the JUA, the term "replace" or "replacement" is used to describe action taken with reference to poles, not attachments on poles. *See, e.g.*, JUA, Art. II.D at ATT92 (defining "EMERGENCY REPLACEMENT" as "any replacement of a JOINT POLE due to an immediate threat to service and/or safety"); *id.*, Art. VII at ATT98 (referring to owner's obligation to "replace poles as they become defective," to circumstances when "it is necessary to replace or change the location of a JOINT POLE" and when the joint user "requires that the replacement pole be placed in a specific location"); *id.*, Art. XV.B at ATT105-06, (referring to joint user requests "to replace an existing pole(s)," owner's responsibility to "replace defective or deteriorated poles," joint user's option "to replace the pole(s) if permission is granted in writing" and the joint user's right to bill the owner if it should "replace the pole(s)").

[53] *Id.*, Art. IV.C at ATT94.

apart from the 60-day deadline and the self-help remedy, AT&T's right to require pole replacements is an important benefit under the JUA not enjoyed by competitive attachers.[54]

16. *Access to unlimited pole space*. The JUA expressly allows AT&T "to reserve" an unlimited amount of space "on any existing [AEP] pole" by submitting a written application.[55] The application must "specify[] the location of the poles in question, the amount of space desired and the number and character of the attachments."[56] The JUA provides that AT&T "shall, following notice, have the right as provided herein to make attachments of the character specified in its application" unless AEP notifies AT&T that the poles in question are "excluded from joint use."[57] The JUA places no restriction on the number of attachments AT&T is allowed to make or the amount of space it may occupy on a pole.[58] And the rate AT&T pays per pole does not vary depending on the number of attachments or the amount of space they occupy.[59] Competitive attachers do not benefit from the same arrangement.[60]

[54] *See, e.g.*, AEP Model License Agreement, § 1 at ATT125; License Agreements at AEP62, AEP112, AEP376, AEP894 ({[ ]}).

[55] JUA, Art. IV.A at ATT93-94.

[56] *Id.*

[57] *Id*., Art. IV.A at ATT94; *id*., Art. I.B at ATT91 ("This Agreement shall apply to all wood poles of either Party now erected or to be erected during the term of this Agreement . . . . However, each Party reserves the right to exclude any of its wood poles from joint use as set out in this Agreement"). *See id*., Art. V.A at ATT95-96 ("Whenever either Party requires an additional pole or poles, ... the Party requiring such addition . . . shall promptly notify the other Party . . . . Within 30 days, the notified Party shall [state whether] it desires space on the said poles . . . . If space is requested, the constructing Party shall erect poles suitable for joint use . . . provided that the character and number of the attachments are such that the constructing Party does not consider joint use undesirable."). We note that the cited language from Art. I.B of the JUA is somewhat broader than similar provisions quoted in some prior cases. *See, e.g.*, *AT&T v. DEP Recon Order*, *supra* note 1, at *16, para. 49 n.193 (JUA allowed a party to exclude from joint use poles that "should be restricted for reasons of safety or economy or its own use" and poles that "carry or are intended to carry, circuits or equipment" that make such poles "undesirable for proper rendering of its service."); *see also* Reply at 32-33, para. 16. We find, as we have in prior cases, that the reciprocal nature of the exclusionary provision at issue here makes it unlikely to be invoked by either party. *Verizon Maryland Recon Order*, *supra* note 1, at *2, para. 6 n.23 (In response to argument that JUA provision permits utility to exclude poles from joint use, Commission finds "possibility appears remote because the right to exclude poles from joint use is reciprocal, giving both parties an incentive not to interpret the right broadly"); *AT&T v. DEP Recon Order*, *supra* note 1, at *16, para. 49 n.193 (In response to argument that JUA provision permits utility to exclude poles from joint use, Commission finds the possibility "remote, given the reciprocal nature of the provision")

[58] *See* JUA, Art. IV.A at ATT93-94*; id*., Art. V.B at ATT95-96; Answer at 31-32, 48-49, paras. 21, 27.

[59] *See* JUA, Art. XVII at ATT108-09; JUA, 2001 Amendment, § 1(b) at ATT116; JUA, 2005 Amendment, § 1(b) at ATT120; Answer at 48-49, para. 27; *see* Complaint at 9, para. 16 (acknowledging that the JUA does not allocate any specific amount of space to AT&T).

[60] *See* Answer at 49, para. 27 & n.120 (citing AEP Model License Agreement, § 17.B at ATT132 ("Licensee agrees to pay Owner an Annual Attachment Fee *per attachment* pursuant to 47 U.S.C. 224.")); AEP Model License Agreement, § 1 at ATT125 ("An Attachment shall be a single point of wireline contact utilizing no more than one foot of vertical space on each pole and no less than one vertical foot between any other Attachments."). *E.g.*, License Agreements at AEP8, AEP13 (defining {[ ]} and {[ ]} and requiring {[ ]}); *see also id*. at AEP27, AEP 35 (defining {[ ]} and establishing [ ]}), AEP406, AEP413 (defining {[ ]} and requiring {[

(continued….)

Instead, they pay an additional amount when they place more than one attachment on a pole or place attachments that occupy more than one foot of space on the pole.[61] AT&T hypothesizes that, if the Commission invalidates the flat rate AT&T currently pays under the JUA and grants AT&T's request to substitute the New Telecom Rate, AT&T's rate will be based on the space its facilities occupy, and AT&T will not be advantaged over competitive attachers.[62] We are not persuaded. Under Commission precedent, analysis of a material advantage "is limited to a comparison of the contractual rights afforded the incumbent LEC and those afforded other relevant attachers.[63] We therefore consider the terms currently in the JUA, not terms that may exist in the future. Because the parties will be free to negotiate new JUA terms consistent with the rulings in this *Order*, we do not know whether the parties will strike a bargain that charges AT&T a rate that depends on the space it occupies rather than a flat rate per pole. Thus, AT&T's argument about future terms is speculative.[64] In sum, although the JUA does not allocate to AT&T a certain amount of space on every pole,[65] we find that AT&T's right to reserve an unlimited amount of space on AEP's poles is a benefit accorded AT&T but not its competitors.[66]

17. *No Permitting-Related Fees*. The JUA requires AT&T to provide "written application" or written notice to AEP before attaching its facilities to AEP's poles,[67] but makes no mention of any fees related to the permitting process.[68] Indeed, AT&T admits that the JUA does not require AT&T to pay permitting-related fees to AEP.[69] By contrast, competitive attachers must pay, pursuant to their licenses, several permitting-related fees for work performed by AEP, which can include administrative application

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[redacted]]}), AEP871, AEP878 (same), AEP1045, AEP1046 (defining { [redacted]]} and {[[redacted]]}).

[61] *See supra* note 60. AT&T argues that "[i]f AEP is charging AT&T's competitors per-foot or per-attachment rates that exceed the per-pole rate that results from the new telecom formula . . . . [t]he solution is to correct the rates charged AT&T's competitors . . . not to charge AT&T more." Reply Legal Analysis at 21. The justness and reasonableness of the rates AEP charges competitive attachers under their individual licensing agreements is not at issue in this proceeding, and thus we do not address it here.

[62] Reply Legal Analysis at 20-21; Reply at 53, para. 27; Reply, Exh. C, Reply Affidavit of Mark Peters at ATT317-18, para. 26 (Peters Reply Aff.).

[63] *AT&T v. DEP Recon Order*, *supra* note 1, at *16, para. 48 (citing *AT&T v. FPL Order on Review*, *supra* note 1, at *4, para. 12; *Verizon Maryland Recon Order*, *supra* note 1, at *2-3, paras. 6-8).

[64] Although we conclude in this *Order* that AT&T is entitled to a rate no greater than the Old Telecom Rate for the timeframe covered by the *2018 Order*, *infra* para. 21, the parties are free to negotiate a rate that is lower than the Old Telecom Rate.

[65] *Cf. AT&T v. DEP Recon Order*, *supra* note 1, at *15-16, paras. 47-48; *AT&T v. FPL Order on Review*, *supra* note 1, at *4, paras. 11-12; *Verizon Maryland*, *supra* note 1, at 13615, para. 20.

[66] This benefit is similar, although not identical, to benefits that the Commission has found in other JUAs. *See AT&T v. DEP Recon Order*, *supra* note 1, at *16, para. 50 (JUA granted AT&T the right to use additional space on each pole at no additional expense, but utility charged other attachers for additional space); *Verizon Maryland*, *supra* note 1, at 13615, para. 20 (JUA allocated more space to Verizon than the utility made available to other attachers and required other attachers to pay to use additional space).

[67] *See* JUA, Art. IV, V at ATT93-95, ATT95-96; *see also* Answer at 23-24, para. 16 n.63; Ellis Answer Decl. at AEP1422, para. 49.

[68] *See generally* JUA; *see also* Answer at 51, para. 28 ("AT&T does not pay the costs associated with undergoing AEP's application process; rather, AEP absorbs those costs."); *id*. at 23, para. 16 n.63; Ellis Answer Decl. at AEP1422, para. 49; *see also id*. at AEP1420, para. 42.

[69] Reply Legal Analysis at 19.

review, survey, engineering analysis/make-ready work order generation, and post construction inspection fees.[70]

18. Consistent with precedent, we find that AT&T benefits by avoiding permitting-related fees that its competitors pay.[71] Despite the differences between the JUA and competitors' license agreements regarding permitting-related fees, AT&T argues that it bears the cost of performing the activities that generate such fees by engineering its own facilities, conducting its own field surveys, and performing its own post-installation inspections.[72] Even if AT&T performs its own engineering, survey, and inspection work, we find that AT&T nevertheless benefits from less costly and more efficient facilities deployment.[73] As the Commission has observed, when the attacher is in control, the process

[70] Answer at 23, para. 16 n.63; *id.* at 51, para. 28; Ellis Answer Decl. at AEP1422-23, paras. 49-50; AEP Texas Inc.'s Supplemental Responses to AT&T's First Set of Interrogatories, Proceeding No. 22-357, at 2-3 (filed Jan. 24, 2023); *see also id*. at Exh. 2 (extract from AEP contract with its permitting contractor showing charges for permitting-related costs that are passed through to licensees deploying new attachments on AEP's poles); *see also, e.g.*, AEP Model License Agreement, § 4.C at ATT127 ("Licensee shall remain responsible for the Total Cost of all projects initiated by Owner as the result of a Licensee Proposal . . . . Licensee shall be responsible for all engineering, inspection . . . work undertaken by Owner on Owner's poles"), § 11 at ATT129 ("Owner may conduct at Licensee's expense a post-construction inspection of all new Attachment installations or modifications of existing Attachments"), § 17.A at ATT132 (requiring licensees to "reimburse Owner for the Total Cost of all non-recurring expenses incurred by Owner, which are caused by or attributable to Licensee's Attachments"); License Agreements at AEP377 ({[ ]}), AEP123, AEP386 ({[ ]}), AEP484 ({[ ]}), AEP873 ({[ ]}), AEP955 ({[ ]}). Because the license agreements impose an obligation to pay permitting related fees, we reject AT&T's assertion that "[i]f anyone pays the fees" that AEP has identified "it is not because they are required by . . . AEP's license agreements." Reply Legal Analysis at 19; Reply at 55, para. 28. The fact that specific fees and their amounts are not set forth in the license agreements themselves does not persuade us that licensees have no contractual obligation to pay them.

[71] *See AT&T v. DEP Recon Order*, *supra* note 1, at *17, para. 52; *Verizon Maryland*, *supra* note 1, at 13616, para. 20; *AT&T v. DEF*, *supra* note 1, at 18265-66, para. 29.

[72] Reply at 55-57, para. 28; Reply Legal Analysis at 18-19; Peters Reply Aff. at ATT323-25, paras. 36, 38-41; AT&T Initial Brief at 5-7. Although AT&T asserts that it does its own installation and maintenance work, it acknowledges that competitive attachers likewise perform their own installation and maintenance work under their license agreements. Complaint at 15-16, para. 28; Reply at 56, para. 28; Reply Legal Analysis at 18. AT&T further notes that when it requires replacement of an AEP owned pole or a rearrangement of AEP's facilities, AT&T reimburses AEP for the cost of that work. Reply Legal Analysis at 19; Peters Reply Aff. at ATT325-26, paras. 40-41; JUA, Art. IV.B at ATT94. Competitive attachers also pay the cost of rearranging AEP's facilities when necessary to accommodate their attachments, *e.g.*, License Agreements at AEP10, AEP28, AEP65, AEP114, AEP170, AEP233, AEP378-79, and the cost of an AEP pole replacement, where AEP has agreed to replace a pole at the attacher's request. *Id*. at AEP10, AEP28, AEP63, AEP64, AEP168, AEP169, AEP230, AEP232, AEP954.

[73] AT&T contends that the self-help provisions in the JUA are comparable to the one-touch make-ready and self-help provisions in AEP's license agreements with competitive attachers. Reply at 57, para. 28; Complaint at 15-16, para. 28. AT&T, however, retains a material advantage over competitive attachers regarding permitting-related work. For example, AT&T admittedly conducts its own surveys from the outset, but competitors are only accorded that right under limited circumstances, e.g., where AEP decides to forgo the engineering review or fails to complete it within a specified period. *Compare* Reply Legal Analysis at 18-19; Reply at 55-57, para. 28 *with* AEP Model License Agreement, § 6 at ATT127 ("If owner fails to conduct its engineering review within the statutorily allotted time frame, then Licensee may hire a contractor to complete a survey."); License Agreements at AEP83 ({[

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almost certainly takes less time and costs less money.[74] The deployment process is further enhanced by AT&T's right, as noted above, to obtain needed pole replacements in 60 days, along with a self-help remedy where that deadline is not met.[75] We find that AT&T thus enjoys the benefit of largely controlling the pole attachment process.

19. *Billing in Arrears*. The JUA permits AT&T to pay its pole rental payments in arrears,[76] but other attachers to AEP's poles must pay in advance.[77] AT&T does not dispute these facts. Thus, consistent with Commission precedent,[78] we find that the JUA's billing provision allows AT&T to benefit from the time value of money and thereby accords a material advantage not provided to its competitors.

20. *Other Arguments*. AEP claims that the JUA affords AT&T a number of additional material benefits that competitive attachers do not enjoy. We find that AEP has failed to establish these benefits by clear and convincing evidence for the reasons discussed below.

Lowest Position on the Pole. The JUA contains no provision that reserves "a particular location on the pole for AT&T,"[79] as AEP acknowledges.[80] AEP nevertheless asserts that AT&T benefits

(Continued from previous page) [redacted]]}), AEP407 (same), AEP491 (same), AEP513 (same), AEP721 (same), AEP378 ({[[redacted]]}); AEP896 (same). As the Commission has recognized, placing the attacher in control of the surveys, notices and make-ready work is faster and cheaper. *See AT&T v. FPL Order on Review*, *supra* note 1, at *6, para. 17 (citing *AT&T v FPL I*, *supra* note 1, at 5328, para. 14 n.56); *2018 Order*, *supra* note 1, at 7711-19, paras. 11-24.

[74] *AT&T v. DEP Recon Order*, *supra* note 1, at *17, para. 52 (citing *AT&T v. FPL Order on Review*, *supra* note 1, at *6, para. 17 and *2018 Order*, *supra* note 1, at 7711-19, paras. 13-24); *AT&T v FPL I*, *supra* note 1, at 5328, para. 14 n.56.

[75] *Supra* paras. 13-15.

[76] Answer at 14, para. 11 n.39; JUA, Art. XVII at ATT109 (requiring each Party to issue a bill by January 30 each year for poles occupied or reserved by the other Party during the prior calendar year).

[77] *E.g.*, License Agreements at AEP13, AEP67, AEP89, AEP123, AEP235, AEP413, AEP455, AEP957.

[78] *AT&T v. FPL Order on Review*, *supra* note 1, at *6, para. 19; *Verizon Maryland*, *supra* note 1, at 13616, para. 20. AT&T, however, claims that its ability to pay in arrears is not a "net advantage." Reply at 25-26, para. 11; Reply Legal Analysis at 23 ("If AT&T and its competitors paid the same just and reasonable rate . . ., AEP would pay a proportional rate for use of AT&T's poles 'such as the same rate per foot of occupied space.' In this scenario, AEP's rates for use of AT&T's poles would necessarily be higher than AT&T's rate, given AEP's greater pole space needs. And, with a greater payment obligation, AEP stands to gain far more from paying in arrears than AT&T does . . . . The payment accommodation AT&T would provide AEP would offset any timing difference between AT&T and its competitors.") (citations omitted); Reply, Exh. D, Reply Affidavit of Christian M. Dippon at ATT379-380, para. 94 (Dippon Reply Aff.). AT&T's argument is irrelevant to the current discussion of material benefits, which focuses on comparing the JUA with competitors' license agreements, and in any event, is speculative.

[79] Complaint at 8-9, para. 16; Complaint, Exh. C, Affidavit of Mark Peters at ATT35-36, para. 17 (Peters Complaint Aff.) (referencing Exhibit 10, which shows "AT&T's facilities are not always the lowest facilities on AEP's poles"). The Commission has previously found that a preferential location on the pole is a net benefit. *2018 Order*, *supra* note 1, at 7771, para. 128; *AT&T v. FPL Order on Review*, *supra* note 1, at *5, para. 14.

[80] Answer at 23, para. 16 ("the 1992 Agreement itself does not expressly reserve the lowest position on the pole to AT&T"); *id*. at 22, para. 16 ("the 1992 Agreement contains no express space allocation").

from a "long-standing practice" of reserving the lowest position on a pole for AT&T.[81] As stated above, analysis of a material advantage "is limited to a comparison of the contractual rights afforded the incumbent LEC and those afforded other relevant attachers."[82] Here, it is undisputed that the JUA does not reserve a particular location on the pole to AT&T, much less the lowest position. For these reasons, we cannot find that the JUA grants AT&T a benefit relating to the lowest position on AEP's poles.[83]

Built to Suit Network. AEP asserts that the JUA, and a prior agreement executed in 1934, caused AEP to build a network of taller and stronger poles than was necessary for its facilities.[84] According to AEP, in a hypothetical world where the JUA and the prior agreement did not exist, AEP would have built shorter poles and, if AT&T had later requested access to AEP's poles, AT&T would have had to pay for the cost of replacing AEP's existing poles.[85] AEP therefore maintains that the JUA provides AT&T with the additional benefit of avoided network deployment costs.[86] The Commission has rejected similar arguments in prior orders,[87] and we do so here.[88] First, as the Commission has observed, the height of the utility's poles "is not a

[81] *Id*. at 23, 31-32, paras. 16, 21; *see id*. at 32, para. 21 n.76 (citing Answer, Exh. 6, BellSouth Telecommunications, LLC d/b/a AT&T Kentucky General Subscriber Services Tariff, Section A5.13 AT&T's Stand-Alone Structure Access Agreement for Poles, Ducts, Conduits, and Rights-of-Ways, at AEP1373, which states that "generally" parties attaching to AT&T's poles will be attached above AT&T facilities); Ellis Answer Decl. at AEP1420-22, paras. 44-48; *id*. at para. 45 (referencing AEP313-15,{[ ]}).

[82] *Supra* para. 16 (citing *AT&T v. DEP Recon Order*, *supra* note 1, at *16, para. 48 (citing *AT&T v. FPL Order on Review*, *supra* note 1, at *4, para. 12; *Verizon Maryland Recon Order*, *supra* note 1, at *2-3, paras. 6-8)).

[83] Further, as discussed *infra* note 125, the record shows that in some instances attachments are in fact placed below AT&T's facilities on AEP's poles. This evidence undermines AEP's claim that AT&T is entitled to occupy the lowest position on AEP's poles.

[84] *See* Answer at 52-53, para. 29 & n.134; Ellis Answer Decl. at AEP1417-18, paras. 35-37. AEP also points to AT&T's alleged right to "notice and the opportunity to 'opt in' to joint use" when AEP replaces existing poles, extends poles or constructs new pole lines as additional evidence of its build to suit network argument. Answer at 52, para. 29. *See also* Answer, Exh. D, Declaration of Christopher Tierney at AEP1581, paras. 20, 23 (Tierney Answer Decl.).

[85] *See* Answer at 52-53, para. 29 & n.134; *see* Ellis Answer Decl. at AEP1417-19, paras. 35-40; Tierney Answer Decl. at AEP1581, paras. 20, 23.

[86] Answer at 52-53, para. 29; *see also* Ellis Answer Decl. at AEP1417-19, paras. 35-41 (AEP installed poles taller than it otherwise would due to JUA and (prior JUA executed in 1934), and thus, AT&T avoided the cost of replacing all of the shorter poles AEP would have otherwise installed without the JUA; competitive LECs and cable attachers, on the other hand, "take AEP's network as they find it"); Tierney Answer Decl. at AEP1578, para. 11 ("The only reason it would make sense for AEP Texas to incur costs of a more expensive network is if it had a basis for recovering the costs, such as the JUA. In the absence of a joint use agreement, had AT&T later requested access to AEP Texas's poles, AT&T would have had to pay for the cost of replacing AEP Texas's existing poles . . . ."), AEP1580-86, paras. 19-38 (quantifying avoided costs due to JUA); Answer, Exh. C, Declaration of William Ross McCorcle, at AEP1559-60, paras. 9, 11, 12 (McCorcle Answer Decl.).

[87] *See, e.g.*, *AT&T v. DEP Recon Order*, *supra* note 1, at *10, para. 31 (affirming Bureau's rejection of pole owner's "effort to justify an inflated rate based on the cost of a duplicative network that does not, and likely never would, exist"); *AT&T v. DEF*, *supra* note 1, at 18273-74, para. 42 & n.152 (citing *AT&T v. FPL I*, *supra* note 1, at 5330, para. 15).

[88] AEP acknowledges that the Commission has rejected its theory of avoided network costs in prior cases but contends those decisions are "legally or factually incorrect." Answer at 52-53, para. 29. AEP's disagreement with Commission precedent is not a reason to reach a different conclusion.

competitive advantage for AT&T, as AT&T's competitors also require space on [the utility's] joint use poles and have for decades."[89] Second, the Commission has rejected attempts to "justify a higher rate based on [an incumbent LEC's] historical status as the first attacher on [a utility's] poles, rather than on specific, advantageous terms in the JUA."[90] Third, the testimony AEP cites in support of its "built to suit" theory is speculative and unpersuasive.[91]

The Rate AEP Pays AT&T. AEP maintains that AT&T receives a benefit denied competitive attachers because the pole attachment rate AEP has paid AT&T under the JUA has averaged {[ ]} of AT&T's annual pole cost.[92] But the central question here is whether AT&T, as an attacher to AEP's poles, has a material advantage over other attachers on AEP poles. If it does, the Old Telecom Rate is the maximum rate AEP can charge AT&T under the *2018 Order*.[93] The rate AEP pays AT&T under the JUA for attachments to AT&T poles is not relevant to the question of whether the JUA provides AT&T a material advantage over other attachers on AEP's poles.[94]

21. In sum, although we do not accept every "benefit" that AEP alleges, we conclude, on balance, that AEP has demonstrated, by clear and convincing evidence, that the JUA collectively provides AT&T with a variety of unique benefits that materially advantage AT&T over competitive attachers on the same poles.[95] 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*.

[89] *AT&T v. DEP Recon Order*, *supra* note 1, at *10, para. 32.

[90] *Id.* at *10, n.114; *see also Verizon Maryland*, *supra* note 1, 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"). Notably, AEP acknowledges that approximately 60 percent of the joint use poles were already in place when the parties entered into the JUA in 1992. Ellis Answer Decl. at AEP1412, para. 16.

[91] *See* Ellis Answer Decl. at AEP1418, para. 35 ("If AEP had constructed its network in the absence of the 1934 and 1992 Agreements, AEP would have built a network to suit only its own service needs—i.e., AEP's pole network would have been built with shorter poles."); McCorcle Answer Decl. at AEP1559, para. 9 ("Because of AEP's joint use agreements with AT&T, AEP's pole network consists of poles that are 5 to 10 feet taller than necessary to install electric service facilities only."). Here, as in *AT&T v. DEP*, the declarants cited by AEP did not establish that they had any role in determining the height of the utility's poles at the time the parties entered the JUA, or that they had examined any company records documenting the utility's decision-making concerning the height of its poles at that time. *See AT&T v. DEP Recon Order*, *supra* note 1, at *11, para. 33. Nor did AEP provide "information regarding the height of the poles in the parties' overlapping service area before and immediately after the parties entered into a joint use relationship" or "data on the height of [the utility's] poles not jointly used by AT&T." *Id.*

[92] Answer at i, 15-16, 17, 29-30, 54, paras. 12, 13, 17, 20, 30. AEP further argues that, when pole attachment payments from competitive LEC and cable attachers to AT&T for attachment to AT&T's poles are included, AT&T enjoys {[ ]} on its own poles. *Id.* at 29, para. 20.

[93] *See 2018 Order*, *supra* note 1, at 7771, para. 129.

[94] *See AT&T v. DEP Recon Order*, *supra* note 1, at *8, para. 24 n.88 (the relevant comparison is between AT&T and other attachers, and not between AT&T and DEP in terms of how much each contributes to each other's pole costs).

[95] We note that AEP attached an expert declaration to its Answer suggesting that the JUA permits AT&T to keep attachments on AEP poles upon termination, which would be an additional advantage to AT&T. Tierney Answer Decl. at AEP1577, AEP1580, paras. 9, 18. Because AEP did not allege in its Answer that the JUA accords this right, we do not find that AEP has met its burden to plead and present facts and legal analysis in support of such an advantage. *See 2018 Order*, *supra* note 1, at 7768, para. 123; *see also* 47 CFR §§ 1.1413(b), 1.726(b), 1.721(b), (d).

C. AT&T Is Not Entitled to Relief Under the *2011 Order*

22. As discussed above, AT&T is entitled to review under the *2018 Order* as of January 1, 2020, because the JUA renewed and extended on that date.[96] AT&T also seeks review under the *2011 Order* of the JUA rates it paid before January 1, 2020 based on the claim that AT&T was unable to terminate the JUA and obtain a new arrangement.[97] As we explain below, we conclude that AT&T has failed to show that it is entitled to review, and thus relief, under the *2011 Order*.

23. The *2011 Order* states that if an incumbent LEC that is a party to an "existing" joint use agreement can demonstrate that it lacks the ability to terminate an agreement and negotiate a new arrangement, "the Commission can consider that as appropriate in a [pole attachment] complaint proceeding."[98] In the *AT&T v. DEP Recon Order*, the Commission interpreted the *2018 Order* to provide that "the *2011 Order*'s 'guidance regarding review of incumbent LEC pole attachment complaints will continue to apply' to existing agreements[,]" consistent with the relevant statute of limitations, "*pending renewal of those agreements*."[99] Thus, review of an existing joint use agreement under the *2011 Order* is available until the agreement is renewed and thereby becomes subject to review under the *2018 Order*.[100]

24. For AT&T to obtain review under the *2011 Order*, it must have initiated negotiations with AEP when the "existing" JUA was subject to review under the *2011 Order*—i.e., "pending" the JUA's January 1, 2020 renewal. But the undisputed facts show that AT&T first sought renegotiation of the JUA rates on June 9, 2021,[101] more than 17 months after the JUA renewed on January 1, 2020.[102] By

[96] *See supra* Part III.A (finding that the JUA automatically renewed and extended, within the meaning of rule 1.1413(b) and the *2018 Order*, on January 1st each year, and that the *2018 Order* provides the relevant standard for reviewing the JUA as of January 1, 2020, the date of the first automatic renewal after the *2018 Order*'s March 11, 2019 effective date).

[97] Complaint at 10, 12-14, paras. 19, 22-23; *see also* Reply at 16, para. 8 & n.66 (citing *AT&T v. DEP Recon Order*, *supra* note 1, at *7, para. 18) (quoting *2011 Order*, *supra* note 1, at 5335-36, para. 216)). Although AT&T briefly lists factors that it contends establish its inability to terminate the JUA and obtain a new rate, we do not address this argument in light of our determination that the *2011 Order* does not apply to the JUA for any period at issue in this case. *See* Complaint at 12-14, paras. 22-23.

[98] *2011 Order*, *supra* note 1, at 5335-36, para. 216. An "existing agreement" is one entered into before the *2011 Order*. *Id.*

[99] *AT&T v. DEP Recon Order*, *supra* note 1, at *7, para. 20 (quoting *2018 Order*, *supra* note 1, at 7770, para. 127 & n.478) (emphasis added).

[100] *See, e.g.*, *2018 Order*, *supra* note 1, at 7770, para. 127 & n.478; *AT&T v. DEP Recon Order*, *supra* note 1, at *7, para. 20 (internal citation omitted); *Verizon Maryland*, *supra* note 1, at 13616, para. 22 n.70 (internal citation omitted); *see also AT&T v. DEP*, *supra* note 1, at 13687-88, paras. 9-10; *id.* at 13701, para. 37 n.114 (where incumbent LEC initiated rate negotiations with electric utility seven months *prior to* renewal date of parties' joint use agreement under *2018 Order*, incumbent LEC was entitled to review under *2011 Order* for pre-renewal period); *Verizon Maryland*, *supra* note 1, at 13612, 13616-20, paras. 14, 22-32 (incumbent LEC entitled to *2011 Order* review for pre-renewal period where negotiations commenced more than a year prior to renewal date under *2018 Order*); *AT&T v. FPL I*, *supra* note 1, at 5325-27, paras. 10-12 & n.37 (parties' relationship governed by *2011 Order* standards where the parties' negotiations commenced in August 2018 and the rate period in question began July 1, 2014, and ended December 31, 2018).

[101] *See* Complaint, Exh. 4, June 2021 Letter at ATT146-48; Complaint at 13, para. 23 & n.59. Although AT&T states that AT&T and AEP "discussed the possibility of a global pole attachment rental rate settlement between all AEP-affiliated and AT&T-affiliated companies" at an unspecified time in 2020, AT&T concedes that it did not request "executive-level negotiations specific to the JUA" until June 2021. *See* Reply at 7, para. 6. And even if these 2020 discussions had encompassed the JUA, they could not trigger review under the *2011 Order* because they occurred after January 1, 2020, when the JUA was subject to review under the *2018 Order*.

[102] *See, e.g.*, Complaint at 7-8, para. 14; Answer at 18-19, para. 14.

that time, the JUA was no longer reviewable under the *2011 Order* because, upon renewal on January 1, 2020, it became subject to review under the *2018 Order*. AT&T's assertion that it is entitled to review under the *2011 Order* rests on the hypothetical and speculative proposition that it *would have* failed to obtain a new arrangement *if* it had tried to obtain one prior to January 1, 2020. Because AT&T never made that attempt when the JUA was subject to review under the *2011 Order*, AT&T cannot rely on its asserted inability to renegotiate the JUA with AEP to obtain relief under the *2011 Order* here.[103]

25. We reject AT&T's assertion that it was not required to initiate negotiations "'during any period governed by the [*2011 Order*]'" in order to obtain relief under the *2011 Order*.[104] AT&T relies on the Commission's statement in the *AT&T v. DEP Recon Order* that "[n]othing in the Commission's rules or orders required AT&T to request negotiations prior to the effective date of the *2018 Order* in order to secure review of the JUA rates under the *2011 Order*."[105] But the facts of that case are materially different from the facts here. The complainant in *AT&T v. DEP* initiated negotiations after the effective date of the *2018 Order*, but approximately seven months *before* its JUA was renewed and became subject to review under the *2018 Order*. Thus, when the complainant in *AT&T v. DEP* initiated negotiations with the utility, its JUA was subject to review under the *2011 Order*.[106] Here, by contrast, AT&T initiated negotiations with AEP 17 months after the JUA renewed and became subject to the *2018 Order*.[107] Accordingly, the cited language from the *AT&T v. DEP Recon Order* does not support AT&T's claim that it is entitled to relief under the *2011 Order* despite having failed to initiate negotiations before the JUA renewed on January 1, 2020.

26. We therefore conclude that any relief due AT&T in this case must be based solely on the *2018 Order*, and may extend no earlier than January 1, 2020.[108] By that time, the JUA was no longer reviewable under the *2011 Order* because, upon renewal on January 1, 2020, it became subject to review under the standards of the *2018 Order*.

D. Calculating the Old Telecom Rate

27. The parties dispute two inputs to the Old Telecom Rate: (1) how much space AT&T occupies on AEP's poles, and (2) how many attachers are on the poles. We resolve the disputes below.[109]

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[103] We reach no conclusions as to whether AT&T lacked the ability to terminate the JUA and obtain a new arrangement, as required to secure review under the *2011 Order*, *see* Complaint at 12-14, paras. 22-23, given that the parties' negotiations commenced after the *2011 Order* ceased to govern the parties' relationship in this case. *See 2011 Order*, *supra* note 1, at 5335-36, para. 216 (stating that the Commission can consider, "as appropriate," whether an incumbent LEC "genuinely" lacks the ability to terminate an agreement and obtain a new arrangement under the *2011 Order*).

[104] Reply at 47, para. 22 (quoting *AT&T v. DEP Recon Order*, *supra* note 1, at *7, para. 20) (italics added). *See* Reply at 61, para. 31 (asserting that the date when it first sought to negotiate a new arrangement with AEP is not "relevant for purposes of awarding relief").

[105] Reply at 47, para. 22 (quoting *AT&T v. DEP Recon Order*, *supra* note 1, at *7, para. 20) (italics added).

[106] *See AT&T v. DEP Recon Order*, *supra* note 1, at *4, *13, paras. 10, 41.

[107] Of course, if the JUA had never become subject to the *2018 Order*, the JUA would have continued to be reviewable under the *2011 Order*.

[108] Accordingly, any refund due AT&T under the *2018 Order* will extend back approximately 33 months (i.e., from January 1, 2020 until the filing of the Complaint on October 4, 2022). This result is consistent with the Commission's decision declining to allow refunds under the *2018 Order* to extend as far back as the statute of limitations to the extent that period pre-dates renewal of an existing agreement. *2018 Order*, *supra* note 1, at 7770, para. 127 n.478 (internal citation omitted).

[109] AT&T contends that it has rebutted the presumption of 37.5 feet for the pole height input in section 1.1410 and claims the correct input for the height of AEP's poles is {[ ]}feet. AT&T Initial Brief at 12-13; Suppl. Joint (continued….)

28. *Space Occupied by AT&T.* Calculating the Old Telecom Rate requires a determination of the amount of space attachments occupy on an owner's poles.[110] To avoid excessive cost and burden, the Commission has established a rebuttable presumption that an attachment occupies one foot of space on the poles.[111] Either party may rebut this presumption by "probative direct evidence,"[112] which may include, "[w]here the number of poles is too large, and/or complete inspection impractical … a statistically sound survey."[113]

29. AEP proposes three different figures for the space AT&T occupies on its poles.[114] Initially, AEP claims that the actual space AT&T occupies on its poles is either {[[redacted]]} or {[[redacted]]} feet.[115] AEP arrives at the {[[redacted]]} figure by allocating the 3.33 feet of safety space on the pole and adding {[[redacted]]} feet, which AEP asserts is the average amount of space AT&T's attachments actually occupy on its poles.[116] The {[[redacted]]} figure is based on a survey AEP commissioned (November 2022 Survey) "for the purpose of determining the height of AT&T's attachments."[117] That survey data purports

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Statement, Exh. A, Supplemental Affidavit of Daniel P. Rhinehart at ATT398-99, paras. 28-29 (Rhinehart Suppl. Joint Statement Aff.); *see also* 47 CFR § 1.1410. AEP suggests that it is open to using AT&T's proposed input. AEP Reply Brief at 5. Thus, we do not believe there is a dispute about the pole height input that we need to address at this time. AT&T requests that we "set the just and reasonable rate" it should pay AEP. Complaint at 21, 23, paras. 41, 42; *id*. at 2 n.6. As the parties will need to negotiate additional matters, including the rate AEP will pay for attaching to AT&T's poles, we resolve the proper rate formula to be used and the rate inputs that are in dispute.

[110] 47 CFR § 1.1409(e)(2) (2010) (calculating preexisting telecom rates based on "Space Occupied").

[111] 47 CFR § 1.1410 (providing that "the space occupied by an attachment is presumed to be one foot" and this presumption "may be rebutted by either party").

[112] *AT&T v. FPL Order on Review*, *supra* note 1, at *7, para. 21 (noting that the one-foot space occupied presumption may be rebutted by "probative direct evidence"); *see also Teleport Commc'ns Atlanta, Inc. v. Georgia Power Co.*, Order on Review, 17 FCC Rcd 19859, 19866, para. 19 n.41 (2002) (*Teleport v. Georgia Power*) ("A party may always choose to present probative direct evidence regarding an acceptable alternative to a presumption in order to reflect its unique circumstances."); *AT&T v. DEP Recon Order*, *supra* note 1, at *18, para. 55 (noting that the presumptive number of attachers in the Old Telecom Rate may be rebutted by "probative direct evidence"); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, Report and Order, 2 FCC Rcd 4387, 4394, para. 52 n.27 (1987).

[113] *Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12135, para. 63 (2001) (*2001 Order on Reconsideration*); *AT&T v. FPL II*, *supra* note 1, at 258-59, 260, paras. 17, 21.

[114] AEP specifically alleges that AT&T occupies {[[redacted]]} feet of space on its poles. Answer at 58, para. 31; *id*. at 6, 14-15, 22-23, 31-32, 43, 49, 58, 64-65, paras. 7, 11, 16, 21, 23, 27, 31, 39; Ellis Answer Decl. at AEP1412-15, paras. 15-25; Suppl. Joint Statement at 5-7, paras. 10-13; Suppl. Joint Statement, Exh. A, Supplemental Declaration of Pamela F. Ellis, at AEP2929-31, paras. 13-20 (Ellis Suppl. Joint Statement Decl.).

[115] *See* Answer at 58, para. 31; *see also id*. at 6, 14-15, 22-23, 31-32, 43, 49, 64-65, paras. 7, 11, 16, 21, 23, 27, 39; Ellis Answer Decl. at AEP1412-15, paras. 15-25; Suppl. Joint Statement at 5-7, paras. 10-13. AT&T also claims that AEP "proposed" {[[redacted]]} feet as the amount of space AT&T occupies on AEP's poles. Reply Legal Analysis at 10-11. We do not agree that AEP makes this argument, but instead was merely referencing a provision of the parties' superseded JUA that allocated this amount of space to AT&T. Answer at i, 6, para. 7. Nonetheless, we agree with AT&T that allocated space under a superseded JUA is not "probative direct evidence" of the amount of space AT&T now occupies. Reply Legal Analysis at 10.

[116] Answer at 6, 14-15, 22-23, 31-32, 43, 49, 58, 64-65, paras. 7, 11, 16, 21, 23, 27, 31, 39; *id*.at 32-38, para. 21 (alleging safety space should be allocated to AT&T); Ellis Answer Decl. at AEP1412-15, paras. 15-17, 19-25; Suppl. Joint Statement at 5, para. 10.

[117] Ellis Answer Decl. at AEP1413, para. 20; *see also* Suppl. Joint Statement at 5-7, paras. 10-12 (describing survey design and collection methods); Suppl. Joint Statement, Exh. B, Declaration of James C. Manlove at AEP2934,
(continued….)

to show that the average height of AT&T's highest attachment is {[ ] feet.[118] AEP offers two slightly different explanations of how it reaches the {[ ]}feet figure it claims AT&T's attachments actually occupy, but both rely on the assumption that the space AT&T's attachments occupy begins at the Commission's presumed 18-foot minimum ground clearance[119] and includes one foot above the average height of AT&T's highest attachment.[120]

30. Under longstanding Commission precedent, the safety space is attributed to the electric utility, not the attacher.[121] We reject AEP's suggestion that the 3.33 feet of safety space should be included in the calculation of space occupied by AT&T and, therefore, we reject AEP's claim that AT&T occupies {[ ]} feet of space on its poles. We also reject AEP's claim that AT&T's attachments actually occupy {[ ]} feet of space because AEP's methodology is based on faulty assumptions. In particular, AEP assumes that the space AT&T's attachments occupy must begin at the 18-foot minimum ground clearance point on the pole, which is generally presumed to be the bottom of the usable space.[122] First, AEP does not assert that, on average, AT&T has attachments at the 18-foot minimum ground clearance level. Indeed, AEP states that "the average height of AT&T's lowest attachment is {[ ]} feet" and that, on poles on which AT&T has only one attachment, 70% of poles surveyed, "the average

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para. 6; Suppl. Joint Statement, Exh. C, Declaration of Joseph D. Chambers (Chambers Suppl. Joint Statement Decl.); AEP Compliance Filing, Proceeding No. 22-357, Exhs. 5-8 at AEP2920-23 (filed Feb. 24, 2023) (AEP Compliance Filing) (bearing on the statistical validity of AEP's pole survey)); AEP Texas Inc.'s Supplemental Responses to AT&T's First Set of Interrogatories, Proceeding No. 22-357, Exh. 5 at AEP1662 (filed Jan. 24, 2023) (November 2022 Numerical Data); *id*., Exhs. 6.1-6.8 at AEP1663-2915 (Survey Photos). We note that AEP filed the underlying data used to support its space occupied claims after AT&T filed its Reply and Reply Legal Analysis. Although AT&T raises questions regarding the survey in its Reply and Reply Legal Analysis, AT&T does not challenge "the statistical validity or margin of error of the data gathering AEP performed" in its subsequent pleadings. Rhinehart Suppl. Joint Statement Aff. at 2, para. 2. We accept AEP's survey as statistically valid.

[118] *See* Ellis Answer Decl. at AEP1413, para. 19; Suppl. Joint Statement at 6, para. 12; Chambers Suppl. Joint Statement Decl. at AEP2944, para. 12.

[119] The calculation of the maximum Old Telecom Rate requires a space factor determination. 47 CFR § 1.1409(e)(2) (2010). In turn, the space factor input requires a determination of the space occupied by an attachment and total unusable space. *Id*. Total unusable space is space below the minimum grade level. 47 CFR § 1.1402(c). The Commission generally presumes an average minimum ground clearance of 18 feet. *2001 Order on Reconsideration*, *supra* note 113, at 12129, para. 48.

[120] *See* Answer at 22-23, para. 16 ("When the {]} average height of AT&T's highest attachment is paired with the Commission's presumption that the lowest point of attachment on a pole is 18 feet, this means that AT&T is actually occupying, on average, {[ ]} feet of space. An attachment at 18' would be deemed to occupy one foot of space. Thus, if the average height of AT&T's highest attachment is 1.29' above 18' then this means AT&T is occupying an[] additional {[ ]} of space (i.e., {[ ]} of space)."); *see also id.* at 23, para 16; Ellis Answer Decl. at AEP1412, AEP1413-14, paras. 17, 19-24. AEP also asserted that the {[ ]} feet of space it claims AT&T's attachments actually occupy is based, in part, on its assertion that the average midspan sag of AT&T's facilities precludes attachments below AT&T's attachment. Ellis Suppl. Joint Statement Decl. at AEP2930, paras. 17-18; Suppl. Joint Statement at 6-7, para. 12.

[121] *AT&T v. DEP Recon Order*, *supra* note 1, at *14, paras. 42-44; *see also Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Report and Order, 15 FCC Rcd 6453, 6467-68, paras. 21-22 (2000) (*2000 Fee Order*); *2001 Order on Reconsideration*, *supra* note 113, at 12130, para. 51 (2001) (the safety space is "usable and used by the electric utility") (citing *Adoption of Rules for the Regulation of Cable TV Attachments*, CC Docket No. 78-144, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59, 69-70 (1979); *2011 Order*, *supra* note 1, at 5320, para. 180 & nn.558-59 (declining to revisit prior ruling that the safety space is usable and used by the electric utility).

[122] *Supra* note 119.

height of AT&T's attachment is {[[redacted]]} feet."[123] Second, AT&T is not guaranteed the right to locate its facilities at the lowest point in the communications space on AEP's poles.[124] Finally, AEP itself states that "the survey data reveals that there is between {[[redacted]]} to {[[redacted]]} feet of *usable* space [at the pole] below AT&T's lowest attachment on jointly used poles owned by AEP."[125] Based on these facts, the record does not support AEP's premise that all of the space from the 18-foot minimum ground clearance to the average height of AT&T's highest attachment is occupied by AT&T's attachments. Thus, AEP's methodology fails to provide a reasonable approach to determine the space AT&T's attachments occupy on AEP's poles.

31. AEP alternatively claims that AT&T's attachments occupy {[[redacted]]} feet of space on AEP's poles.[126] This claim is based on data from AEP's November 2022 Survey showing that AT&T has, on average, {[[redacted]]} attachments on AEP's poles.[127] AEP applies the presumption in section 1.1410 that an attachment occupies one foot to the average number of AT&T attachments on its poles, {[[redacted]]}, and concludes that AT&T's attachments occupy {[[redacted]]} feet.[128] Thus, AEP does not attempt to rebut the

[123] AEP Initial Brief at 5 (citing Chambers Suppl. Joint Statement Decl. at AEP2944, AEP2946, para. 12, Attachment 1). We note that there is a minor discrepancy between these two pleadings with regard to the average height of AT&T's lowest attachment—AEP Initial Brief states it is {[[redacted]]}, Chambers Suppl. Joint Statement Decl. states it is {[[redacted]]}—but we do not find it material.

[124] *Supra* para. 20; Complaint at 8-9, para. 16; Answer at 23, para. 16.

[125] AEP Initial Brief at 5-6 (emphasis added); *see id*. at 6 n.17. Although AEP acknowledges there is usable space below AT&T "*at the pole*," AEP contends "there is, on average, insufficient space midspan for an additional attachment below AT&T." *Id*. at 6 n.17; *see also* Ellis Suppl. Joint Statement Decl. at AEP2930, paras. 17-18 (asserting that because AEP's survey showed that the average height of AT&T's lowest midspan clearance is {[[redacted]]} feet and the National Electric Safety Code requires 15.5 feet of ground clearance at midspan over most types of terrain, "there is no room for another attacher to attach below AT&T."). We are not convinced. AEP has failed to demonstrate that midspan clearance issues make it impossible to accommodate a wireline or other attachment below AT&T's facilities, through make-ready or otherwise. Indeed, AEP has acknowledged that its survey showed a small number of third-party hardline facilities below AT&T, and that municipalities are allowed to place attachments below AT&T on AEP poles. AEP Initial Brief at 5 n.13 (citing Arnett Decl. at AEP1464, para. 21); *see also* Answer at 23, para. 16 & n.62; Ellis Answer Decl. at AEP1421-22, paras. 47-48.

[126] Answer at 15, 58, paras. 11, 31; Ellis Answer Decl. at AEP1413, para. 18; Ellis Suppl. Joint Statement Decl. at AEP2931, para. 20 (stating that data from its pole survey shows "AT&T has an average of {[[redacted]]} attachments per AEP pole. Because an attachment is deemed to occupy one foot of space under the Commission's presumptions, this means that . . . AT&T is occupying {[[redacted]]} feet of space per each AEP pole according to those presumptions."); AEP Initial Brief at 2, 7-8.

[127] Answer at 15, 58, paras. 11, 31; Ellis Answer Decl. at AEP1413, para. 18 ("AEP's data indicates that, for the period from 2018-2022, AT&T had an average of {[[redacted]]} attachments on each AEP pole."); Chambers Suppl. Joint Statement Decl. at AEP2944 ("subject to a 4.8% margin of error, the average number of AT&T attachments per pole with the Population is {[[redacted]]} attachments"); AEP Initial Brief at 7. AT&T initially took issue with the figure of {[[redacted]]} attachments per pole because it was "uncorroborated and impossible to verify or challenge without source data." AT&T Reply at 12, para. 7. AEP subsequently submitted the source data. *Supra* note 117. AT&T's pleadings filed after AEP submitted the source data do not dispute the {[[redacted]]} figure, even though it had the opportunity to address "factual material" filed subsequent to filing its Reply. *See* Letter from Rosemary H. McEnery, Chief, Market Disputes Resolution Division, to Christopher S. Huther, Counsel for Complainant, and Eric B. Langley, Counsel for Defendant, Proceeding No. 22-357 (Mar. 16, 2023). *See also* Chambers Suppl. Joint Statement Decl. at AEP2945. Thus, we accept that AT&T, on average, has {[[redacted]]} attachments on AEP's poles.

[128] Answer at 15, 58, paras. 11, 31; Ellis Answer Decl. at AEP1413, para. 18; Ellis Suppl. Joint Statement Decl. at AEP2931, para. 20 (stating that data from its pole survey shows "AT&T has an average of {[[redacted]]} attachments per AEP pole" and that "[b]ecause an attachment is deemed to occupy one foot of space under the Commission's presumptions, this means that . . . AT&T is occupying {[[redacted]]} feet of space per each AEP pole according to those presumptions."); AEP Initial Brief at 2, 7-8. *See* 47 CFR § 1.1410.

presumption in section 1.1410, as AT&T suggests;[129] rather AEP relies on the presumption that an attachment occupies one foot and applies it. We find this to be a reasonable approach to calculating the space occupied input to the Old Telecom Rate formula.[130]

32. AT&T's attempt to undermine AEP's {[ ]} foot calculation based on photos taken during AEP's November 2022 Survey is unavailing.[131] According to AT&T, these photos refute AEP's {[ ]} foot space occupied figure because they show that AT&T's attachments are {[ ]}.[132] AEP counters that the Survey Photos AT&T cites show conditions not authorized by AEP.[133] In light of the disputed record regarding the extent to which attachments spaced closer than one foot are authorized, and because we cannot determine the validity of either party's position from the Survey Photos alone,[134] we find AT&T's critique inadequate to rebut the presumption that each of its attachments occupies one foot.

33. Further, we find that AT&T's analysis of the November 2022 Survey data also fails to rebut this presumption. AT&T claims that its analysis of AEP's November 2022 Survey data supports a space occupied figure of one foot or less for its attachments.[135] AT&T measured the distance between

[129] *See, e.g.*, AT&T Reply Legal Analysis at 33 (AEP "seeks to rebut the space occupied input"). AT&T's arguments seem to be based on the mistaken premise that under our rules, the total amount of space an attacher occupies on a pole—regardless of the number of attachments—is presumed to be one foot. *See, e.g.*, AT&T Initial Brief at 10; Peters Reply Aff. at ATT313, para. 17; *id*. at ATT310, 313, paras. 12, 18. But section 1.1410 provides that "the space occupied by *an attachment* is presumed to be one foot." 47 CFR § 1.1410 (emphasis added); *see also 2011 Order*, *supra* note 1, at 5297 n.399 (referring to the Commission's rebuttable presumption of "1 foot for the space occupied by an attachment"). Section 1.1410 does not address the total amount of space *an attacher* occupies on a pole where, as here, it averages more than one attachment on a pole. We also reject any claim that our precedent suggests a different view. *See* AT&T Reply Brief at 2-3 (citing *AT&T v. DEP Recon Order*, *supra* note 1, at *8, para. 24 & n.91; *AT&T v. DEF*, *supra* note 1, at 18276, para. 47). Unlike here, the utilities in those cases provided only statistically invalid surveys to rebut the presumption that an attachment occupies one foot of space. *AT&T v. DEP Recon Order*, *supra* note 1, at *8, para. 24 & n.91; *AT&T v. DEF*, *supra* note 1, at 18276-78, paras. 47-50.

[130] Our ruling here is consistent with the Commission's observation in the *Verizon Maryland Recon Order* that "the presumption to account for attachments and clearances is one foot of space" and "an incumbent LEC's position as the lowest attacher is irrelevant to the calculation." *Verizon Maryland Recon Order*, *supra* note 1, at *9, para. 27. Thus, where a party relies upon the presumption, as AEP does here, it may reasonably assume each attachment occupies one foot of space regardless of whether some of those attachments occupy the lowest position on the pole. Of course, as discussed below, AT&T is free to attempt to rebut the presumption that each of its attachments occupies one foot of space.

[131] *See* Rhinehart Suppl. Joint Statement Aff. at ATT397-98, para. 26; AT&T Reply Brief at 2, 5-6.

[132] *Id*.

[133] *See* AEP Initial Brief at 7-8 (explaining that, consistent with the NESC, communications attachments should be twelve inches apart, unless agreed to by parties involved, including the pole owner; that AEP "has never agreed to reduce the required separation between communications attachments on its poles" and therefore "the photographs cited by AT&T establish nothing more than the fact that AT&T is creating NESC violations on AEP's poles"). *See also* Peters Reply Aff. at ATT316, para. 22; Reply, Exh. A, Reply Affidavit of Daniel P. Rhinehart at ATT279, para. 16 (Rhinehart Reply Aff.).

[134] For example, numerous Survey Photos show attachments below the presumptive 18-foot minimum ground clearance, potentially supporting AEP's claims that the attachments are unauthorized. *E.g.*, Survey Photos at AEP1668, AEP1776, AEP1790, AEP1806, AEP2142, AEP2326. However, AT&T argues that site-specific ground clearance requirements vary based on factors such as "topography and what is below the aerial facilities." Peters Reply Aff. at ATT311, para. 14. We have no way to resolve the issue based on the current record.

[135] *See* Suppl. Joint Statement at 7-8, para. 14; Rhinehart Suppl. Joint Statement Aff. at ATT394-96, paras. 18, 20-22; *id*. at ATT396, para. 22 (calculating an {[ ]}; *see also* AT&T Reply (continued….)

AT&T's {[ ]} on AEP's surveyed poles, computed an {[ ]} distance of {[ ]} feet and, in apparent recognition of the need for clearance between attachments, {[ ]},[136] but {[ ]}.[137]

34. The record shows, however, that AT&T has no guaranteed right to have the lowest attachment on the pole,[138] that "the average height of AT&T's lowest attachment is {[ ]} feet," and that, on poles on which AT&T has only one attachment, 70% of poles surveyed, "the average height of AT&T's attachment is {[ ]} feet."[139] Thus, as discussed above, the survey data indicates that "there is between {[ ]} to {[ ]} feet of usable space [at the pole] below AT&T's lowest attachment on jointly used poles owned by AEP."[140] This amount of usable space, on average, permits another attachment below AT&T on such poles. Yet AT&T's calculation is based on the premise that the space "below [its] lowest attachment is *unusable* space already accounted for in the Commission's rate formula."[141] Because AT&T's calculation assumes, incorrectly, that there is only unusable space below its attachments where it has the lowest attachment, we are not persuaded that AT&T's measurement is reasonable. Therefore, based on the record before us, we find that AEP has shown that AT&T's attachments occupy, on average, {[ ]} feet of space on AEP's poles.

35. *Average Number of Attachers*. Calculating the Old Telecom Rate requires a determination of the average number of attaching entities per pole.[142] In order to avoid excessive cost and burden, the Commission has established rebuttable presumptions of three or five attachers (for rural or urban areas, respectively).[143] As with the one-foot presumption, this presumption may be rebutted by

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Brief at 2-3. Although AT&T characterizes its analysis as "corroborating" its conclusion that "the proper space occupied input for AT&T's use of AEP's poles is the presumptive input of 1 foot because AEP has not rebutted the presumption," we note that AEP did not attempt to rebut the presumption with its use of {[ ]} feet. *Supra* para. 31.

[136] Rhinehart Suppl. Joint Statement Aff. at ATT394-95, paras. 20-21; *see also* AEP Initial Brief at 3. AT&T alleges that its {[ ]}. *Id*. at ATT395, para. 20. Because we are not persuaded that AT&T's methodology is reasonable, we attach no significance to this alleged {[ ]}.

[137] *Id.* at ATT396, para. 22. Using the November 2022 Survey data, AT&T determined that there were {[ ]}. *Id*. at para. 22.

[138] *Supra* para. 20.

[139] AEP Initial Brief at 5 (citing Chambers Suppl. Joint Statement Decl. at AEP2944, AEP2946, para. 12, Attachment 1).

[140] *Supra* para. 30.

[141] Rhinehart Suppl. Joint Statement at ATT396 n.39 ("I did not assign 6 inches of additional space where AT&T is the lowest attacher because below that lowest attachment is *unusable* space already accounted for in the Commission's rate.") (emphasis added). *See also* Rhinehart Complaint Aff., Exh. R-1 at ATT13 (basing AT&T's rate calculation, in part, on {]}; Dippon Reply Aff. at ATT352, para 40 ("pole space below the lowest attachment is unusable space, which the Commission's rate formula takes into account").

[142] 47 CFR § 1.1409(e)(2) (2010) (calculating preexisting telecom rates based on "No. of Attaching Entities"); *AT&T v FPL Order on Review*¸ *supra* note 1, at *7, para. 21.

[143] 47 CFR § 1.1409(c).

"probative direct evidence,"[144] including "a statistically sound survey."[145] AT&T asserts that its service area qualifies for the presumption of five attachers under our rules—a point AEP does not dispute.[146] However, AEP maintains that it has rebutted that presumption with data for the years 2018 through 2021 showing that the overall average number of attaching entities on its poles is between {[ ]} and {[ ]}.[147] AT&T's analyses of AEP's data purportedly show an average number of attaching entities input that ranges from {[ ]} to {[ ]} attachers for the years 2018 through 2021,[148] and AT&T has stated that it is willing to {[ ]}.[149] The parties' competing analyses are both largely based on data that AEP collected as part of its annual pole inventory for the years 2018 to 2021.[150]

36. We find that AEP has produced data sufficient to rebut the presumption of five attachers per pole.[151] We now consider which party's methodology for calculating an average number of attachers

[144] *See AT&T v. DEP Recon Order*, *supra* note 1, at *18, para. 55 (noting that the presumptive number of attachers in the Old Telecom Rate may be rebutted by "probative direct evidence"); *AT&T v. FPL Order on Review*, *supra* note 1, at *7, para. 21 (same); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, *supra* note 112, at 4394, para. 52 n.27; *Teleport v. Georgia Power*, *supra* note 112, at 19866, para. 18 n.41.

[145] *2001 Order on Reconsideration*, *supra* note 113, at 12135, para. 63; *AT&T v. FPL Order on Review*, *supra* note 1, at *7, para. 21.

[146] Rhinehart Complaint Aff. at ATT4, para. 7; Suppl. Joint Statement at 4, para. 8; AT&T Initial Brief at 1.

[147] Suppl. Joint Statement at 2, para. 3; Ellis Suppl. Joint Statement Decl. at AEP2926-29, paras. 3-12; AEP Initial Brief at 8-11, 12; AEP Reply Brief at 6-8; Answer at 14, 58, 64, paras. 11 n.40, 31, 39; Ellis Answer Decl. at AEP1415-16, para. 28. AEP's average number of attaching entities is largely based on data from its annual pole attachment inventories conducted by AEP's pole inventory contractor, VentureSum. Ellis Answer Decl. at AEP1416, para. 29 ("each year, AEP performs an attachment inventory on approximately twenty percent (20%) of the distribution poles within its service territory . . . . [and as a result], the data used to determine each year's average attaching entity figure was collected during the five (5) preceding years"); *see id* at AEP1416-17, para. 31; *see also* AEP Compliance Filing at 1, para. 1; *id*., Exhs. 1-4 at AEP2916-19; Suppl. Joint Statement at 3, para. 7.

[148] Suppl. Joint Statement at 4, para. 8; Rhinehart Suppl. Joint Statement Aff. at ATT385-393, paras. 3-17; Rhinehart Reply Aff. at ATT282, para. 24. As indicated above, the data used to determine each year's average attaching entity figure was collected during the five preceding years. Thus, each party's calculation of average number of attachers for the years 2018, 2019, 2020 and 2021 is based on data collected during the five preceding years, and when the parties refer to data for a given year, they mean a dataset collected over multiple years. We adopt the same convention here in referring to data for a given year.

[149] AT&T Initial Brief at 1; Suppl. Joint Statement at 4, para. 8 ("{[ ]}"); Rhinehart Suppl. Joint Statement Aff. at ATT385, para. 3. *See* Complaint at 18, para. 31 & nn.85, 86 (calculating both the New Telecom Rate and the Old Telecom Rate using average number of attaching entities input of {[ ]}).

[150] *Supra* note 147; Rhinehart Suppl. Joint Statement Aff. at ATT386-391, paras. 5-13; AT&T's Data Submission in Accordance with February 15, 2023 Letter Ruling, Proceeding No. 22-357 at 1-2 & Exhs. 1-7 (filed Feb. 24, 2023); Suppl. Joint Statement at 2-3, 4-5, paras. 3-7, 9. *See* Rhinehart Reply Aff. at ATT279-283, paras. 18-26; Rhinehart Complaint Aff. at ATT4-5, paras. 4-10. As explained below, AT&T used 3 different methodologies to filter AEP pole inventory data for 2021. *Infra* paras. 37, 39.

[151] Although AT&T claims there are "flaws" in the data AEP produced, AT&T has not shown that these "flaws" provide a reasonable basis to disregard the data entirely and apply the presumption of five attachers. *See* Rhinehart Reply Aff. at ATT282-283, paras. 25-26; Rhinehart Suppl. Joint Statement Aff. at ATT385, ATT391, para. 3 & n.21. AT&T's claim is largely based on its observation that there is an "inexplicable dip" in the average number of attaching entities and a lower pole match rate for the year 2020. *See infra* paras. 37, 39. Other than a mere

(continued….)

from that data is more reasonable and persuasive.[152] AEP calculates an average number of attaching entities based on three datasets:[153] (1) poles throughout AEP's entire service territory, including an area that is not covered by the JUA, known as the former AEP Texas North Company territory;[154] (2) poles throughout the entire service area covered by the JUA, known as the former AEP Texas Central Company service territory, including areas within that territory that AT&T does not serve;[155] and (3) poles located in counties within the former Texas Central Company service where AT&T has attachments.[156] AEP states that all three of its datasets yielded numbers ranging from {[ ]} to {[ ]} for the years 2018 to 2021, for an average of {[ ]} for those years.[157] AEP asserts that if the Commission believes that it would be inappropriate to calculate an average number of attachers based on the first dataset described above, encompassing poles in AEP's entire service territory, the Commission should look to the averages derived from its second or third datasets.[158]

37. AT&T by contrast, filtered the pole inventory data AEP produced to identify only those AEP poles covered by the JUA on which AT&T has attachments.[159] AT&T's analysis of these poles

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observation, there is nothing in the record to show this "dip" justifies an upward adjustment in the average number of attachers. We likewise find that the "dip" does not justify setting aside AEP's survey data entirely and imposing the presumptive input of five attachers. *See* AT&T Initial Brief at 12.

[152] In determining a reasonable average number of attaching entities, we consider all relevant record evidence, regardless of the purpose for which it was offered. Thus, we consider AT&T's detailed analyses of AEP's data even though AT&T asserts that it "did not 'propose' a methodology for calculating the average number of attaching entities, but instead argued for use of the presumptive input." *See* AT&T Reply Brief at 7 n.33.

[153] The JUA at issue here covers poles located within the former AEP Texas Central Company's service territory. Ellis Suppl. Joint Statement Decl. at AEP2928, para. 11; Joint Statement at 2, para. 3. AEP Texas Central Company and AEP Texas North Company merged in 2016. Ellis Suppl. Joint Statement Decl. at AEP2926, para. 5. Beginning with billing year 2019, AEP began to calculate its pole attachment rates based on the entire service area of these former two companies. *Id.* at AEP2926, paras. 5-6*;* Compliance Filing Exhs. 1-4 at AEP2916-19.

[154] Suppl. Joint Statement at 2-3, para. 4; Rhinehart Suppl. Joint Statement Aff. at ATT386-88, paras. 5, 7. The former AEP Texas North Company territory is covered by a separate joint use agreement, not at issue here. *See* Suppl. Joint Statement at 2-3, para. 4; *see* Joint Statement at 2, para.3.

[155] Suppl. Joint Statement at 3, para. 5; Ellis Suppl. Joint Statement Decl. at AEP2927, AEP2928, paras. 7-9, 11.

[156] Suppl. Joint Statement at 3, para. 5; Ellis Suppl. Joint Statement Decl. at AEP2928, para. 11.

[157] *See* Suppl. Joint Statement at 2, para. 3; Ellis Suppl. Joint Statement Decl. at AEP2926, AEP2927, AEP2928, paras. 3, 5, 7, 8, 11 (for AEP's entire service area, AEP calculated the average number of attaching entities to be {[ ]} (2018, based on Texas Central Company poles only), {[ ]} (2019), {[ ]} (2020), and {[ ]} (2021); for the former AEP Texas Central Company service territory, AEP calculated the average number of attaching entities to be {[ ]} (2018), {[ ]} (2019), {[ ]} (2020), and {[ ]} (2021); for the counties in which AT&T has attachments in the former AEP Texas Central Company service territory, AEP calculated the average number of Attaching entities to be{[ ]} (2018), {[ ]} (2019), {[ ]} (2020), and {[ ]} (2021)).

[158] AEP Initial Brief at 11.

[159] *See* Rhinehart Reply Aff. at ATT282, para. 24; Rhinehart Suppl. Joint Statement Aff. at ATT386-91, paras. 5-12. AEP provided AT&T several spreadsheets that contained information pertaining to the number of attaching entities on AEP's poles, referred to as Attacher Detail Spreadsheets, which AEP relied on to support its proposed average number of attaching entities inputs for the years 2018 to 2021. Rhinehart Suppl. Joint Statement Aff. at ATT386, para. 5; *supra* note 147. AT&T then reviewed the pole count in each Attacher Detail Spreadsheet and determined that the number of poles identified was higher than the number of poles for which AT&T had been invoiced over the same time period. Rhinehart Suppl. Joint Statement Aff. at ATT386-87, para. 6. AT&T largely attributed the difference to AEP's inclusion of poles on which AT&T had no attachments and poles not covered by the JUA. *Id.* at ATT386-388, paras. 6-7. AT&T filtered out those poles in its calculations. *Id.* at ATT388-89, paras. 8-10; *see also id.* at ATT389, paras. 9 (describing efforts to compare AEP's Attacher Detail Spreadsheets with pole information
(continued….)

yielded an average number of attachers ranging from{[ ]} to {[ ]} for the years 2018 to 2021.[160] In addition, AT&T applied two alternative filtering methodologies to data for 2021, which respectively produced averages of {[ ]} and {[ ]}.[161] AT&T claims that in order to correct for certain alleged "flaws" in AEP's data, evidenced by an "inexplicable dip" in the average number of attaching entities for 2020, we should use an average number of attaching entities input of {[ ]}.[162]

38. In considering which party's calculation is more reasonable, we begin with the standard announced in *Teleport v. Georgia Power*, cited by both parties.[163] There, the Commission stated that "to be a reasonable reflection of the actual poles to which an attacher is fixed," an average number of attachers based on survey data "must reflect only those poles in areas where the attacher is actually affixed."[164] In applying this precedent, we agree that there may be multiple ways to calculate an average number of attachers, as AEP observes,[165] but, where the record supports it, we find it more reasonable to rely on an approach likely to yield the most accurate number for the poles at issue. We are also mindful that AEP "does not contend that AT&T's proposed methodology [,which only considers poles on which AT&T has attachments,] is incorrect."[166]

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collected by AEP's pole inventory contractor, VentureSum, for exact pole matches to "produce[] a list that included the number of attaching entities identified in the Attacher Detail spreadsheet for each pole identified as an AEP-owned JUA pole shared by AEP and AT&T in the VentureSum inventory spreadsheet"); *id*. at para. 10 (explaining that the VentureSum information "provides a valid comparative data set for isolating poles with AT&T attachments covered by the JUA" and noting that "AEP describes the VentureSum inventory spreadsheet as 'the source data for the attachment inventories utilized in the Attacher Detail spreadsheets'"); *id*. at ATT390, para. 11 (asserting that "the high number of exact matches between poles identified in the Attacher Detail spreadsheets and those identified as JUA poles shared by the parties in the VentureSum inventory spreadsheet . . . validated the process [AT&T used] to filter the AEP Attacher Detail data"); *see also* Ellis Answer Decl. at AEP1416, para. 29. AT&T states that this filtering methodology produced a "reliable list" of AEP poles with the number of attaching entities identified that allowed AT&T to "calculate the average number of attaching entities on AEP poles to which AT&T is attached under the JUA." Rhinehart Suppl. Joint Statement Aff. at ATT390, para. 12.

[160] *See* Rhinehart Suppl. Joint Statement Aff. at ATT391, para. 12 (using AEP data, AT&T calculated the average number of Attaching entities to be {[ ]} (2018), {[ ]} (2019), {[ ]} (2020), and {[ ]} (2021)).

[161] AT&T arrived at an average of {]} attachers by taking the "list of all poles with AT&T attached" that AEP used to identify the sample of 425 poles to be included in AEP's November 2022 survey—a list of more than {[ ]} poles—and comparing it with the poles in AEP's most recent 2021 Attacher Detail Spreadsheet to identify "exact matches" between the two. Rhinehart Suppl. Joint Statement Aff. ATT391-392, paras. 14-15; *see* AEP Compliance Filing, Exh. 5 at AEP2920; *id*., Exh. 4 at AEP2919 (AEP's 2021 Attacher Detail Spreadsheet). To arrive at an average of {[ ]} attachers, AT&T compared the spreadsheet identifying the 425 poles that AEP asked its contractor to survey in November 2022 with AEP's 2021 Attacher Spreadsheet to identify exact matches between the two. Rhinehart Suppl. Joint Statement Aff. at ATT393, paras. 16-17; *see also* Ellis Answer Decl. at AEP1413-14, paras. 20-24; AEP's 2021 Attacher Detail Spreadsheet at 2919; November 2022 Numerical Data spreadsheet at AEP1662.

[162] *See* Rhinehart Reply Aff. at ATT282, para. 25 ("the average number of attaching entities tends to increase over time" but AEP's data show "an inexplicable dip in the number of attaching entities for a single year (2020)"); Rhinehart Suppl. Joint Statement Aff. at ATT385, para. 3; *id*. at ATT391, n.21 (claiming that there is a "similar unexplained anomaly in the lower pole match rate for 2020"); Suppl. Joint Statement at 4, para. 8.

[163] Suppl. Joint Statement 3, 4-5, paras. 5, 9.

[164] *Teleport v. Georgia Power*, *supra* note 112, at 19869, para. 25.

[165] AEP Initial Brief at 11; AEP Reply Brief at 8.

[166] AEP Initial Brief at 11. We find no basis for AEP's assertion, however, that AEP's chosen method is entitled to deference. *Id.*; AEP Reply Brief at 8.

39. Given the circumstances here, where the data about the poles on which AT&T is attached is readily available from AEP's records, we find that a calculation based on that data provides the most "reasonable reflection of the actual poles to which [AT&T] is affixed."[167] We therefore conclude that AT&T's analyses of AEP's data, which include only poles on which AT&T is attached, more persuasive than AEP's analyses, which include poles on which AT&T has no attachments.[168] Although we accept AT&T's approach to calculating the average number of attachers, we reject AT&T's argument that we should adopt an input of {[ ]} to account for an alleged "inexplicable dip" in the average number of attaching entities for 2020, particularly since AT&T failed to investigate this issue in discovery.[169]

40. Rather than computing one overall average number of attaching entities figure to be used in calculating any refund liability, we find that the parties should use the AT&T-calculated average number of attaching entities figure that most closely aligns with the relevant rate year for which a refund may be due.[170] Thus, for the year 2020, the parties should use the AT&T calculated figure of {[ ]}, and for the year 2021, the parties should use the AT&T-calculated figure of {[ ]}.[171] As additional

[167] *Teleport v. Georgia Power*, *supra* note 112, at 19869, para. 25. We do not hold that *Teleport v. Georgia Power* requires that a survey supporting the average number of attachers input be limited to poles on which a party has attachments. *See id.* ("the average must reflect only those poles in areas where the attacher is actually affixed"); *see also 2001 Order on Reconsideration*, *supra* note 113, at 12137 n.227. Nor are we persuaded by AEP's suggestion that using such a methodology here will make it impossible for AEP to calculate an average attaching entity figure for a new attacher that has no attachments. As AEP admits, it charges all competitive attachers the Cable Rate, which requires no input for average number of attachers. Answer at 14, n.40; *see id*. at 55-56, 64, nn.138, 156.

[168] Even putting aside AEP's inclusion of poles on which AT&T is not attached, we believe AEP fails to show that its analyses and resulting calculations produce the more reasonable input figures. Specifically, AEP acknowledges that two of its calculations include areas broader than the service area in which AT&T attaches to AEP's poles, but fails to explain why including poles from such broad service areas reasonably reflects AT&T's service area at issue. *See* AEP Reply Brief at 7; *see also* Ellis Suppl. Joint Statement Decl. at AEP2926-28, paras. 4-11; Joint Statement at 2, para. 3; *Teleport v. Georgia Power*, *supra* note 112, at 19869, para. 25 (noting that Teleport targeted only local business telephone customers in urban areas, which "tends to support the use of a smaller, denser representative area," and that the pole owner failed to offer any explanation of why it included or excluded poles in determining a representative area). AEP similarly fails to explain why its third calculation, which includes all poles within the counties in the former AEP Texas Central Company in which AT&T has attachments, is a reasonable reflection of the poles to which AT&T is attached. Indeed, the fact that AT&T's analyses, which are limited to poles with AT&T attachments, all yield a larger average number of attaching entities than AEP's third calculation, suggests that this third county-focused calculation does not reasonably reflect the areas where AT&T is attached.

[169] *See* AEP Initial Brief at 9-10 n.33 (noting that it provided AT&T with this data during the "pre-complaint settlement negotiations," but despite having the data, AT&T failed to "prove this issue during pre-complaint negotiations or discovery in this proceeding"); Rhinehart Suppl. Joint Statement Aff. at ATT386, ATT389, paras. 5, 10; *see also* 47 CFR § 1.730. We also reject AT&T's suggestion that using an input of {[ ]}is supported by the two alternative filtering methodologies that AT&T applied to data for 2021, which respectively produced averages of {[ ]} and {[ ]}. Rhinehart Suppl. Joint Statement Aff. ATT391-393, paras. 14-17; *see also* AEP Compliance Filing, Exh. 5 at AEP2920; AEP's 2021 Attacher Detail Spreadsheet at AEP2919; Ellis Answer Decl. at AEP1413-14, paras. 20-24; November 2022 Numerical Data spreadsheet at AEP1662. The first alternative, {[ ]}, is not materially different from, and essentially corroborates, the average of {[ ]} that AT&T calculated for 2021 using its original filtering technique. The {[ ] figure provides no basis to adopt an average of {[ ]} for the entire period at issue. Further, because the second alternative filtering methodology, which produced an average of {[ ]}, was based on a vastly smaller number of poles, we see no basis to substitute that figure for the {[ ]} figure that AT&T's original filtering technique produced for 2021 based on an analysis of {[ ]} poles. *See* Rhinehart Suppl. Joint Statement Aff. at ATT391, para. 12.

[170] As noted elsewhere in this *Order*, any refund due AT&T would extend from filing of the Complaint back to January 1, 2020.

[171] *See supra* note 160.

pole inventory data becomes available, the parties should calculate the average number of attaching entities input figure for subsequent years consistent with AT&T's methodology and our finding here. Alternatively, the parties may agree to use another average number of attaching entities input during their negotiations to implement this *Order*.

E. AT&T's Refund Request is Governed by a Four-Year Statute of Limitations

41. Section 1.1407 of the Commission's rules 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."[172] 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."[173] Neither the Act nor Commission rules specifies a limitations period for pole attachment complaints. Consequently, the Commission has established a "borrowing" rule, which looks to the law of the state where the utility's poles are located, determines the state cause of action most analogous to the claims at issue, and applies the state statute of limitations for such actions.[174]

42. In this case, the poles at issue are located in Texas. The Commission has held that a state limitations period governing breach of contract actions is 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."[175] Applying this precedent, we find that the most closely analogous state statute of limitations is for an action involving a breach of contract. The limitations period for breach of contract actions in Texas is four years.[176] We therefore find that this action is governed by a four-year statute of limitations.

43. AEP does not dispute that contract actions in Texas are governed by a four-year limitations period. Rather, AEP asserts that because "AT&T does not contend that AEP breached the contract" but instead "claims that an express term of the contract is unlawful" the "state law claim most analogous to AT&T's refund claim is a claim for unjust enrichment."[177] AEP cites a case from Texas holding that "[u]njust enrichment claims are governed by the two-year statute of limitations in section 16.003 of the Civil Practice and Remedies Code."[178] Section 16.003 provides that a two-year limitations

[172] 47 CFR § 1.1407(a).

[173] 47 CFR § 1.1407(a)(3).

[174] *See AT&T v. DEP Recon Order*, *supra* note 1, at *12, para. 38; *Verizon Maryland*, *supra* note 1, at 13626, paras. 40-42; *see also AT&T v. DEP*, *supra* note 1, at 13711, para. 58; *AT&T v. FPL II*, *supra* note 1, at 256, paras. 9-10; *AT&T v. DEF*, *supra* note 1, at 18280, para. 56.

[175] *See Verizon Maryland*, *supra* note 1, 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. DEP*, *supra* note 1, at 13712, para. 59; *AT&T v. DEF*, *supra* note 1, at 18280-81, para. 57; *AT&T v. FPL II*, *supra* note 1, at 256, para. 10 & n.26.

[176] *See Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002) ("A party asserting a breach of contract claim must sue no later than four years after the day the claim accrues.") (citing Tex. Civ. Prac. & Rem. Code § 16.051). Tex. Civ. Prac. & Rem. Code § 16.051 provides: "Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues."

[177] *See* Answer at 56; *id.* at 14 n.38; *id.* at 68 (Affirmative Defense 5); *id*. at 59 (arguing that although "AT&T is challenging the contractual payment obligation set forth in a Texas contract, this action 'involves' a federal administrative claim that sounds in restitution").

[178] *Elledge v. Friberg-Cooper Water Supply, Corp*., 240 S.W.3d 869, 871 (Tex. 2007); Answer at 57 & n.142.

period governs actions for "trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer."[179] We are not persuaded that the claims governed by this statute are more analogous to AT&T's cause of action than a claim for breach of contract. AT&T's claims in this case require us to analyze and interpret the terms of the JUA to determine whether and when the JUA renewed, whether it provides material advantages to AT&T, and whether the rate term in the JUA complies with section 224(b) of the Act, section 1.1413(b), and Commission precedent. Similar to a contract dispute, the focus of our inquiry here is on how to interpret and apply specific contractual terms in the JUA, and not on applying equitable principles, such as unjust enrichment, to void a contract provision. Indeed, the remedy in this case requires the parties to enter negotiations over new rate terms in their agreement, with instructions that the rate charged AT&T may not exceed the Old Telecom Rate, and the rate charged AEP should be a proportional reciprocal rate. For all of these reasons, we find that the Texas statute of limitations applicable to contract actions is the most closely analogous statute of limitations.[180]

44. We also reject AEP's argument that we should apply the two-year limitations period in section 415(b) of the Act which governs complaints against a "carrier" for the recovery of damages not based on overcharges.[181] Prior Commission orders have repeatedly rejected application of section 415(b) in similar pole attachment complaint proceedings involving incumbent LECs.[182]

45. Application of the four-year statute of limitations would ordinarily mean that any refund due AT&T would extend back for four years from the filing date of the Complaint. However, because we

[179] Tex. Civ. Prac. & Rem. Code § 16.003(a). *See Elledge v. Friberg-Cooper Water Supply Corp*., 240 S.W.3d at 869-70 (citing Tex. Civ. Prac. & Rem. Code § 16.003(a)).

[180] *See Verizon Maryland*, *supra* note 1, at 13626-27, para. 43. AEP cites *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 775 (Tex. 2005) (*BMG v. Peake*) in support of its contention that AT&T's claim is most analogous to a claim for unjust enrichment, and thus the two-year limitation period in Tex. Civ. Prac. & Rem. Code § 16.003 should apply here. Answer at 56-57, para. 31. *BMG v. Peake* does not address a statute of limitations issue. The case addresses whether the voluntary payment rule, an equitable defense, is available in an action alleging that a late payment fee provision in a contract is an unlawful penalty. The court found that a claim to void a late fee term in a contract as an unlawful penalty sounds in restitution for unjust enrichment rather than in contract and is subject to a "voluntary payment" defense. In this case, by contrast, AT&T does not seek to void a term in the JUA and obtain relief based on equitable principles. Rather, as discussed, AT&T seeks review of the rate term in the JUA to ensure that it complies with section 224(b) and Commission rules and precedent. AEP's citation to *BMG v. Peake* therefore does not persuade us that AT&T's claims in this case should be governed by the two-year limitations period in Tex. Civ. Prac. & Rem. Code § 16.003. *Cf. AT&T v. DEP*, *supra* note 1, at 13712, n.199 (rejecting argument that AT&T's complaint was analogous to an action to rescind a contract, noting that "the 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.").

[181] Answer at 56 & n.139 (citing Petition for Declaratory Ruling of the Electric Edison Institute, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Apr. 20, 2021)) (EEI Petition); *id.* at 68 (Affirmative Defense 6); *see* 47 U.S.C. § 415(b) (providing that "[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, and not after").

[182] *AT&T v. DEP Recon Order*, *supra* note 1, at *13, para. 40; *Verizon Maryland*, *supra* note 1, at 13627, para. 45 & n.158; *AT&T v. FPL II*, *supra* note 1, at 256-57, para. 11. AEP's Answer does not address this precedent regarding application of section 415 to pole attachment complaints. Indeed, AEP's advocacy in favor of the two-year limitations period in section 415(b) of the Act is limited to its citation to a petition for declaratory ruling filed by a third party in a separate proceeding. *See* Answer at 56, para. 31 & n.139 (citing EEI Petition); *see also id*. at 4-5, para. 6 & n.15. As stated in *AT&T v. DEP Recon Order*, we address here only the arguments made in the pleadings before us and do not address arguments set forth in materials filed in a separate proceeding. *AT&T v. DEP Recon Order*, *supra* note 1, at *13, n.149.

find that AT&T is only entitled to relief under the *2018 Order*, any refund due AT&T will not be available before the date when AT&T became entitled to relief under the *2018 Order*—i.e., upon renewal of the JUA on January 1, 2020. Thus, any refund due AT&T would extend from filing of the Complaint back to January 1, 2020.[183]

46. AEP asserts additional grounds to limit or bar AT&T's recovery of a refund. None have merit. AEP asserts the equitable defenses of estoppel,[184] waiver,[185] accord and satisfaction,[186] unconscionability,[187] laches,[188] the voluntary payment doctrine,[189] unjust enrichment,[190] and the filed rate doctrine.[191] Even assuming such defenses may be asserted in a pole attachment complaint proceeding under section 224,[192] they fail here because AEP did not plead the essential elements of each defense, explain how the evidence supports each element, or cite supporting legal authority as the Commission's

[183] We reject AEP's assertion that "awarding a refund for periods preceding the complaint would constitute retroactive ratemaking" given (a) that AEP charged AT&T consistent with the JUA and (b) "there has never been a rate or formula establishing defined parameters for joint use agreement rates, particularly for periods governed by the [*2011 Order*]." Answer at 66, paras. 41-43. First, reference to the *2011 Order* is inapposite because we find here that relief is available only under the *2018 Order*. Second, the *2018 Order* established defined parameters for rates in newly renewed agreements such as the one at issue here. For such agreements, the *2018 Order* established a presumption that the incumbent LEC is similarly situated to other telecommunications attachers and entitled to a rate no higher than the New Telecom Rate and, if the presumption is rebutted, a rate no higher than the Old Telecom Rate, which serves as a "hard cap." *See 2018 Order*, *supra* note 1, at 7767-71, paras. 123, 126-129. Thus, in awarding a refund here, we prospectively apply the *2018 Order* to an agreement that was renewed after the *2018 Order* took effect.

[184] Answer at 68 (Affirmative Defense 1).

[185] Answer at 68 (Affirmative Defense 2).

[186] Answer at 68 (Affirmative Defense 3).

[187] Answer at 69 (Affirmative Defense 8)

[188] Answer at 69 (Affirmative Defense 12).

[189] Answer at 68 & n.161 (Affirmative Defense 4).

[190] Answer at 68 (Affirmative Defense 7).

[191] Answer at 69 (Affirmative Defense 14).

[192] *See Air Touch Cellular v. Pacific Bell*, Memorandum Opinion and Order, 16 FCC Rcd 13502, 13508 (2001) (finding that defendant failed to provide specific authority for the availability of equitable defenses in a formal complaint proceeding).

rules require.[193] AEP's filed rate doctrine defense also fails because AEP does not file tariffs with the Commission and thus there is no filed rate here.[194]

47. We reject AEP's further defense that the "rule upon which AT&T's complaint is premised is unlawful, *ultra vires*, arbitrary, capricious, and unreasonable."[195] The assertion that the rule, which presumably targets section 1.1413, is unlawful or *ultra vires* is meritless because the Commission duly adopted that rule pursuant to the authority in section 224 to ensure that pole attachment rates are just and reasonable.[196]

48. We also reject AEP's argument that the Commission should forbear, under section 10(a) of the Act, from exercising regulatory authority in this case generally, or from applying a four-year limitations period under section 1.1407.[197] AEP's forbearance request lacks merit because, as discussed above, we find that the JUA rates are not just and reasonable; thus forbearing from enforcement of section 224(b) here would impede, rather than ensure, just and reasonable charges.[198] Further, forbearance would

[193] *See* 47 CFR §§ 1.721(b) (all matters concerning a claim or defense "should be pleaded fully and with specificity"); 1.721(d) (claims or defenses "must be supported by relevant evidence"); 1.721(e) (legal arguments "must be supported by appropriate statutory, judicial, or administrative authority"); 1.726(b) (an answer must state "fully and completely" "the nature of any defense"); 1.726(c) (an answer shall "include legal analysis relevant to the claims and arguments set forth therein"); *see also AT&T Corp. v. Business Telecom, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd. 12312, 12336, para. 52 & n.154 (2001) (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"); *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*, *supra* note 1, at 18283, para. 62; *AT&T v. DEP*, *supra* note 1, at 13714, para. 61.

[194] *See Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998) (under the filed rate doctrine "'the rate of the carrier duly filed [in a tariff] is the only lawful charge'") (quoting *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)); *Wireless Consumers Alliance, Inc.*, WT Docket No. 99-263, Memorandum Opinion and Order, 15 FCC Rcd 17021, 17029, 17031, paras. 16, 18 (2000) (explaining that "[t]he filed rate doctrine forbids a regulated entity from charging rates 'for its services other than those properly filed with the appropriate federal regulatory authority'" and concluding that because CMRS carriers do not file tariffs with the Commission, the filed rate doctrine does not preclude a state court from awarding monetary relief against such carriers) (internal citations omitted).

[195] Answer at 69 (Affirmative Defense 11).

[196] *See 2018 Order*, *supra* note 1, at 7767-71, 7791-91, paras. 123-29, 174-75. As noted in *Verizon Maryland*, two circuit courts of appeal have upheld the Commission's authority under section 224 to set just and reasonable rates for incumbent LECs. *See Verizon Maryland*, *supra* note 1, at 13612 n.43 (citing *City of Portland v. United States* and *Am. Elec. Power Serv. Corp. v. FCC*, *supra* note 1).

[197] Answer at 62, para. 36 & n.151; *id*. at 69 (Affirmative Defense 9); *id*. at 57, para. 31 & n.143. *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.").

[198] *See supra* Parts III.A, B.; *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");

(continued….)

not be "consistent with the public interest"[199] because the Commission has determined that the public interest is served by permitting incumbent LECs to file complaints, like AT&T's here, challenging the justness and reasonableness of pole attachment rates, and to obtain refunds of unjust and unreasonable rates "consistent with the applicable statute of limitations."[200] For similar reasons, we find no merit in AEP's request, under section 1.3 of the rules, for a waiver or suspension of section 1.1413.[201] Waiver of Commission's rules is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest.[202] AEP did not plead, and has not shown, that waiver of section 1.1413 would be in the public interest.[203] Having found that AEP 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 or obtain a refund of unjust and unreasonable charges previously paid.[204]

49. In sum, we apply the most closely analogous statute of limitations borrowed from state law[205] and conclude that the applicable limitations period for a refund under section 1.1407(a)(3) is four years. Accordingly, any refund due AT&T shall extend from the filing of the Complaint on October 4, 2022, back to January 1, 2020, the date when the *2018 Order* came to govern the agreement at issue here.

IV. ORDERING CLAUSES

50. Accordingly, IT IS HEREBY ORDERED, pursuant to sections 4(i), 4(j), 208, and 224 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 208, and 224, and sections 0.111, 0.311, 1.720-1.740, and 1.1401-1.1415 of the Commission's rules, 47 CFR §§ 0.111, 0.311, 1.720-1.740, and 1.1401-

(Continued from previous page)
AT&T v. FPL I, *supra* note 1, at 5332, para. 19; *AT&T v. DEP*, *supra* note 1, at 13714, para. 62; *AT&T v. DEF*, *supra* note 1, at 18283-84, para. 63 & n.236.

[199] 47 U.S.C. § 160(a)(3).

[200] 47 CFR § 1.1407(a)(3); *see 2011 Order*, *supra* note 1, at 5327-28, paras. 199-203; *AT&T v. FPL I*, *supra* note 1, at 5332, para. 19; *AT&T v. DEP*, *supra* note 1, at 13714, para. 62; *AT&T v. DEF*, *supra* note 1, at 18283-84, at para. 63 & n.236. AEP argues that the Commission should forbear from applying a four-year limitations period under rule 1.1407(a)(3) because it would be unjust and unreasonable to allow a refund to extend back to October 4, 2018 (four years prior to filing the complaint), which would precede AT&T's first request to renegotiate the JUA rates on June 9, 2021 and the Commission's first determination in November 2020 that the "applicable statute of limitations" under rule 1.1407(a)(3) was the state law limitations period for breach of contract action. Answer at 57, 58, para. 31 & nn.143, 144 (citing *Verizon Maryland*, *supra* note 1, at 13627-28, para. 46). We note that our ruling above, that any refund to AT&T may extend no earlier than January 1, 2020, partially moots this forbearance request. Indeed, under the two-year limitations period that AEP advocates, any refund to AT&T would extend back to October 4, 2020—a refund period that is only 10 months shorter than the one prescribed here, which extends back to January 1, 2020. *See* Answer at 56-57, para. 31 (arguing that the Commission should impose the two-year limitations period under 47 U.S.C. § 415(b) or the two-year limitations period for unjust enrichment claims under Texas state law). In any event, the Commission has repeatedly permitted recovery of refunds under rule 1.1407 covering periods prior to November 2020, and rejected arguments that an attacher should receive no refund for the period before it disputed the JUA rate. *See Verizon Maryland*, *supra* note 1, at 13627-28, 13630 paras. 46, 52(c); *AT&T v. DEP Recon Order*, *supra* note 1, at *12-13, paras. 38, 41 & n.155 (citing *2011 Order*, *supra* note 1, at 5290, para. 112); *see also AT&T v. FPL II*, *supra* note 1, at 258, para. 14 & n.42.

[201] Answer at 62, para. 36 & n.152; *id*. at 69 (Affirmative Defense 10). *See* 47 CFR § 1.3 (rules "may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission").

[202] *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C.Cir.1990).

[203] *See* 47 CFR § 1.3; Answer at 62, para. 36 & n.152; *id*. at 69 (Affirmative Defense 10).

[204] *See AT&T v. DEP*, *supra* note 1, at 13714, para. 62; *AT&T v. DEF*, *supra* note 1, at 18283-84, para. 63.

[205] *See* Tex. Civ. Prac. & Rem. Code § 16.051.

1.1415, and for the reasons explained above, AT&T's Complaint is GRANTED IN PART AND DENIED IN PART as follows:

(a) Any relief due AT&T must be based on the standards and presumptions established in the *2018 Order* and extend no earlier than January 1, 2020;

(b) The rate AEP may charge AT&T for attachments to AEP's poles under the JUA for the period starting January 1, 2020, may equal but not exceed the rate as calculated under the Old Telecom Rate formula;

(c) AT&T and AEP are directed to negotiate in good faith to reach an agreement on new JUA rate terms consistent with this Memorandum Opinion and Order, including (a) and (b) above, that reflect proportional reciprocal rates for AEP's attachments to AT&T's poles under the JUA;

(d) AT&T and AEP are directed to negotiate in good faith to reach an agreement on the amount of any refund that may be due consistent with this Memorandum Opinion and Order; and

(e) AT&T and AEP are directed to file a joint status report thirty (30) days following issuance of this Memorandum Opinion and Order summarizing the status of the parties' efforts to comply with this Memorandum Opinion and Order, including the directives in paragraphs (a) through (d) above.

FEDERAL COMMUNICATIONS COMMISSION

Loyaan A. Egal
Chief
Enforcement Bureau