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

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

ORDER ON REVIEW

Adopted: June 7, 2022 **Released: June 8, 2022**

By the Commission:

I. INTRODUCTION

1. Pursuant to section 5(c)(4) of the Communications Act of 1934, as amended (Act),[1] we grant in part and deny in part an Application for Review filed by BellSouth Telecommunications, LLC d/b/a AT&T Florida (AT&T).[2] AT&T, an incumbent local exchange carrier (LEC) in Florida, requests review of three Enforcement Bureau (Bureau) orders (*Orders*)[3] resolving a complaint filed by AT&T against Florida Power & Light Company (FPL), an electric utility, in the captioned proceeding.[4] In its

[1] 47 U.S.C. § 155(c)(4). *See* 47 CFR § 1.115.

[2] Application for Review of BellSouth Telecommunications, LLC d/b/a AT&T Florida, Proceeding Nos. 19-187 and 20-214, Bureau ID Nos. EB-19-MD-006 and EB-20-MD-002 (filed Sept. 15, 2021) (Application). FPL opposes the Application. *See* Respondent Florida Power & Light Company's Opposition to the Application for Review of BellSouth Telecommunications, LLC, d/b/a AT&T Florida, Proceeding Nos. 19-187 and 20-214, Bureau ID Nos. EB-19-MD-006 and EB-20-MD-002 (filed Oct. 29, 2021) (FPL Opposition). *See also* BellSouth Telecommunications, LLC d/b/a AT&T Florida's Reply in Further Support of the Application for Review of Four Bureau Orders, Proceeding Nos. 19-187 and 20-214, Bureau ID Nos. EB-19-MD-006 and EB-20-MD-002 (filed Nov. 18, 2021) (Reply).

[3] *See BellSouth Telecomm'ns, LLC d/b/a AT&T Florida v. Florida Power & Light Co.*, Memorandum Opinion and Order, 35 FCC Rcd 5321 (Enf. Bur. 2020) (*First Order*); *BellSouth Telecomm'ns, LLC d/b/a AT&T Florida v. Florida Power and Light Co.*, Memorandum Opinion and Order, 36 FCC Rcd 253 (Enf. Bur. 2021) (*Second Order*), and *BellSouth Telecomm'ns, LLC d/b/a AT&T Florida v. Florida Power and Light Co.*, Memorandum Opinion and Order, 2021 WL 4031532, [ ] FCC Rcd [ ] (Enf. Bur. Aug. 16, 2021) (*Third Order*) (collectively, *Orders*). AT&T's Application seeks review not only of the *Orders*, but also of an Enforcement Bureau order released in a related, later-filed, complaint proceeding that AT&T brought against Florida Power & Light. *See* Application at 2, 18-25 (challenging aspects of the Memorandum Opinion and Order released in Proceeding No. 20-214). We resolve in a separate order the Application insofar as it pertains to Proceeding No. 20-214.

[4] *See* Pole Attachment Complaint, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (filed July 1, 2019); Amended Pole Attachment Complaint, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (filed July 12, 2019) (Complaint).

Complaint, AT&T asserts that the rate it pays to attach its facilities to FPL's utility poles under the parties' agreement for the joint use of each other's poles (JUA) is unjust and unreasonable within the meaning of section 224(b)(1) of the Act.[5] The Bureau granted the Complaint in part, finding that AT&T's rate was unjust and unreasonable and prescribing a maximum just and reasonable rate.[6] After reviewing AT&T's Application, the parties' submissions below, and the *Orders*, we conclude that the Bureau properly decided all matters before it except the rate-of-return input used to calculate AT&T's maximum just and reasonable rate.

II. BACKGROUND[7]

A. Legal Background

2. Section 224(b)(1) of the Act provides that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable …."[8] Section 224(e) of the Act and section 1.1406(d) of the Commission's rules establish a methodology to calculate the maximum attachment rate to be paid by telecommunications carriers.[9]

3. In the *2011 Pole Attachment Order*,[10] the Commission revised the methodology for calculating the telecommunications attachment rate, such that competitive LECs would pay a lower attachment rate (New Telecom Rate) than had applied under earlier Commission orders (Old Telecom Rate).[11] The Commission also concluded that section 224 authorized it to regulate the rates, terms, and conditions for incumbent LEC pole attachments, but stressed "the need to exercise that authority in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier [i.e., competitive LEC] or cable operator attachers."[12] The Commission noted that incumbent LECs frequently obtained access to electric utility poles through historical joint use agreements, which differ from cable and competitive LEC attachment agreements in that they are typically structured as cost-sharing arrangements and often provide incumbent LECs advantages not offered competitive LEC and cable operator attachers.[13]

4. The Commission did not establish a rate for incumbent LEC attachments under joint use agreements entered into before the *2011 Pole Attachment Order*.[14] With respect to agreements executed after the *2011 Order*, the Commission decided that, if an incumbent LEC could establish that its "new" agreement did not "provide a material advantage" over competitive LEC and cable operator attachment agreements with the utility, then the incumbent LEC should be afforded the same rate as other attachers.[15]

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[5] 47 U.S.C. § 224(b)(1).

[6] *See First Order*, 35 FCC Rcd at 5329, para. 15; *Second Order*, 36 FCC Rcd at 261, para. 25.

[7] The *Orders* detail more fully the background of this proceeding. *See First Order*, 35 FCC Rcd at 5321-26, paras. 2-9; *Second Order*, 36 FCC Rcd at 253-56, paras. 2-7; *Third Order*, 2021 WL 4031532 at *1, paras. 2-4.

[8] 47 U.S.C. § 224(b)(1).

[9] *See* 47 U.S.C. § 224(e); 47 CFR § 1.1406(d).

[10] *See Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (*2011 Pole Attachment Order*), *aff'd, Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013).

[11] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5244, para. 8.

[12] *2011 Pole Attachment Order*, 26 FCC Rcd at 5333, para. 214.

[13] *2011 Pole Attachment Order*, 26 FCC Rcd at 5334, para. 216 & n.651.

[14] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5334, para. 214 (incumbent LEC rate complaints to be resolved "on a case-by-case basis").

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

If, however, the new agreement materially advantaged the incumbent LEC in relation to competitive LEC or cable attachers, the Commission found it "reasonable to look to the pre-existing, high-end telecom rate [i.e., the Old Telecom Rate] as a reference point in complaint proceedings."[16]

B. The Bureau *Orders*

5. In the *First Order*, the Bureau granted AT&T's Complaint in part, finding (under the *2011 Pole Attachment Order*) that the rate the JUA required AT&T to pay for its attachments was unjust and unreasonable.[17] The Bureau also concluded that the JUA provided AT&T material advantages over FPL's attachment agreements with competitive LECs and cable operators and that, therefore, AT&T's rate should be reduced to the Old Telecom Rate rather than the New Telecom Rate.[18] The Bureau limited its findings in the *First Order* to the period ending December 31, 2018 (the end of the 2018 pole attachment year) because FPL argued that it terminated AT&T's right to attach to FPL's poles in early 2019.[19] The Bureau concluded that the parties' dispute as to whether FPL effectively terminated AT&T's rights is a question of state contract law that should be resolved by the United States District Court for the Southern District of Florida, where it is pending.[20]

6. In the *Second Order*, the Bureau determined that a five-year statute of limitations applied to the Complaint, and that AT&T therefore was entitled to the Old Telecom Rate for the period beginning July 1, 2014 (five years prior to the date AT&T filed its Complaint) and ending December 31, 2018 (in accordance with the *First Order*).[21] The *Second Order* also resolved the parties' disputes as to how the Old Telecom Rate should be calculated under Commission rules and orders.[22] The *Third Order* dismissed without prejudice that portion of AT&T's Complaint that sought a remedy for the period after December 31, 2018.[23]

III. DISCUSSION

7. In its Application, AT&T challenges the *Orders* on three main grounds. First, AT&T argues that the Bureau applied the incorrect legal standard and improperly placed the burden of proof on AT&T to show that the JUA did not provide AT&T material advantages over other attachers.[24] Second, AT&T contends that the Bureau was wrong to find that the JUA offers AT&T material advantages not

[16] *2011 Pole Attachment Order*, 26 FCC Rcd 5336-37, para. 218. In the *2018 Pole Attachment Order*, the Commission established a rebuttable presumption that an incumbent LEC that is a party to a new or "newly-renewed" joint use agreement is "similarly situated" to competitive LEC attachers and therefore entitled to the same rate (i.e., the New Telecom Rate). *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7769, para. 126 (2018) (*2018 Pole Attachment Order*). *See also* 47 CFR § 1.1413(b) (discussing the presumption). The *2018 Pole Attachment Order* and accompanying rules went into effect on March 11, 2019.

[17] *See First Order*, 35 FCC Rcd at 5327, para. 13.

[18] *See First Order,* 35 FCC Rcd at 5328-31, paras. 14-17.

[19] *See First Order*, 35 FCC Rcd at 5326, para. 10 n.32.

[20] *See First Order*, 35 FCC Rcd at 5321, para. 1, 5326, para. 10 n.32. AT&T maintains that its right to attach to existing joint use poles continues indefinitely because of the JUA's "evergreen" clause. *See, e.g.*, Complaint at 6, para. 12; Application at 24.

[21] *See Second Order,* 36 FCC Rcd at 253, para. 1, 258, para. 15.

[22] *See Second Order,* 36 FCC Rcd at 258-61, paras. 16-24.

[23] The *Third Order* incorporated by reference the *First* and *Second Orders*, so that the time to file an Application for Review of any of the orders would begin upon release of the *Third Order*. *See Third Order*, 2021 WL 4031532 at *1, para. 4.

[24] *See* Application at 4-6, 11-13.

found in FPL's attachment agreements with competitive LECs and cable operators.[25] Finally, AT&T disagrees with the Bureau's resolution of the parties' disputes as to how to calculate the Old Telecom Rate.[26] For the reasons discussed below, we deny the Application except insofar as it challenges the Bureau's finding as to the rate-of-return input used to calculate the Old Telecom Rate.

A. The Bureau Correctly Applied the *2011 Pole Attachment Order* to AT&T's Complaint.

8. AT&T contends that the Bureau "appl[ied] the wrong standard" in reviewing the Complaint.[27] Specifically, AT&T argues that its Complaint is not governed by the *2011 Pole Attachment Order*, but by the subsequent *2018 Pole Attachment Order*.[28] The *2018 Pole Attachment Order* establishes a rebuttable presumption that an incumbent LEC that is a party to a new or "newly-renewed" joint use agreement is "similarly situated" to competitive LEC attachers and therefore entitled to the same attachment rate.[29] AT&T is mistaken. The *2018 Pole Attachment Order* did not go into effect with respect to incumbent LEC pole attachment complaints until March 11, 2019, so that, for the period prior to March 11, 2019, the *2011 Pole Attachment Order* governs AT&T's Complaint.[30] The *Orders* addressed the rate paid by AT&T to attach to FPL's poles only for the period beginning July 1, 2014, and ending December 31, 2018. Therefore, the presumption established in the *2018 Pole Attachment Order* does not apply.

9. AT&T further asserts that, under the *2011 Pole Attachment Order*, the Old Telecom Rate is "an upper bound, not a presumptive just and reasonable, or an automatically applied, rate, even if an ILEC receives net material competitive benefits," and that, therefore, FPL must justify "[a]ny upward variation from the new telecom rate."[31] We reject this assertion. The Commission recently addressed this very argument in the context of a dispute between Verizon and Potomac Edison, finding that the *2011 Pole Attachment Order* does not "require a utility to justify a rate higher than the new telecom rate with quantified costs it incurs."[32] As the Commission explained, the "Old Telecom Rate best accomplishe[s] the goals of compensating utilities for advantages provided to incumbent LECs under JUAs, while

[25] *See* Application at 6-11.

[26] *See* Application at 13-18. AT&T also objects to the *Orders*' refusal to address the period after December 31, 2018, asserting that, despite FPL's termination, it remains, and has a perpetual right to remain, attached to FPL's poles under the JUA. *See* Application at 24. But the effect of FPL's purported termination is the very question that is pending before the Florida district court. *See First Order*, 35 FCC Rcd at 5324-25, paras. 8-9. We find that the Bureau properly refused to address AT&T's post-2018 claims because to do so could prove a waste of Commission resources. *See Third Order*, 2021 WL 4031532 at *1 para. 4 ("Therefore, we affirm our prior finding in our first order in this proceeding that the effect of the Notice of Termination is a matter of state law to be decided by the district court.").

[27] Application at 4 (heading) (initial capitalizations removed).

[28] Application at 4-5.

[29] *See supra* note 15.

[30] *See 2018 Pole Attachment Order*, 33 FCC Rcd at 7792, para. 175; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Development*, 84 Fed. Reg. 2460 (Feb. 7, 2019) ("The amendment to 47 CFR 1.1413 . . . is effective March 11, 2019").

[31] Application at 11-12 (italics omitted).

[32] *Verizon Maryland LLC v. The Potomac Edison Co.*, Order on Reconsideration, 2022 WL 990572, [ ] FCC Rcd [ ], [ ], para. 13 (2022) (*Verizon v. Potomac Edison Recon Order*).

keeping the rates just and reasonable based on costs, as reflected in the Commission's rate formula."[33] Accordingly, FPL was under no burden to justify any "upward variation" from the New Telecom Rate.

B. The Bureau Correctly Found that the Joint Use Agreement Provided AT&T Material Advantages.

10. The Bureau properly concluded that AT&T receives material advantages under the JUA.[34] AT&T makes the overarching argument that, even if it did receive advantages, they are offset by the fact that, under the JUA, it must allow FPL to attach to its poles. According to AT&T, "[t]hese reciprocal JUA terms impose costs on AT&T that its competitors do not bear."[35] But FPL pays AT&T to attach to AT&T's poles, thereby reimbursing AT&T for those costs.[36] AT&T also argues that, in any event, the Bureau's analysis of AT&T's advantages is flawed.[37] We disagree. As discussed below, the *Orders* enumerate and correctly analyze each of the material advantages AT&T receives under the JUA.[38]

11. Guaranteed space on FPL's poles. The Bureau properly found that AT&T received a material advantage over cable operators and competitive LECs because the JUA guarantees AT&T space on FPL's poles, including "new poles" (i.e., "new pole lines and extensions of existing pole lines").[39] AT&T's competitors are not guaranteed space on any pole to which they are not already attached.[40]

12. AT&T argues that any such advantage is offset by the fact that cable operators and competitive LECs have a statutory right of access to FPL's poles, while AT&T's access "is purely a matter of contract under the JUA."[41] AT&T's argument cannot succeed because it compares AT&T's contractual rights under the JUA with its competitors' statutory rights. As we recently explained, under the *2011* and *2018 Pole Attachment Orders*, an analysis of material advantages is limited to a comparison

[33] *Verizon v. Potomac Edison Recon Order*, [ ] FCC Rcd at [ ], para. 15. *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218 (the Commission "find[s] it reasonable to look to the [Old Telecom Rate] as a reference point in complaint proceedings involving a pole owner and an incumbent LEC attacher that is not similarly situated, or has failed to show that it is similarly situated to a cable or telecommunications attacher"), *id.* at 5336, para. 217 (New Telecom Rate applies where the incumbent LEC demonstrates that it is "comparably situated" to competitive LEC and cable attachers); *Verizon Maryland LLC v. The Potomac Edison Co.*, Memorandum Opinion and Order, 35 FCC Rcd 13607, 13612, para. 20 (2020) (*Verizon v. Potomac Edison Order*).

[34] *See First Order,* 35 FCC Rcd at 5328-31, paras. 14-17.

[35] Application at 6.

[36] *See* Complaint Exh. 1 (JUA) at Art. X. AT&T's argument also fails because the record does not establish why AT&T installed its own poles rather than attaching to FPL's poles. Therefore, the JUA is not necessarily the cause of any pole ownership costs borne by AT&T.

[37] *See* Application at 6-11.

[38] We deny FPL's motion to file a sur-reply, in which FPL seeks to address factual allegations made by AT&T for the first time on reply. Motion for Leave to File a Sur-Reply, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, Proceeding No. 20-214, Bureau ID No. EB-20-MD-002 (filed Dec. 17, 2021). FPL need not respond to AT&T's allegations because they relate to matters that occurred after the record in this proceeding had closed and that therefore will not be considered by the Commission.

[39] *See First Order*, 35 FCC Rcd at 5328, para. 14 (citing Complaint Exh. 1 (JUA) at section 4.2).

[40] *See First Order*, 35 FCC Rcd at 5328, para.14. *See also Verizon v. Potomac Edison Order*, 35 FCC Rcd at 13612, para. 20 (an incumbent LEC is materially advantaged under a joint use agreement where, *inter alia*, it is guaranteed space on the utility's poles); *2018 Pole Attachment Order*, 33 FCC Rcd at 7771, para. 128 (guaranteed space is an advantage) (citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5334, para. 216 n.654 (same)).

[41] Application at 6.

of the contractual rights afforded the incumbent LEC and those afforded other attachers.[42] In any event, there are limits to the statutory right of access of AT&T's competitors.[43] FPL can deny access to cable operators and competitive LECs "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[44] In contrast, under the JUA, FPL is obligated to build poles that are tall enough and strong enough for AT&T's attachments.[45] As a result, AT&T not only avoids make-ready costs for its attachments on new and improved poles, but, unlike its competitors, is never precluded from offering service to customers because there is no space on a pole for its attachments.[46]

13. AT&T argues further that the JUA provides that either party may terminate the agreement as to future pole lines and notes that FPL exercised this right, effective September 2019.[47] AT&T states that, as a result, it "cannot deploy on new FPL pole lines and must instead identify, obtain permits for, and fund alternate infrastructure for its facilities without the rights and protections of the federal pole attachment scheme."[48] AT&T's argument is unsuccessful because AT&T's right to attach to FPL's future poles ended in September 2019, after the period under consideration in the *Orders*. For the period at issue (July 2014 to December 2018), AT&T had guaranteed space on every FPL pole, including new poles, while its competitors did not.[49] The *Orders* correctly found that AT&T's attachment rate for

[42] *See Verizon v. Potomac Edison Recon Order*, [ ] FCC Rcd at [ ], para. 9 & n.33 (citing 47 U.S.C. § 224(f)(2) and 47 CFR § 1.1403(a)).

[43] *See Verizon v. Potomac Edison Recon Order*, [ ] FCC Rcd at [ ], para. 9 ("Even if it were appropriate to compare the statutory access rights of Verizon's competitors' against Verizon's contractual rights, such a comparison would show those statutory rights do not materially advantage Verizon's competitors and do not collectively outweigh the advantages Verizon enjoys under the JUA.").

[44] 47 U.S.C. § 224(f)(2). AT&T notes that, under section 2.2 of the JUA, FPL can deny access to poles FPL deems unsuitable for joint use. *See* Application at 6 & n.25 (citing Complaint Exh. 1 (JUA) at section 2.2). But section 224(f) also would permit FPL to deny competitive LEC and cable operators access to the poles described in section 2.2 of the JUA, because the poles would not meet the safety and reliability standards of section 224(f) of the Act. *See* Complaint Exh. 1 (JUA) at section 2.2 (one party may refuse the other party access to its poles because of "hazards or similar impediments").

[45] *See* Amended Answer of Florida Power & Light Co., Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (filed Mar. 6, 2020) (Answer) at Exh. A (Kennedy Aff.) at 4-5, paras. 9-10. *See also Verizon v. Potomac Edison Recon Order*, [ ] FCC Rcd at [ ] , para. 9 ("[W]hile section 224(f)(2) allows Potomac Edison to deny access to a pole that is not tall enough or strong enough to accommodate a new attachment, the JUA contains no such restrictions on Verizon's right of access to Potomac Edison's poles.").

[46] AT&T attaches to approximately 3,000 new FPL poles each year, and is usually the first to attach. *See* Answer Exh. A (Kennedy Aff.) at 4-5, paras. 9-10. AT&T notes that FPL stated in a different Commission proceeding that, where there is insufficient capacity for new attachments, FPL has a "practice to voluntarily replace" the pole. *See* Application at 7 n.30 (citing Comments of FPL et al. at 2, *Accelerating Wireline Broadband by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (Sept. 2, 2020) (FPL Comments)). But a "voluntary practice" is not the equivalent of a contractual obligation, and the new attacher must pay the costs associated with the pole replacement. *See* FPL Comments at 2. Moreover, the fact that there is always space on FPL's poles for AT&T's attachments means that AT&T has the considerable advantage of speed to market, for, unlike its competitors, it never has to wait for FPL to replace a pole in order to offer service.

[47] *See* Application at 6-7 (citing Complaint Exh. 1 (JUA) at Article XVI ("this Agreement, insofar as the same may relate to the further granting of joint use of poles hereunder, may be terminated by either party . . . upon six (6) months' notice . . . provided . . . that . . . this agreement shall remain in full force and effect with respect to all poles jointly used by the parties")).

[48] Application at 6-7.

[49] The JUA was in effect for nearly half a century before FPL terminated AT&T's right to attach to future poles because AT&T refused to pay the invoices for the 2017 and 2018 pole rental years. *See First Order* at 5324-25,

(continued….)

these years should reflect this material advantage.[50]

14. Lowest space on FPL's poles. AT&T argues that, contrary to the Bureau's finding, its typical location on the pole—the bottom of the communications space—is a competitive disadvantage relative to its competitors.[51] We disagree. The Commission has recognized that a preferential position on the poles can be a material advantage.[52] Even giving credence to AT&T's contention, AT&T has not established that the asserted disadvantages of occupying the lowest space on a pole outweigh the clear and material advantages. As the Bureau explained, AT&T's employees work in a safer area of the pole and can more easily identify and access AT&T's attachments.[53] AT&T argues that its lowest position is the result of history, not choice. But AT&T has never requested to attach in any other location and, in fact, acknowledges that its location "eliminates confusion."[54] AT&T further concedes that maintaining its location provides consistency that benefits all attachers, including AT&T, "to quickly identify the ownership of facilities on a pole."[55] Moreover, as the lowest attacher, AT&T is unlikely to incur the

para. 18. A pole owner may terminate its attachment agreement with competitive LECs or cable operators and may remove their existing attachments in some circumstances. *See* 47 CFR § 1.1403(c)(1) (utilities must provide competitive LEC and cable attachers sixty days' notice of "[r]emoval of facilities . . . , such removal . . . arising out of a rate, term, or condition of the cable television system operator's or [competitive LEC's] pole attachment agreement"). *Cf. MAW Communications, Inc. v. PPL Elec. Utilities Corp.*, Memorandum Opinion and Order, 34 FCC Rcd 7145, 7152, para. 18 (2019) (utility is not "require[d] . . . repeatedly to incur expenses for pre-engineering and make-ready design on multiple applications [to attach to a utility's poles] where the [competitive LEC] attacher has indicated no good-faith intention to pay these expenses").

[50] We are not convinced that AT&T will be unable to attach to FPL's future poles because, just as AT&T will need to attach to FPL's future poles, FPL will need to attach to AT&T's future poles. *See, e.g.*, *2011 Pole Attachment Order*, 26 FCC Rcd at 5327, para. 199 (incumbent LEC pole ownership is a source of bargaining power with other pole owners), *id.* at 5328, para. 203 (incumbent LECs are often "differently situated" from other attachers because they own poles).

[51] Application at 9-10. Specifically, AT&T contends that, as the lowest attacher, it (1) may make multiple trips to the pole when transferring facilities to a replacement pole, if other attachers do not transfer their facilities as scheduled, (2) incurs higher costs due to the vulnerability of its attachments being struck by large vehicles or damaged by workers ascending a pole to work on higher-placed facilities, and (3) is most likely to receive a request to temporarily raise its facilities to accommodate an oversized vehicle or a load that exceeds standard vertical clearance. *Id.* Nevertheless, AT&T proffers no evidence, beyond recitation of these claims, to support these assertions. *Id.* at 9.

[52] *2018 Pole Attachment Order*, 33 FCC Rcd at 7771, para. 128.

[53] *First Order*, 35 FCC Rcd at 5329, para. 14. *See also* FPL Opposition at 10. In its Application, AT&T questions how its position "1 foot below the facilities of [its] competitor" provides safer or easier access. Application for Review at 10 n.41. Although it is unclear whether AT&T is actually seeking review of this finding, accessing facilities that are sandwiched between the facilities of other attachers would pose more safety concerns than accessing facilities that have no other facilities below them.

[54] *First Order*, 35 FCC Rcd at 5329 & n.59.

[55] Application at 10.

make-ready expense involved in relocating or rearranging existing attachments to make space for its attachment.[56] We affirm the Bureau's finding on this issue.[57]

15. Four feet reserved space on FPL's poles. The Bureau also found that the JUA offers AT&T a material advantage over cable operators and competitive LECs because it reserves to AT&T four feet of space on FPL's poles, while other attachers are restricted to one foot.[58] These four feet ensure that AT&T has the necessary space to accommodate its copper cables and to add new attachments, such as fiber optic cable and other advanced services.[59] In addition, as FPL notes, AT&T's four feet of space provides AT&T a "time to market" advantage over its competitors.[60] FPL explains that AT&T does not usually attach at the lowest position within its four feet of space.[61] As a result, if the only available space for a competitor's new attachments is below AT&T, the competitor is delayed because "FPL must forward the attachment request to AT&T to have it grant permission" or, if permission is denied, the attacher must wait until AT&T's attachments are moved to a lower space on the pole.[62]

16. Citing a paragraph from the 1996 *Local Competition Order*, AT&T counters that the JUA's reservation to AT&T of four feet of space cannot be considered a benefit because it is "unlawful, unenforceable and unobserved."[63] As we recently explained, however, that "passage . . . precludes an incumbent LEC from reserving excess capacity on its own poles for its own use to the detriment of competitive attachers who may later seek access to the poles . . . it does not apply to a pole owner reserving space for other entities, as is the case here."[64] Further, while AT&T correctly notes that other attachers may use AT&T's reserved space, it fails to mention that, if AT&T needs the space and it is occupied by another attacher, the JUA requires FPL to expand capacity at no cost to AT&T.[65] Therefore, AT&T always has four feet of reserved space, even if it is temporarily occupied by another attacher. AT&T's competitors enjoy no similar benefit. Finally, AT&T argues that, unlike its competitors, who only pay for the space they actually occupy, it must pay FPL for the four feet reserved to it under the

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[56] *2018 Pole Attachment Order*, 33 FCC Rcd at 7770-71, para. 128 (identifying "[n]o relocation and rearrangement costs" on poles as evidence that may demonstrate "material benefits" under a joint use agreement). *See also BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Memorandum Opinion and Order, 2021 WL 4170563 at *10-11, paras. 30-31, *13, para. 39 (Enf. Bur. 2021) (*Duke Energy Florida*).

[57] AT&T also posits that material advantages "cannot stem from these features of an ILEC's 'historic status as an [I]LEC.'" AT&T Reply at 2-3. Regardless of its history, we find that AT&T has a material advantage as the lowest attacher on the pole. What is more, when quoting from *Duke Energy Florida*, AT&T fails to acknowledge the Bureau's finding that AT&T's position on the pole was a material advantage under both the *2018 Order* and *2011 Order*. *Duke Energy Florida*, 2021 WL 4170563 at *11, para. 31 ("Based on our review of the record, we find that the significant competitive benefits to AT&T resulting from its lowest position on the pole outweigh the alleged disadvantages identified by AT&T.").

[58] *See First Order*, 35 FCC Rcd at 5328, para. 14.

[59] *See id*.; Answer Exh. A (Kennedy Aff.) at 13, para. 25; AT&T's Reply to FPL's Answer, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, Exh. B (Miller Aff.) at 5, para. 8.

[60] Answer Exh. A (Kennedy Aff.) at 8, para. 13.

[61] *See* Answer Exh. A (Kennedy Aff.) at 8, para. 13.

[62] Answer Exh. A (Kennedy Aff.) at 8, para. 13.

[63] *See* Application at 7 n.31 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16079, para. 1170 (1996) (*Local Competition Order*), *vacated in part Iowa Utilities Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000)).

[64] *Verizon v. Potomac Edison Recon Order*, [ ] FCC Rcd [ ], at [ ], para. 10 (citing *Local Competition Order*, 11 FCC Rcd at 16079, para. 1170).

[65] *See* Complaint, Exh. A (Kennedy Aff.) at 6, para. 11 (citing Complaint Exh. 1 (JUA) at section 14.5).

JUA.[66] Not so. Under the Old Telecom Rate, AT&T is charged only for the space it does in fact occupy.[67] In short, the Bureau correctly found that the JUA space allocation provision provides a benefit that materially advantages AT&T.[68]

17. No Permitting. Unlike what FPL requires of other attachers,[69] the JUA does not require AT&T to navigate FPL's attachment permit application process before attaching facilities.[70] AT&T claims that avoiding the permitting process "cannot competitively advantage AT&T because AT&T performs the work itself"[71] and that it performs this work "under competitively disadvantageous conditions."[72] We reject AT&T's assertion. As the Commission has recognized, material benefits may include no advance approval to attach to a pole owner's poles.[73] AT&T fails to recognize the full scope of the benefit it receives by avoiding FPL's permitting process; instead, AT&T narrowly focuses on certain steps it must take during that process.[74] The Bureau correctly stated that AT&T avoids an extensive and time-consuming permitting process that includes costs AT&T does not pay.[75] More broadly, as the Bureau correctly recognized, when the attacher is in control of the process, the process

[66] *See* Application at 8.

[67] *See* 47 CFR §§ 1.1406(c), 1.1410; *Amendment of Commission's Rules and Policies Governing Pole Attachments,* Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12128-29, paras. 46-48, 12139, para. 70, 12145, para. 80 (2001).

[68] *See First Order*, 35 FCC Rcd at 5328, para. 14.

[69] *First Order*, 35 FCC Rcd at 5328-29, para. 14 & n.56.

[70] *First Order*, 35 FCC Rcd at 5328, para. 14 & n.55.

[71] In the *Verizon v. Potomac Edison Recon Order*, we made clear that the Old Telecom Rate is a maximum rate to be used in party negotiations. Thus, as relevant here, FPL need not quantify costs and benefits of the JUA. [ ] FCC Rcd at [ ], paras. 13-16. To the extent AT&T's argument suggests otherwise (*see* Application at 8), we reject it. *See also First Order*, 35 FCC Rcd at 5331, para. 17 (directing the parties to the "Old Telecom Rate as a reference point for a 'just and reasonable rate' for the period [at issue]").

[72] Application at 8-9. AT&T claims that the JUA does not guarantee timely make-ready when other attachers must modify, "e.g., move or transfer," their facilities before AT&T can attach its facilities. According to AT&T, it is "uniquely subject to 'excessive delays' with 'limited remedies' if FPL or AT&T's competitors do not promptly complete their work. . . . [w]hereas AT&T's competitors are statutorily guaranteed timely access and are protected by the Commission's one touch make ready rules." *Id.* at 9. AT&T's vague assertions insufficiently explain what excessive delays AT&T suffers during the permitting process. Even if it were appropriate to compare AT&T's contractual rights with the statutory and regulatory rights of its competitive attachers—a proposition we rejected in the *Verizon v. Potomac Edison Recon Order*—the Commission's one-touch make-ready rules were not in effect during the period at issue here. *2018 Pole Attachment Order*, 33 FCC Rcd at 7792, para. 175. Thus, we do not believe AT&T is at a competitive disadvantage in the permitting process.

[73] *See 2011 Pole Attachment* Order, 26 FCC Rcd at 5335, n.654; *2018 Pole Attachment Order*, 33 FCC Rcd at 7771, para. 128.

[74] Application at 8-9 (noting that AT&T performs some of the engineering work involved in the permitting/make ready process). *See also* FPL Opposition at 9.

[75] *See First Order*, 35 FCC Rcd at 5328-29, para. 14 & n.56 (citing Answer Exh. A (Kennedy Aff.) at 9, paras. 15-16); *see also* Answer Br. at 56-57. FPL states that permit applications require extensive documentation and time to prepare. Answer Exh. A (Kennedy Aff.) at 9-11, paras. 15-16. *See also e.g.*, *BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina, v. Duke Energy Progress, LLC*, Memorandum Opinion and Order, 2021 WL 4355277 at *8, para. 30 (Enf. Bur. 2021) ("Even if AT&T must compile for its own purposes the same information that its competitors include on permit applications, AT&T nevertheless enjoys immediate access to Duke's poles, requires no prior approval from Duke for any planned attachments, and avoids paying fees that competitive attachers pay in connection with Duke's permitting requirements.")

almost certainly takes less time and costs less money.[76] Nothing AT&T states here leads us to reach a different conclusion.

18. No inspection. Unlike what FPL requires of other attachers, the JUA does not require AT&T to perform a post-attachment inspection and pay a corresponding fee.[77] AT&T maintains that this "fourth identified 'advantage' [in the *First Order*] . . . cannot competitively advantage AT&T because AT&T performs the work itself."[78] We reject AT&T's claim. The Commission has recognized that having no post-attachment inspection costs may be a material benefit.[79] And, by its own admission, AT&T only randomly performs its own inspections.[80] We agree with the Bureau that AT&T enjoys a material advantage over its competitors with regard to post-inspection requirements and fees.[81]

19. Payment in arrears. Unlike what FPL requires of other attachers, the JUA does not require AT&T to pay its pole rental payments in advance.[82] AT&T claims that the difference between its pole rental payment schedule and its competitors' pole rental payment schedule is immaterial because "AT&T would pay the full annual rental amount in March [of the year following the rental period] that its competitors would pay semi-annually 3 months earlier in December and 3 months later in June."[83] AT&T does not refute that its competitors pay pole attachment fees in advance,[84] which indicates that it benefits from the time value of money, and AT&T fails to explain sufficiently that the payment schedule

[76] *First Order*, 35 FCC Rcd at 5328, para. 14 n.56 (citing *2018 Pole Attachment Order*, 33 FCC Rcd at 7711-19, paras. 11-24 (placing the attacher in control of the surveys, notices and make-ready work required for new attachments so that attachment is faster and cheaper)).

[77] *First Order*, 35 FCC Rcd at 5329, para. 14. *See also* FPL Opposition at 9-10.

[78] Application at 8.

[79] *2018 Pole Attachment Order*, 33 FCC Rcd at 7771, para. 128. *See also Verizon v. Potomac Edison Order*, 35 FCC Rcd at 13616, para. 20 (finding that avoiding post-inspection fees, among others, is a material advantage).

[80] *First Order*, 35 FCC Rcd at 5329, n.57 (citing Reply Exh. C (Peters Aff.) at 9, para. 17).

[81] *First Order*, 35 FCC Rcd at 5329, para. 14.

[82] Answer at 54 ("AT&T pays its joint use fees in arrears annually . . . other telecom providers pay pole attachment fees in advance semiannually.").

[83] Application at 10. This timing difference, according to AT&T, "would average out and eliminate any 'time value of money' that could materially advantage to AT&T relative to its competitors." *Id.* at 10-11.

[84] Answer at 54; *see also* Opposition at 11 ("[b]ecause AT&T pays in arrears on a yearly basis, AT&T has the benefit of holding onto . . . money for many months while other telecom providers pay their attachment fees in advance.").

differential is immaterial.[85] We agree with the Bureau that AT&T's payment schedule is a material advantage.[86]

C. We Grant in Part and Deny in Part AT&T's Challenge to the Bureau's Findings Regarding Proper Calculation of the Old Telecom Rate.

20. The Bureau resolved a number of disputes between the parties as to how the Old Telecom Rate should be calculated. In its Application, AT&T objects to the Bureau's resolution of two of those disputes. We deny AT&T's challenge to the Bureau's finding regarding the average number of attachers and space occupied, but grant its challenge concerning the proper calculation of the rate of return.

21. Average number of attachers and space occupied. The Old Telecom Rate includes inputs as to the average number of attachers per pole and the space occupied by the attacher at issue. The Commission has established presumptions as to each of these inputs, which may be rebutted by "probative direct evidence."[87] The Bureau found that FPL rebutted the presumptions by submitting the results of surveys of its poles.[88] AT&T contends that the Commission's presumptions as to the number of attachers should apply because FPL applies those presumptions in calculating the New Telecom Rate, which it charges its competitive LEC attachers.[89] We disagree. As an initial matter, no Commission rule or precedent requires such a result. Further, the Commission's rules establish two distinct pole attachment rate formulas, the Old Telecom Rate formula and New Telecom Rate formula. Under these formulas, the number of attaching entities has a significant effect on the Old Telecom Rate, but little effect on the New Telecom Rate, regardless of whether the Commission's presumptions apply. Accordingly, FPL reasonably may have decided, in setting the rate for its competitive LEC attachers, to rely on the Commission's presumption as to the average number of attachers rather than expending time and money surveying its poles, since the results of a survey would have only a minimal, if any, effect on

[85] AT&T supports it position by comparing specific rates billed to its competitors in December 2014 and June 2015 (${[ ]} per pole for competitive LECs and ${]} per pole for cable companies) with the comparable "new telecom" rate that AT&T contends it should have been billed in March 2015 for the 2014 rental period ${[ ]} per pole). Application at 10 n.44 (citing FPL Answer to First Set of Interrogatories, Response to Interrogatory 5 at 8-13 and Complaint at Exh. A (Rhinehart Aff.) at para. 14.). The comparison, however, confuses the time value of money with the amount of the money to be paid, i.e., the rate, and is inapt. Moreover, AT&T's specific rate analysis is faulty because it includes several incorrect inputs. *See Second Order*, 36 FCC Rcd at 258-61, paras. 16-25 (finding that, for example, in calculating the Old Telecom Rate, FPL rebutted presumptions AT&T sought to include, such as the number of attachers and space occupied). Although the *Second Order* addressed the calculation for the Old Telecom Rate, AT&T relied on the same faulty inputs in calculating its New Telecom Rate. *See, e.g.*, Complaint at Exh. A (Rhinehart Aff.); AT&T Reply Legal Analysis at Exh. A (Rhinehart Aff.). In sum, AT&T fails to meet its burden to provide sufficiently accurate analysis regarding the advantage of billing in arrears versus billing in advance to cause us to consider, much less reach, a different conclusion. Material set off by double brackets {[ ]} is confidential and is redacted from the public version of this document.

[86] We note that, even if AT&T could show that this benefit is immaterial, the totality of the remaining material advantages demonstrate that AT&T is not entitled to the New Telecom Rate.

[87] *Amendment of Commission's Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles,* Report and Order, 2 FCC Rcd 4387, 4394, para. 52 n.27 (1987); *Teleport Commc'ns Atlanta, Inc. v. Georgia Power Co.*, Order on Review, 17 FCC Rcd 19859, 19866, para. 10 n.41 (2002).

[88] *See Second Order*, 36 FCC Rcd at 259-60, paras. 18-21. AT&T does not agree that FPL's surveys were sufficiently well-designed to rebut the presumptions, making the same arguments in support of its position that it made before the Bureau. *See* Application at 16. We find that the Bureau fully and properly addressed these arguments and adopt the Bureau's reasoning here. *See Second Order*, 36 FCC Rcd at 259-60, paras. 18-21.

[89] *See* Application at 15-16.

the rate. Therefore, FPL's application of the Commission's presumptions to calculate the New Telecom Rate does not mean that it must apply the same presumptions to calculate the Old Telecom Rate. [90]

22. Rate of Return. We find that the parties should apply the rate of return prescribed by the Florida Public Service Commission (PSC) for FPL's intrastate services rather than, as the Bureau concluded, the Commission's default rate of return, which applies "when a state has not prescribed a rate of return for a utility covering the period of time in which the rates were in dispute." [91] The Bureau reasoned that the default rate of return should apply because, during the period at issue, the Florida PSC did not expressly announce a prescribed rate of return for FPL. [92] Nevertheless, the record reveals that, during the period at issue, FPL filed periodic Rate of Return Surveillance Reports with the Florida PSC that calculate "the required rate of return." [93] Accordingly, we find that Florida does prescribe a rate of return for FPL, and that the parties should apply that rate rather than the Commission's default rate of return. [94]

[90] *See Second Order*, 36 FCC Rcd at 259-60, paras. 18-21. We do not address AT&T's argument that FPL's survey should not have included six inches clearance below AT&T's attachments, *see* Application at 15, because AT&T did not make that argument before the Bureau. *See* 47 CFR § 1.115(c) ("No application for relief will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.").

[91] *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, 6491, para. 76 (2000)).

[92] *See Second Order*, 35 FCC Rcd at 260-61, paras. 23 (citing Answer Exh. A (Kennedy Dec'l) at 16, para. 31, and Exh.D (Deaton Decl) at 55, para.10). *See also* Answer at 70 n.278 ("FPL has no authorized rate of return approved by a Florida Public Service Commission order").

[93] Complaint Exh. A (Rhinehart Decl.) at Attach't R-2 at *e.g.*, ATT00034 (Letter from FPL to Florida PSC dated Feb. 15, 2016 ("Enclosed is [FPL's] Earnings Surveillance Report . . . . The required rate of return was calculated using the return on common equity as authorized [by the Florida PSC].")) *See id*. at ATT00028-44 (FPL monthly Rate of Return Earnings Surveillance Reports with cover letters) (ESRs); *Petition for Increase in Rates by Florida Power & Light Co.*, Order No. PSC-10-0153-FOF-EI (Fla. PSC Mar. 17, 2010) (using the same method to calculate FPL's prescribed rate of return on rate base used in the ESRs at issue here).

[94] Specifically, the parties should apply the required rate of return in FPL's Earnings Surveillance Reports, which is updated with each successive report to reflect more recent financial data. *See* Complaint Exh. A (Rhinehart Decl.) at Attach. R-2 at ATT00028-44. AT&T's adjustment to exclude accumulated deferred income taxes from the rate of return calculation is correct because these deferred taxes are subtracted from gross pole investment as part of the net cost of a bare pole calculation in the Old Telecom Rate Formula. AT&T's adjustment to exclude accumulated deferred investment tax credits from the rate of return calculation is incorrect because these deferred tax credits are not subtracted from gross pole investment as part of the net cost of a bare pole calculation and the exclusion is contrary to the Florida PSC's treatment of investment tax credits in the rate of return calculation. *See id*. at Attach. R-2 at ATT00027; *see Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12121, 12176 (App. E-2, Section 224(e) Telecom Formula for Determining Maximum Rate For Use of Electric Utility Poles Using FERC Form 1 Accounts).

IV. ORDERING CLAUSE

23. Accordingly, **IT IS HEREBY ORDERED**, pursuant to sections 4(i), 4(j), 5(c) and 224(b) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 155(c), and 224(b), and sections 1.115, 1.720-1.740, 1.1401, 1.1404, 1.1406, 1.1407, and 1.1413 of the Commission's rules, 47 CFR §§ 1.115, 1.720-1.740, 1.1401, 1.1404, 1.1406, 1.1407 and 1.1413, that the Application for Review is **GRANTED IN PART AND DENIED IN PART**, and that this proceeding is **TERMINATED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary