PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. DUKE ENERGY FLORIDA, Defendant.	Proceeding No. 20-276 Bureau ID No. EB-20-MD-003 REDACTED

APPLICATION FOR REVIEW OF
BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA

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* Certain information in this Application for Review has been designated confidential pursuant to 47 C.F.R. § 1.731. The designated information is marked with a text box in the confidential version of these pleadings and is redacted in the public version.

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Pursuant to 47 C.F.R. § 1.115, BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T") respectfully submits this Application for Review of the Enforcement Bureau's Memorandum Opinion and Order issued on August 27, 2021 in Proceeding No. 20-276 (the "*Bureau Order*").[1]

I. Introduction and Summary

The *Bureau Order* correctly finds that Duke Energy Florida ("Duke Florida") charged AT&T unjust and unreasonable pole attachment rates under the parties' joint use agreement ("JUA") and must refund amounts it unlawfully collected. But, contrary to the Commission's decade-long effort to eliminate artificial and outdated rate disparities that have unjustifiably forced ILECs to pay rates far higher than their competitors, aspects of the *Bureau Order* part with Commission precedent in ways that will perpetually and competitively disadvantage AT&T simply because it is an ILEC.

The *Bureau Order* lets Duke Florida demand rates from AT&T that are up to [redacted] *times* the approximately $[redacted] per pole rate Duke Florida charges AT&T's competitors for use of comparable space on the same poles based upon immutable characteristics of ILECs, an unlawful contract term, and a rate formula input Duke Florida would use to calculate rates *only* for AT&T.[2] Duke Florida is fully compensated at the approximately $[redacted] per pole rate it charged AT&T's competitors because the Commission's new telecom rate formula is "just, reasonable, and fully compensatory" to the pole owner.[3] Letting Duke Florida collect rates *far* higher from

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[1] Memorandum Opinion and Order, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (EB Aug. 27, 2021) ("*Bureau Order*").

[2] *See id.* ¶ 12; *see also* Answer, Proceeding No. 20-276 (Oct. 30, 2020) ("Answer"), Ex. D at DEF000173 (Olivier Decl. ¶ 10) (listing rates Duke Florida charged CLEC and cable attachers).

[3] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5299 (¶ 137) (2011) ("*Pole*

AT&T will perpetuate an anti-competitive rate disparity and overcompensate Duke Florida, in contravention of the Commission's competition and deployment goals. The Commission should correct the *Bureau Order* to ensure the competitively neutral just and reasonable pole attachment rates that are essential to the Commission's longstanding work to reduce infrastructure costs, promote competition, and foster broadband deployment.[4]

The Commission should also clarify that the parties need to amend *only* the JUA's rate provision to conform to the Commission's decision—and do *not* also need to negotiate an entirely new joint use agreement as the *Bureau Order* suggests.[5] Requiring wholesale renegotiation of the JUA would moot much of the Commission's work on this case, which analyzes Duke Florida's rates based on the terms and conditions of *this* JUA. Negotiations for a new joint use agreement would also needlessly increase costs and the potential for additional delays and disputes, when the exact opposite is needed to further the Commission's competition and deployment goals.[6] The Commission should direct Duke Florida to promptly amend the JUA's rate provision and provide AT&T the competitively neutral rates the Commission's objectives require.

Attachment Order"); *see also id.* at 5321 (¶ 182) (finding "no evidence" of "any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate"); *FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987); *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002).

[4] *See, e.g.*, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 30 FCC Rcd 13731, 13741 (¶ 20) (2015) ("*Cost Allocator Order*") ("[W]e view pole attachment rate reform as part of the Commission's fundamental mission to advance the availability and adoption of broadband in America.").

[5] *See Bureau Order* ¶ 65(b).

[6] *In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order, 33 FCC Rcd 7705, 7771 (¶ 129) (2018) ("*Third Report and Order*") (seeking to "reduce the number of disputes"); *Pole Attachment Order*, 26 FCC Rcd at 5241 (¶ 1) (seeking to "reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks, in order to accelerate broadband buildout").

II. The *Bureau Order* Creates an Unwarranted Rate Disparity That Undermines the Commission's Deployment and Competition Goals.

Electric utilities are required by statute to charge cable and telecommunications providers "just and reasonable" pole attachment rates.[7] For 10 years, the Commission has worked to promote competition and broadband deployment by ensuring that these "just and reasonable" rates are low and competitively neutral among ILECs, CLECs, cable companies, and other competing companies.[8] The *Bureau Order* goes only part way toward this goal, reducing but not eliminating a significant and unwarranted rate disparity. The Commission should make 3 changes to the *Bureau Order* to ensure the "consistent, cross-industry attachment rates" that encourage broadband deployment and adoption.[9] It should (1) apply the correct standard of competitive neutrality, (2) clarify that its cost-causer approach to rates requires Duke Florida to quantify relevant and recurring costs that would justify charging AT&T a rate higher than the fully compensatory new telecom rate guaranteed AT&T's competitors, and (3) require Duke Florida to calculate a per-pole rental rate for AT&T using the same generally applicable "average number of attaching entities" input that applies to all other attachers on the same poles, as required for competitive neutrality and compliance with 47 U.S.C. § 224(e).

A. The *Bureau Order* Applies the Wrong Standard for Reviewing Rates Charged to ILECs.

The Commission's regulations include a presumption that AT&T is similarly situated to its competitors and should pay the same just and reasonable new telecom rate guaranteed its

[7] 47 U.S.C. § 224(b).

[8] *See, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5316 (¶ 172).

[9] *Cost Allocator Order*, 30 FCC Rcd at 13738 (¶ 16).

competitors.[10] Under the presumption, which the *Bureau Order* correctly found applies here,[11] Duke Florida can charge AT&T a rate higher than the new telecom rate only if it proves by clear and convincing evidence that the JUA provides AT&T net benefits "that materially advantage[ ] [AT&T] over other telecommunications carriers or cable television systems providing telecommunications services on the same poles."[12]

The *Bureau Order* diverges from this standard in 3 ways. *First*, the *Bureau Order* wholly undercuts the new telecom rate presumption by finding that immutable characteristics of ILECs impose net material advantages, thus justifying higher rates. Yet, net material advantages cannot stem from an ILEC's "historic status as an [I]LEC."[13] In its 2018 *Third Report and Order*, the Commission presumed that ILECs *are* "similarly situated" to CLECs and cable companies[14] despite well-known historical facts about ILECs: for example, they obtain pole access by contract because they do not have the "statutory right of nondiscriminatory access to poles" enjoyed by their competitors;[15] their agreements include evergreen provisions to protect

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[10] 47 C.F.R. § 1.1413(b).

[11] *See Bureau Order* ¶ 15. Although the *Bureau Order* correctly found the new telecom rate presumption applies, it incorrectly limited the presumption's reach to time periods after July 1, 2019, the date the JUA automatically renewed. *See id.* ¶¶ 14-15. The Commission did not carve complaint proceedings into different time periods subject to different standards when it adopted the presumption; it adopted the presumption without temporal limitation to simplify disputes and accelerate rate reductions. By regulation, the presumption applies to an entire "complaint proceeding[ ] challenging utility pole attachment rates" under a newly renewed JUA, 47 C.F.R. § 1.1413(b), and it should have applied to all rental periods at issue here.

[12] 47 C.F.R. § 1.1413(b).

[13] *See Bureau Order* ¶ 42; *see also* Letter Order at 4, *Verizon Md. LLC. v. The Potomac Edison Co.*, Proceeding No. 19-355 (May 22, 2020) (competitive benefits must "derive from the terms and conditions of the joint use agreement rather than Verizon's historical status as an [I]LEC.").

[14] *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *see also* 47 C.F.R. § 1.1413(b).

[15] *Pole Attachment Order*, 26 FCC Rcd at 5329-30 (¶ 207).

the existing network in light of that absence of statutory access rights;[16] and they are almost always the lowest attacher on the pole[17] because they were the *only* communications company to attach many decades ago.[18]

Letting these historic hallmarks of ILECs justify charging ILECs higher rates, as the *Bureau Order* does, will effectively eliminate the new telecom rate presumption, as evidenced by every Enforcement Bureau decision since the Commission's 2018 *Third Report and Order*. Applying the new telecom rate presumption in this manner effectively reinstates the pre-2011 pole attachment rate regime where rates were set based on "the regulatory classification of pole attachers" rather than relevant costs.[19] That result would be contrary to the Commission's goal to remove the "outdated rate disparities" that "inhibit broadband deployment."[20]

Second, the *Bureau Order* compares *only* the "*contractual* rights and responsibilities" of AT&T and its competitors, while expressly dismissing acknowledged statutory and regulatory rights and responsibilities.[21] For example, AT&T's right to pole access under the JUA may "benefit" AT&T (as compared to no access at all), but dismissing AT&T's competitors' statutory

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[16] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475).

[17] *Id.* at 7718 (¶ 22).

[18] *See* Complaint, Proceeding No. 20-276 (Aug. 25, 2020) ("Compl."), Ex. C at ATT00041-42 (Peters Aff. ¶ 21); Compl. Ex. D at ATT00070-71 (Dippon Aff. ¶ 46).

[19] *Pole Attachment Order*, 26 FCC Rcd at 5242 (¶ 5); *see also National Broadband Plan* at 110 (2010) (criticizing "[d]ifferent rates for virtually the same resource (space on a pole), based solely on the regulatory classification of the attaching provider").

[20] *See Third Report and Order*, 33 FCC Rcd at 7707, 7767 (¶¶ 3, 123); *see also Pole Attachment Order*, 26 FCC Rcd at 5243 (¶ 6) ("[W]idely disparate pole rental rates distort infrastructure investment decisions and in turn could negatively affect the availability of advanced services and broadband, contrary to the policy goals of the Act.").

[21] *See Bureau Order* ¶ 25 (emphasis in original); *see also* ¶ 28 ("[T]he present analysis is limited to comparing the contractual rights of AT&T and its competitors and, thus, a comparison of extracontractual rights of Duke's licensees under section 224(f) is beyond the scope of this discussion").

right to pole access, which wholly offsets that "benefit," leads to a contrived and illogical conclusion that AT&T has competitively *superior* pole access rights.[22] This selective approach is factually wrong and incompatible with the Commission's pole attachment regulations and principles of competitive neutrality. AT&T is presumed to be entitled to the same new telecom rate as its competitors using the same poles *unless* it receives net material advantages over those competitors.[23] That presumption cannot be undone simply by comparing the *contract* terms that apply to AT&T versus the *contract* terms that apply to AT&T's competitors, without due regard for other realities.[24]

Third, the *Bureau Order* absolves Duke Florida of its burden to prove relevant net material competitive advantages "by clear and convincing evidence."[25] Duke Florida failed to prove that any "advantage" was *material*, as its "attempts to calculate the monetary value of the advantages … [we]re speculative and unsupported by reliable evidence."[26] Yet the *Bureau Order* somehow then finds the presumption rebutted anyway based on a review of the record.[27] The result is a decision that finds an "advantage"[28] even where Duke Florida admitted "ILECs

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[22] *See Bureau Order* ¶¶ 23-25.

[23] The Commission's regulation does *not* refer to, let alone limit the comparative analysis to, CLEC and cable television license agreements. 47 C.F.R. § 1.1413(b); *see also Adams Telcomm'cn, Inc. v. FCC*, 38 F.3d 576, 582 (D.C. Cir. 1994) ("[I]t is elementary that an agency must adhere to its own rules and regulations.") (citation and quotation omitted).

[24] *See, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5244 (¶ 8) (regulating rates charged ILECs based on evidence about "current market conditions"); *id.* at 5328 (¶ 206) (finding regulation of rates charged ILECs needed due to "current market realities").

[25] 47 C.F.R. § 1.1413(b).

[26] *Bureau Order* ¶ 41; *see also id.* ¶ 43 (finding Duke's claims "controverted by evidence"); *id.* ¶ 43 n.157 (finding Duke's analysis "speculative and lacking support").

[27] *Id.* ¶ 22 ("The record shows that the JUA provides AT&T with benefits that give material advantages over competitive LEC and cable attachers on the same poles.").

[28] *See id.* ¶¶ 23-25, 27-28.

are at a material *disadvantage* compared to CLECs and CATVs."[29] And, even though the Commission's new telecom rate presumption places the burden of proof on Duke Florida, the *Bureau Order* misplaces that burden and faults AT&T for failing to provide evidence it considers relevant, including information about *Duke Florida*'s own practices and intentions.[30] At the same time, the *Bureau Order* discounts or ignores unrefuted evidence AT&T offered, which proves that the JUA materially and competitively *disadvantages* AT&T as compared to other attachers on Duke Florida's poles.[31] This upside-down analysis—which holds AT&T to a higher evidentiary standard than Duke Florida and finds materiality in "advantages" the value of which Duke Florida could not quantify—is incompatible with the Commission's regulation and its *Third Report and Order*. Instead, each calls for the Commission to set the new telecom rate as the just and reasonable rate absent clear and convincing evidence from Duke Florida that AT&T

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[29] *See* Answer Ex. E at DEF000208 (Metcalfe Aff. ¶ 9).

[30] *See, e.g.*, *Bureau Order* ¶ 23 (faulting AT&T for "offer[ing] no evidence" that Duke Florida "is likely to" invoke a JUA provision "to AT&T's detriment."); *id.* ¶ 24 (faulting AT&T for "provid[ing] no evidence" that Duke Florida intends to terminate the JUA and preclude AT&T from attaching to new pole lines); *id.* ¶ 26 n.83 (faulting AT&T for not "cit[ing] evidence" showing that Duke Florida allows licensees to "occupy more than one foot of space" on its poles).

[31] *See, e.g.*, *id.* ¶ 31 n.109 (discounting AT&T's evidence of higher costs due to its typical location on Duke Florida's poles). *But see* Answer ¶ 19 (admitting there are "certain costs and risks attendant to the lowest position on the pole"). The *Bureau Order* wholly ignores the significant pole ownership costs the JUA imposes on AT&T, which are *not* imposed on AT&T's competitors. *See* Compl. Ex. 1 at ATT00096, ATT00097 (JUA §§ 4.7, 8.1) (requiring AT&T to own and "at its own expense, maintain its joint poles" and "replace … such of said poles as become defective" or are damaged during emergencies); Answer Ex. A at DEF000130 (Freeburn Decl. ¶ 9) (stating that AT&T's competitors "do not own poles" under Duke Florida's license agreements). AT&T's pole ownership and maintenance costs are not trivial. AT&T has more than $234 million invested in poles in Florida and has expended tens of millions of dollars in each year covered by this dispute to own and maintain those poles. *See* Compl. Ex. A at ATT00018 (Rhinehart Aff., Ex. R-3).

receives net benefits under the JUA that "materially advantage [AT&T] over other telecommunications attachers."[32]

These foundational errors permeate the *Bureau Order*'s discussion of the 5 "advantages" it relied upon to permit an excessive and anti-competitive rate. Two of the identified "advantages"—AT&T's contractual access to Duke Florida's poles under the JUA and, after its termination, under the JUA's evergreen provision[33]—set AT&T at a material *disadvantage* compared to AT&T's competitors, which enjoy broader and permanently guaranteed statutory access to Duke Florida's poles.[34] The *Bureau Order* finds this statutory right of access irrelevant,[35] but it indisputably *disadvantages* AT&T.[36] As an ILEC, AT&T's pole access is purely pursuant to contract under the JUA.[37] And the JUA allows Duke Florida to deny AT&T

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[32] *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123); 47 C.F.R. § 1.1413(b); *see also* 7A Fed. Proc., L. Ed. § 17:36 (Clear and convincing evidence is "evidence so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.").

[33] *See Bureau Order* ¶¶ 23-25, 27-28.

[34] 47 U.S.C. § 224(f).

[35] *See Bureau Order* ¶ 25 ("Although competitive attachers … have a statutory right of nondiscriminatory access to a utility's poles under section 224(f)(1), any discussion of such a right is outside the scope of the present analysis, which necessarily compares the *contractual* rights and responsibilities of AT&T under the JUA with those of AT&T's competitors under their respective license agreements with Duke."); *id.* ¶ 28 ("AT&T also argues that, to the extent that Duke's license agreements require removal of attachers' facilities upon termination of those agreements, they are unenforceable in light of the licensees' statutory right of access to Duke's poles, and therefore cannot represent a competitive advantage to AT&T. As explained above, however, the present analysis is limited to comparing the contractual rights of AT&T and its competitors and, thus, a comparison of extracontractual rights of Duke's licensees under section 224(f) is beyond the scope of this discussion.").

[36] Answer Ex. E at DEF000208 (Metcalfe Aff. ¶ 9) ("Duke Energy Florida is required by the FCC to provide mandatory access to CLECs and CATVs, but is not required to provide mandatory access to AT&T, which is an ILEC. This represents a fundamental difference between CLECs or CATVs, as compared to ILECs. Without a contractual obligation for a utility to provide access, … ILECs are at a material disadvantage compared to CLECs and CATVs.").

[37] *See Pole Attachment Order*, 26 FCC Rcd at 5329-30 (¶ 207).

access to poles Duke Florida deems unsuitable for joint use *and* to terminate—at any time and for any reason—AT&T's ability to deploy facilities on future Duke Florida pole lines.[38] Were that to occur, AT&T would need to identify, obtain permits for, and fund alternate infrastructure for its facilities without the rights and protections of the federal pole attachment scheme, significantly complicating and increasing AT&T's deployment costs.[39]

In contrast, AT&T's CLEC and cable competitors enjoy the permanent statutory right to access Duke Florida's poles that is unavailable to AT&T.[40] And, in those few cases where Duke Florida can lawfully deny CLECs and cable companies access due to insufficient pole capacity, Duke Florida has, in fact, replaced its poles so they can attach.[41] As a matter of fact and law, AT&T absolutely is not *competitively* advantaged by its far more limited contractual access to Duke Florida's poles.

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[38] *See* Compl. Ex. 1 at ATT00092, ATT00102-103 (JUA §§ 2.2, 3.1, 16.1).

[39] *See, e.g.*, Compl. Ex. C at ATT00043 (Peters Aff. ¶ 24); Reply Legal Analysis, Proceeding No. 20-276 (Nov. 24, 2020) ("Reply"), Ex. C at ATT00282-83 (Peters Reply Aff. ¶ 15).

[40] *See* 47 U.S.C. § 224(f). AT&T's competitors have the right to maintain their existing attachments on Duke Florida's poles after their license agreements are terminated regardless of what the agreements say. Federal law gives them the right to install *and maintain* their facilities on Duke Florida's poles. *See id.*; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16059-60 (¶ 1123) (1996) ("*Local Competition Order*"). This is a right that "does not depend upon the execution of a formal written attachment agreement," *id.* at 16074 (¶ 1160), and that "may not be defeated by private contractual provisions," *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50).

[41] *See, e.g.*, Ex Parte Letter of Duke Energy et al. at 2, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (Jan. 29, 2021) (acknowledging Duke Energy's "historical willingness to replace poles to expand capacity for attachers … rather than exercising their right to deny access for insufficient capacity under Section 224(f)(2)"); *see also* Initial Comments of Duke Energy Corp., et al. at 16-17, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket 17-84 (Sept. 2, 2020) (just 0.024% of electric utility poles required replacement in 2019 due to lack of capacity).

A third identified "advantage"—the reservation of *excess* space on Duke Florida's poles[42]—cannot materially or competitively advantage AT&T as a matter of law. For the last 25 years, the reservation of excess space in the JUA has been unlawful, unenforceable, and unobserved.[43] Yet Duke Florida has relied on the excess space allocation in the 1969 JUA to charge AT&T far higher rates for excess space that AT&T does not want, use, or require.[44] In contrast, AT&T's competitors have a statutory right to use as much space on Duke Florida's poles as they require—*including* the excess space AT&T already paid for, but does not use—at per pole rates covering only the space they "*actually*" occupy.[45] The JUA's excess space allocation thus lets Duke Florida double- and triple-collect for space already paid for by AT&T, but does not and cannot materially or competitively advantage AT&T. The *Bureau Order* rejects AT&T's argument that an unenforceable contract term cannot confer a competitive advantage,[46]

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[42] *Bureau Order* ¶ 26.

[43] *Local Competition Order*, 11 FCC Rcd at 16079 (¶ 1170) ("Permitting an incumbent LEC, for example, to reserve space for local exchange service … would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers."); *see also* Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 25); Reply Ex. C at ATT00289-290 (Peters Reply Aff. ¶ 29); Reply Ex. D at ATT00303, ATT00306-308 (Davis Reply Aff. ¶ 13 & Ex. D-1).

[44] *See, e.g.*, Compl. Ex. D at ATT00062-63, ATT00070-71 (Dippon Aff. ¶¶ 31-36, 46); Reply Ex. E at ATT00324-325 (Dippon Reply Aff. ¶¶ 31-32); *see also Bureau Order* ¶ 44 (finding reservation of excess space "is of limited value because … Duke has not shown that AT&T actually occupies the full amount of space allocated to it under the JUA").

[45] *See BellSouth Telecommunications v. Fla. Power & Light Co.*, 35 FCC Rcd 5321, 5330 (¶ 16) (EB 2020) ("*FPL 2020 Order*") (emphasis added); *see also* 47 C.F.R. § 1.1406(d)(2) (calculating new telecom rates based on "Space Occupied"); *In Re Amend. of Commission's Rules & Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12143 (¶ 77) (2001) ("*Consolidated Partial Order*") ("The statutory language prescribes that we allocate costs based on space occupied"); *id.* at 12143 (¶ 78) ("determination of the amount of space occupied" is based on "the amount of space actually occupied").

[46] *Bureau Order* ¶ 24 n. 78.

but that is simply wrong, as it is axiomatic that an unlawful (and hence, unenforceable) benefit is no real benefit at all.[47]

The fourth identified "advantage"—no permitting fees for new attachments[48]—also provides no real-world advantage to AT&T because AT&T performs the work itself.[49] And, under prior Commission precedent, where AT&T incurs the cost to "perform a particular service itself," Duke Florida "may not embed in [AT&T]'s rental rate costs that [Duke Florida] does not incur."[50] But that is exactly what the *Bureau Order* does. AT&T also performs the relevant work under competitively *disadvantageous* conditions, as 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 to Duke Florida's poles.[51] As a result, AT&T is uniquely subject to "excessive delays," with "limited remedies" if Duke Florida or AT&T's competitors do not

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[47] *See, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 206) (regulating rates charged ILECs based on "current market realities"); *Verizon Va. v. Va. Elec. and Power Co.*, 32 FCC Rcd 3750, 3756 (¶ 16) (EB 2017) ("*Dominion Order*") (clarifying that ILEC rates must be compared to "correctly calculated" new telecom rates, and not to improperly calculated rates advocated by an electric utility).

[48] *Bureau Order* ¶ 29.

[49] *See, e.g.*, *id.* ¶ 44 ("AT&T still must perform some of the same engineering, make-ready, and inspection work that other attachers must perform or pay others to perform before they can attach."); Reply Ex. D at ATT00297-298 (Davis Reply Aff. ¶ 4) ("I am also not aware of any cost related to permitting, engineering, or inspections that AT&T does not already incur."); *see also* Reply Ex. C at ATT00292-293 (Peters Reply Aff. ¶¶ 33-34).

[50] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

[51] *See* Compl. Ex. 1 at ATT00092 (JUA § 3.1) (stating that AT&T can attach its facilities "*after* [Duke Florida] completes any transferring or rearranging which may then be required") (emphasis added); *id.* at ATT00101-102 (JUA § 14.2) (stating that third-party attachments on Duke Florida's poles are "treated as attachments belonging to [Duke Florida]"); Compl. Ex. C at ATT00040 (Peters Aff. ¶ 17) ("AT&T generally needs to wait for all existing attachers to sequentially visit the pole and move or relocate their attachments before AT&T can begin the work it requires to attach."); Reply Ex. C at ATT00290-291 (Peters Reply Aff. ¶ 31) (AT&T "typically is the last party able to transfer its facilities to [a] replacement pole because it has to wait for the other attachers to complete their transfers first").

promptly complete their work.[52] In contrast, AT&T's competitors are statutorily guaranteed *timely* access to Duke Florida's poles,[53] and are protected by the Commission's one-touch make-ready option, make-ready deadlines, and self-help remedies designed to speed their deployment and reduce their costs.[54]

The final identified "advantage"—AT&T's typical location at the bottom of the communications space[55]—is a competitive *disadvantage* due to undisputed "costs and risks attendant to the lowest position" on Duke Florida's poles.[56] The lowest position on the pole is more vulnerable to vandalism and damage and typically requires AT&T to incur higher transfer costs to move its facilities to a replaced or relocated pole.[57] It is unrefuted that AT&T's typical

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[52] *Pole Attachment Order*, 26 FCC Rcd at 5250-51 (¶ 21) ("Evidence in the record reflects that, in the absence of a timeline, pole attachments may be subject to excessive delays.... Beyond generalized problems caused by utility lack of timeliness ..., the record shows pervasive and widespread problems of delays in survey work, delays in make-ready performance, delays caused by a lack of coordination of existing attachers, and other issues."); *id.* at 5242 (¶ 3) ("The absence of fixed timelines and the potential for delay creates uncertainty that deters investment. [And], if a pole owner does not comply with applicable requirements, the party requesting access may have limited remedies"); *see also* Compl. Ex. C at ATT00040 (Peters Aff. ¶ 17); Reply Ex. C at ATT00290-291 (Peters Reply Aff. ¶ 31).

[53] *See In the Matter of Implementation of Section 224 of the Act A Nat'l Broadband Plan for Our Future*, 25 FCC Rcd 11864, 11883 (¶ 17) (2010).

[54] *FPL 2020 Order*, 35 FCC Rcd at 5329 (¶ 14 n.56) (explaining that the Commission's one-touch make-ready regulations were adopted "so that attachment is faster and cheaper"); *see also Third Report and Order*, 33 FCC Rcd at 7714 (¶ 16) ("With OTMR ..., new attachers will save considerable time in gaining access to poles ... and will save substantial costs...."). The Commission's make-ready regulations do not protect AT&T because they define "new attacher" to mean "a cable television system or telecommunications carrier" and exclude ILECs from the definition of "telecommunications carrier." 47 C.F.R. §§ 1.1402(h), 1.1411(a)(2).

[55] *Bureau Order* ¶¶ 30-31.

[56] Answer ¶ 19; *see also* Compl. Ex. C at ATT00041-43 (Peters Aff. ¶¶ 20-23); Compl. Ex. D at ATT00071 (Dippon Aff. ¶ 46); Compl. Ex. 17 at ATT00206-209 (Damage Reports); Reply Ex. C at ATT00290-291 (Peters Reply Aff. ¶¶ 30-31).

[57] For example, as usually the last to transfer its facilities to a replacement pole, AT&T often must make multiple trips to a pole when other attachers located higher on the pole did not transfer their facilities as scheduled. Also, when a pole leans (*e.g.*, from weather damage, normal wear and tear, or improperly engineered or constructed competitor facilities), the lowest

location—which is about 1 foot below the facilities of AT&T's competitors[58]—resulted from decades of history rather than affirmative decision-making,[59] and continues today because pole owners have required consistency in the placement of facilities to allow *all attachers* to quickly identify the ownership of facilities on a pole and avoid the physical damage that would result if facilities crisscrossed mid-span.[60]

Yet, confoundingly, the *Bureau Order* again misplaces the burden on AT&T, which it claims "has never sought to abandon its right to the lowest position in the communications space."[61] There is no evidence AT&T ever asserted a "right" to the lowest position on a pole; instead, the record shows the opposite – photos of a third-party attached *below* AT&T's facilities in the communications space.[62] And, if AT&T were to try to swap pole locations with a

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facilities on the pole (typically, those of AT&T) can become low-hanging without notice and vulnerable to being struck by large vehicles. In addition, the lowest facilities are more vulnerable to damage by workers ascending a pole to work on higher-placed facilities. And, as the typical lowest attacher, AT&T 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. *See* Compl. Ex. C at ATT00040-43 (Peters Aff. ¶¶ 17, 20-23); Compl. Ex. D at ATT00070-71 (Dippon Aff. ¶ 46); Compl. Ex. 17 at ATT00206-209 (Damage Reports); Reply Ex. C at ATT00290-291 (Peters Reply Aff. ¶¶ 30-31).

[58] *See, e.g.*, Answer Ex. 7 at DEF000337. It is unclear why this 12-inch difference would let AT&T use "less expensive bucket trucks" or provide it safer or easier access, conclusory allegations the *Bureau Order* relied upon. *See Bureau Order* ¶ 30 n.103.

[59] Standard construction practices in the early days of joint use placed AT&T's facilities at the bottom of the communications space because AT&T was the only consistent communications attacher on utility poles at that time. *But see Bureau Order* ¶ 42 (competitive benefits must "stem from specific terms and conditions in the JUA, as opposed to AT&T's historic status as an [I]LEC.").

[60] *Bureau Order* ¶ 31 ("AT&T concedes that 'consistency in placement of facilities' allows 'all companies[,]' including AT&T, to readily identify the ownership of particular attachments and avoids 'physical damage that would result if facilities crisscrossed mid-span.'"); *see also* Compl. Ex. C at ATT00041-42 (Peters Aff. ¶ 21); Compl. Ex. D at ATT00071 (Dippon Aff. ¶ 46).

[61] *Bureau Order* ¶ 31.

[62] *See* Reply Ex. at ATT00306-307 (Davis Reply Aff., Ex. D-1).

competitor affixed higher on the pole now, it would necessarily require every communications attacher to incur rearrangement costs – and thereby increase deployment costs across-the-board, contrary to Commission policy. AT&T is not better positioned than its competitors and should not pay a higher rate because of something it cannot change and that operates to the benefit of all attachers.

The *Bureau Order* thus identified 5 "advantages" of the JUA that are *not* real-world material competitive advantages under the Commission's standard for reviewing ILEC rates. And Duke Florida's inability to accurately quantify the value of any or all of the "advantages"[63] is fatal to any attempt to net them against AT&T's material disadvantages under the JUA. Allowing the identified "advantages" to justify competitively high pole attachment rates for AT&T, as the *Bureau Order* does, will frustrate achievement of the Commission's competition and deployment goals.[64]

B. The *Bureau Order* Does Not Ensure Duke Florida Charges Rates That Are Justified by Relevant, Quantified Costs.

The *Bureau Order* uses internally inconsistent language that Duke Florida can seize upon to demand rates that are higher than rates justified by Duke Florida's costs. While the *Bureau Order* correctly states that an electric utility can charge a rate "that *does not exceed* the Old Telecom Rate" where a JUA provides the ILEC with net material competitive benefits,[65] it also refers to the old telecom rate as *the* lawful rate without quantifying (or requiring Duke Florida to

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[63] *Bureau Order* ¶ 41 ("Duke attempts to calculate the monetary value of the advantages that the JUA provides to AT&T, but its calculations are speculative and unsupported by reliable evidence").

[64] *Third Report and Order*, 33 FCC Rcd at 7707, 7767 (¶¶ 3, 123).

[65] *See Bureau Order* ¶ 14 ("We also conclude that AT&T is entitled to a pole attachment rate … that does not exceed the Old Telecom Rate.").

quantify) the value of any of the identified advantages.[66] But 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.[67] Any upward variation from the new telecom rate must be justified based on relevant costs, as an electric utility cannot lawfully recover "costs that [it] does not incur."[68] Indeed, the Commission has always placed the burden on the pole owner to justify charging a rate higher than the regulated rate, as new telecom rates are already "just, reasonable, and fully compensatory."[69]

This quantification requirement is essential to protect against "artificial, non-cost-based differences" in pole attachment rates that "are bound to distort competition."[70] By rule, the old telecom rate is about 1.5 times the new telecom rate[71]—a difference that the Commission found "sufficiently high that it hinders important statutory objectives."[72] It is especially high here, where the identified "advantages" do not impose costs on Duke Florida and have admittedly

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[66] *See Bureau Order* ¶ 65(a) ("The rate Duke may charge AT&T for attachments to Duke's poles under the JUA may equal but not exceed the Old Telecom Rate.").

[67] *Verizon Md. LLC v. The Potomac Edison Co.*, 35 FCC Rcd 13607, 13610 (¶ 8) (2020) ("*Potomac Edison Order*"); *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); *Dominion Order*, 32 FCC Rcd at 3751-52 (¶ 4); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

[68] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18); *see also, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128) (directing companies to determine the "appropriate rate" that "account[s] for" the value of net material competitive advantages, up to the old telecom rate); *Dominion Order*, 32 FCC Rcd at 3759 (¶ 20) (faulting Dominion because, "with only a few exceptions, Dominion does not quantify the purported material advantages that Verizon receives under the Joint Use Agreements"); *Verizon Fla. v. Fla. Power and Light Co.*, 30 FCC Rcd 1140, 1149 (¶ 24) (2015) (requesting "evidence showing that the monetary value of those advantages" to determine the just and reasonable rate); *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218) (providing a range of rates broad enough to "account for" possible "arrangements that provide net advantages to [I]LECs relative to cable operators or telecommunications carriers").

[69] *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183).

[70] *See AEP v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013).

[71] *See* Reply Ex. A at ATT00241 (Rhinehart Reply Aff. ¶ 5).

[72] *Pole Attachment Order*, 26 FCC Rcd at 5303 (¶ 147).

"little value,"[73] if any. Instead, the *Bureau Order* relies on "basic pole attachment" rights given AT&T by contract (for which Duke Florida is fully compensated at a new telecom rate),[74] evergreen protections not yet needed because the JUA has not been terminated and, according to the Enforcement Bureau, is "highly unlikely" ever to be[75] and which have lesser value than the broader statutory right of access AT&T's competitors enjoy in any event, an unenforceable and unobserved allocation of space that AT&T does not use (although its competitors do), permitting costs AT&T already incurs, and a position on Duke Florida's pole that cannot impact Duke Florida's bottom line.[76] When the Commission "cannot afford to dismiss the importance of even potentially small" rate reductions,[77] it certainly should not set the old telecom rate as the lawful rate here, where the identified advantages are so hypothetical and divorced from Duke Florida's costs.[78]

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[73] *See Bureau Order* ¶ 44.

[74] *But see Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128) (requiring electic utility to prove an "[I]LEC receives significant material benefits *beyond basic pole attachment* or other rights given to another telecommunications attacher") (emphasis added).

[75] *Bureau Order* ¶ 24.

[76] The *Bureau Order* mistakenly suggests that the Commission's 2018 *Third Report and Order* characterizes certain "advantages" as per se net material competitive advantages. *See, e.g.*, *Bureau Order* ¶ 24 n.78, ¶ 30 n.103, ¶ 31 & n.104, ¶ 31 n.108 (all citing *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128)). Not so. The paragraph in the Commission's 2018 *Third Report and Order* cited by the *Bureau Order* for this proposition quotes *allegations* only. *See Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128 & n.481) (quoting allegations from Comcast and electric utilities). The Commission required electric utilities to prove by clear and convincing evidence that they are, in fact, net material competitive advantages under the Commission's rules and orders. 47 C.F.R. § 1.1413(b); *see also Third Report and Order*, 33 FCC Rcd at 7768 (¶ 124) (stating only that "joint use agreements *may* provide benefits to the incumbent LECs" as compared to CLECs and cable attachers) (emphasis added); *see also Pole Attachment Order*, 26 FCC Rcd at 5334 (¶ 214) ("declin[ing] to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis.").

[77] *See Cost Allocator Order*, 30 FCC Rcd at 13743-44 (¶ 27).

[78] *See Bureau Order* ¶ 41 (rejecting Duke Florida's valuation attempts as "speculative and unsupported by reliable evidence").

C. The *Bureau Order* Increases Rates by Adopting a Unique "Average Number of Attaching Entities" Input to Calculate Rates for AT&T, Contrary to Law.

The *Bureau Order* improperly adopts and applies a unique [redacted] attaching entities input for Duke Florida to use to calculate the rates it charges AT&T—different from the presumptive 5 attaching entities input that applies when calculating rates for AT&T's competitors to rent space on the same poles.[79] This is antithetical to the statute and the Commission's regulations and principle of competitive neutrality.

The attaching entity input determines how much unusable space is assigned to an attacher,[80] and 47 U.S.C. § 224(e) requires pole owners to divide that unusable space *equally* "among *all* attaching entities."[81] Under Section 1.1409 of the regulations, therefore, pole owners must either use the presumptive number of attaching entities to divide unusable space among all their attachers *or* rebut the presumption for "*all* attaching entities."[82] Pole owners cannot mix and match values, as the *Bureau Order* allows here, as it would require one attacher to pay a greater share of the unusable space costs, contrary to law.[83]

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[79] *See id.* ¶ 51 (recognizing that the Commission has established a rebuttable presumption of 5 attaching entities for serving areas like Duke Florida's "with a population greater than 50,000"); *id.* ¶ 52 (adopting a [redacted] attaching entities input for calculating rates charged AT&T); *see also* Response to AT&T's Initial Brief at 13, Proceeding No. 20-276 (Apr. 19, 2021) (arguing that the Commission should let Duke Florida "single-out AT&T for a [redacted] attaching entity value").

[80] *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6800 (¶ 45) (1998) ("the number of attaching entities is significant because the costs of the unusable space assessed to each entity decreases as the number of entities increases").

[81] 47 U.S.C. § 224(e)(2) (emphasis added); 47 C.F.R. § 1.1409(a).

[82] 47 C.F.R. § 1.1409(d) (emphasis added).

[83] *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd at 6802 (¶ 49) ("Congress concluded that the unusable space 'is of equal benefit to all entities attaching to the pole'") (citation omitted).

It is no mystery why Duke Florida would be motivated to single-out AT&T for a lower average number of attaching entities input. In 2015, the Commission recognized that electric utilities were artificially increasing rates by rebutting this very presumption—of average number of attaching entities—a problem it fixed by applying additional cost allocators to its new telecom rate formula.[84] But the "loophole" remains unpatched in the old telecom rate formula and allows electric utilities to demand far higher old telecom rates than could ever be justified by the value of net material competitive advantages. The Commission found an old telecom rate calculated using default inputs—at about 1.5 times the new telecom rate—would capture all possible "arrangements that provide net advantages to [I]LECs relative to cable operators or telecommunications carriers."[85] But the *Bureau Order*—by departing from the presumptive input—provides for old telecom rates [redacted] *times* the rates Duke Florida charged AT&T's competitors. The value of net material competitive advantages does not change based the number of attaching entities on a pole; neither should the old telecom rate.

The Commission found that "lower and … more uniform pole attachment rates" can "eliminate barriers to broadband deployment, provide regulatory certainty, promote broadband deployment and competition, spur investment, and reduce significant indirect costs caused by the existing differences between the rates paid by competitors."[86] It should correct the *Bureau Order* to comply with statute, regulation, and precedent—and to achieve these goals.

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[84] *See Cost Allocator Order*, 30 FCC Rcd at 13736-38 (¶¶ 13, 16).

[85] *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218).

[86] *Id.* at 5316 (¶ 172) (alterations and quotation marks omitted).

III. The Commission Should Clarify that the Parties Need Only a New Rate Provision and Not a Whole New Agreement.

After the Commission sets the correct competitively neutral rate for AT&T's use of Duke Florida's poles under the JUA, it should clarify that the parties *only* need to amend the JUA to include the new lawful rate provision—and do *not* need to negotiate a whole new joint use agreement. The *Bureau Order* includes ambiguity on this point, as it sets the maximum rate Duke Florida "may charge AT&T for attachments to Duke's poles *under the JUA*," but then directs the parties "to negotiate *a new reciprocal joint use agreement* consistent with [its Order] that reflects proportional reciprocal rates for Duke's attachments to AT&T's poles *under the JUA*."[87]

The parties do not need an entirely new joint use agreement. They and the Commission have devoted significant resources to determining the lawful rate under the JUA they already have. The Commission also does not have authority to order a wholesale revision of the JUA; its regulations instead provide authority to "[t]erminate the unjust and/or unreasonable rate" and "[s]ubstitute in the pole attachment agreement the just and reasonable rate."[88]

The Commission should, therefore, clarify that only "a new reciprocal joint use agreement [*rate provision*] consistent with" its Order is required.[89] More extensive negotiations would increase costs and, potentially, disputes given Duke Florida's nearly 12-to-1 pole ownership advantage, which the Enforcement Bureau found gives Duke Florida superior bargaining power to impose unjust and unreasonable rate, terms and conditions.[90] In light of the

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[87] *Bureau Order* ¶ 65(a)-(b) (emphases added).

[88] 47 C.F.R. § 1.1407(a)(2).

[89] *See Bureau Order* ¶ 65(b).

[90] *See id.* ¶¶ 35-36.

"protracted negotiations between the parties" that already "failed to produce a … just and reasonable rate,"[91] the Commission should limit further negotiations by directing the parties to promptly amend the JUA's rate provision to conform to its Order and ordering Duke Florida to provide AT&T the lawful rate and required refunds without further delay.

IV. Conclusion

For the foregoing reasons, and those detailed in AT&T's other filings in this docket, AT&T respectfully requests that the Commission review and clarify those portions of the *Bureau Order* identified herein, and grant AT&T's Pole Attachment Complaint in full.

Respectfully submitted,

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Dated: September 27, 2021

[91] *Id.* ¶ 35.

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2021, I caused a copy of the foregoing Application for Review of BellSouth Telecommunications, LLC d/b/a AT&T Florida to be served on the following (service method indicated):

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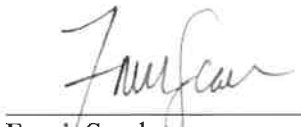

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