Before the
Federal Communications Commission
Washington, DC 20554

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

REPLY SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

* Certain information in this Reply Supplemental Brief and its Exhibits 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.

TABLE OF AUTHORITIES

Page(s)

Statutes

Regulations

Agency Decisions

I. INTRODUCTION AND SUMMARY

Duke Florida's supplemental brief confirms that the just and reasonable rate for AT&T is the competitively neutral new telecom rate guaranteed AT&T's competitors, which is about $5 per pole. Duke Florida's effort to charge AT&T rates [redacted] times higher is based on speculation about a hypothetical world without jointly used utility poles, "dummy" estimates of work Duke Florida never performed, and false claims about pole space that are based on patently incorrect and inherently biased data. Duke Florida has not identified, much less proven with clear and convincing evidence, a net benefit that it provides AT&T under the JUA "that materially advantages [AT&T] over other telecommunications carriers or cable television systems providing telecommunications services on the same poles."[1] Nor has it accounted for the significant competitive *disadvantages* the JUA imposes on AT&T.[2] The just and reasonable rate, therefore, is the approximately $5 per pole new telecom rate that fully compensates Duke Florida and is essential to the Commission's deployment and competition goals.[3]

II. ARGUMENT

A. Duke Florida Misstates the Burden of Proof.

Duke Florida goes beyond the Enforcement Bureau's supplemental briefing request by arguing that it does not need to prove its rates are just and reasonable.[4] To the contrary, Duke Florida, not AT&T, bears the burden of proof. This is a "complaint proceeding[ ] challenging

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[1] 47 C.F.R. § 1.1413(b).

[2] *See* AT&T Initial Suppl. Br. at 2-11 ("AT&T Br.").

[3] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 5299 (¶ 137) (2011) ("*Pole Attachment Order*") ("The [new telecom] rate is just, reasonable, and fully compensatory …."); *In the Matter of Accelerating Wireline Broadband Deployment*, 33 FCC Rcd 7705, 7769 (¶ 126) (2018) ("*Third Report and Order*") ("[W]e agree … that greater rate parity between incumbent LECs and their telecommunications competitors 'can energize and further accelerate broadband deployment.'").

[4] Duke Initial Suppl. Br. at 14-15, 23 ("Duke Br."). *See* Letter Order at 2 (Mar. 8, 2021).

utility pole attachment rates" under a newly renewed JUA; so Duke Florida must prove by clear and convincing evidence that it provides AT&T net benefits under the JUA "that materially advantage[ ] [AT&T] over other telecommunications carriers or cable television systems providing telecommunications services on the same poles" to charge a rate between the new and old telecom rates.[5] This regulation does not carve complaint proceedings into different time periods subject to different standards.[6] Nor can it countenance the JUA rates, which are about [redacted] times the new telecom rate and [redacted] times the old telecom rate.[7]

Indeed, the Commission has always placed the burden on the pole owner to justify charging a rate higher than the regulated rate, as just and reasonable rates are cost-based rates designed to compensate—but not over-compensate—the pole owner.[8] And so, regardless of whether this case is reviewed under the standard the Commission adopted in 2011 or 2018, Duke Florida cannot avoid its burden to "justify 'the rate … alleged in the complaint not to be just and reasonable.'"[9] The

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[5] 47 C.F.R. § 1.1413(b).

[6] *Id.*; *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).

[7] Compl. Ex. A at ATT00007, ATT00009-10 (Rhinehart Aff. ¶¶ 12, 18).

[8] *See, e.g.*, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 30 FCC Rcd 13731, 13745 (¶ 29) (2015) ("*Cost Allocator Order*") (Congress "enact[ed] cost-based rate formulas"); *Verizon Va. v. Va. Elec. and Power Co.*, 32 FCC Rcd 3750, 3759 (¶ 18) (EB 2017) ("*Dominion Order*") (a pole owner may not recover "costs that [it] does not incur"); *Heritage Cablevision Assocs. v. Tex. Utils. Elec. Co*., 6 FCC Rcd 7099, 7105 (¶ 29) (1991) (a pole owner may not charge a higher rate when it does not "incur[ ] any additional costs in preparing or maintaining its poles as a result of [the] installation of fiber optic cables" as compared to "coaxial cable").

[9] Duke Florida did not and cannot dispute that AT&T made a *prima facie* case with a "statement of the specific unreasonable pole attachment rate." *See Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co*., 11 FCC Rcd 11202, 11207 (¶ 11) (1996); *see also Cable Television Ass'n of Ga. v. Ga. Power Co*., 18 FCC Rcd 16333, 16337 (¶ 8) (2003). The burden to justify the JUA rates therefore is on Duke Florida. *Knology, Inc. v. Ga. Power Co*., 18 FCC Rcd 24615, 24635 (¶ 49) (2003) ("[A]fter [the complainant] establishes a *prima facie* case …, [the utility] must produce evidence explaining the challenged charges."); *Marcus Cable Assocs. v. Tex. Utils. Elec. Co*., 18 FCC Rcd 15932, 15938-39 (¶ 13) (2003) ("Once a complainant in a pole attachment matter meets its burden of establishing a *prima facie* case, the [utility] bears a burden to explain or defend its actions.");

Commission "shall" ensure "just and reasonable" pole attachment rates in all cases, including this case where AT&T does not receive net material competitive benefits under the JUA.[10]

B. Duke Florida Does Not Identify, Prove, or Properly Quantify the Value of Net Material Competitive Advantages Provided Under the JUA.

Duke Florida alleges that the JUA provides AT&T with seven competitive advantages (also referred to as "benefits"). In reality, its list is duplicative, can be boiled down to four alleged benefits, and even then, does not demonstrate or properly quantify the value of net material competitive benefits provided by the JUA.

1. "Built-to-Suit" Network. Duke Florida claims that AT&T is competitively advantaged because Duke Florida installed joint use poles when it could have installed shorter non-joint use poles to meet its own electric service needs.[11] The Commission has repeatedly rejected this argument.[12] AT&T *and* its competitors require Duke Florida's joint use poles and have for many decades. Duke Florida "did not build its poles just to accommodate AT&T."[13]

Heritage Cablevision, 6 FCC Rcd at 7105 (¶ 29) ("Our procedural rules require the respondent to justify 'the rate … alleged … not to be just and reasonable.'").

[10] 47 U.S.C. § 224(b); *see also Selkirk Commc'ns v. FPL*, 8 FCC Rcd 387, 389 (¶ 17) (CCB 1993) ("[P]ole attachment rates cannot be held reasonable simply because they have been agreed to ….").
Duke Florida faults AT&T for not quantifying net competitive benefits, Duke Br. at 15, but there are none. Duke Florida relies on an interim decision where quantification was requested based on a finding that the ILEC "concede[d] that it received and continues to receive benefits under the Agreement that are not provided to other attachers." *Id.* (quoting *Verizon Fla. v. FPL*, 30 FCC Rcd 1140, 1149 (¶ 24) (EB 2015)). That is not the case here.

[11] Duke Br. at 3-4 (rows A, C, E), 5-10 (Arguments A, C-D); Answer ¶ 16 (arguing that "DEF … has always installed poles taller and stronger than necessary to meet only DEF's service needs").

[12] *See Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128) (alleged competitive advantages must be "beyond basic pole attachment … rights"); *BellSouth Telecommc'ns v. FPL*, 35 FCC Rcd 5321, 5330 (¶ 15) (EB 2020) ("*FPL 2020 Order*"); *Verizon Md. v. Potomac Edison Co.*, 35 FCC Rcd 13607, 13619-20 (¶ 32) (2020) ("*Potomac Edison Order*").

[13] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *Potomac Edison Order*, 35 FCC Rcd at 13619-20 (¶ 32); Compl. Ex. C at ATT00037 (Peters Aff. ¶ 12); Compl. Ex. D at ATT00068-69 (Dippon Aff. ¶ 43); Reply Ex. C at ATT00278, ATT00280-281 (Peters Reply Aff. ¶¶ 8, 11-12).

Duke Florida nonetheless relies on its rejected "built to suit" theory to argue that AT&T avoided (1) make-ready costs and (2) permitting and inspection costs that AT&T *may have* incurred had it replaced "virtually every" Duke Florida pole with a taller pole in order to attach.[14] This argument fails for at least four reasons.

First, this alternate universe does not exist. No communications company—ILEC, CLEC, or cable—has needed to replace any material number of Duke Florida's poles in order to attach.[15] One of Duke Florida's exhibits shows that by 1972 (*i.e.*, only 3 years after the JUA was entered) [redacted][16] This remains true. In a September 2020 filing, Duke Florida's parent company, joined by other electric utilities, stated that only about 0.024% of an electric utility's poles require replacement each year to accommodate an additional communications facility.[17] In a January 2021 filing, Duke Florida's parent company again emphasized that its utility poles are "almost always capable of hosting an additional attachment."[18] In this record, Duke Florida depicts a [redacted]-foot pole as its "typical" joint use pole and a 45-foot pole as its "typical" pole *without* AT&T attached.[19] There is ample room on poles of

[14] *See* Duke Br. at 3 (row A), 4 (row C), 5.

[15] *See* Reply Ex. C at ATT00279-280 (Peters Reply Aff. ¶¶ 9-10); Reply Ex. E at ATT00335 (Dippon Reply Aff. ¶ 52).

[16] *See* Answer Ex. 6 at DEF000278.

[17] *See* Initial Comments of Duke Energy Corp., et al. at 16-17, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17- 84 (Sept. 2, 2020); *see also* Reply Ex. C at ATT00280 (Peters Reply Aff. ¶ 10).

[18] Ex Parte of Duke Energy Corp., et al. at 2, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17-84 (Jan. 29, 2021).

[19] Answer Ex. C at DEF000168 (Burlison Decl., Ex. C-1).

these heights for AT&T and its competitors to attach without replacing them.[20] It is mere fiction to claim that AT&T would have rebuilt Duke Florida's network absent the JUA.[21]

Second, AT&T does not avoid pole replacement, make-ready, permitting, or inspection costs that its competitors incur.[22] If an existing Duke Florida pole needs to be replaced to accommodate an additional communications facility, it does not matter whether the additional facility is AT&T's or AT&T's competitor's; the same work is required.[23] And under the JUA, AT&T incurs the cost to complete the work, or pays Duke Florida for work it asks Duke Florida to perform.[24] There are no avoided costs.

Duke Florida tries to create the illusion of value where none exists by (1) asking the Commission to ignore "internal costs incurred by AT&T" and focus only on "the costs that AT&T is required (or not required) to pay" to Duke Florida and (2) claiming that it double-checks AT&T's inspections.[25] But the Commission cannot ignore AT&T's internal costs and Duke Florida may not lawfully "charge a higher rate" where an ILEC "performs a particular service itself and incurs costs

[20] The JUA acknowledges that AT&T can attach to a 35-foot pole without replacing it, Compl. Ex. 1 at ATT00090 (JUA, § 1.1.5(B)), and the Commission's regulations presume there is space for Duke Florida and 4 communications attachers on a 37.5-foot pole, 47 C.F.R. §§ 1.1409(c), 1.1410. *See also* Compl. Ex. C at ATT00037 (Peters Aff. ¶ 12); Reply Ex. C at ATT00279 (Peters Reply Aff. ¶ 9); Reply Ex. E at ATT00335 (Dippon Reply Aff. ¶ 51).

[21] *See* Reply Ex. C at ATT00278-281 (Peters Reply Aff. ¶¶ 8-12); Reply Ex. D at ATT00299-300 (Davis Reply Aff. ¶ 7).

[22] Compl. Ex. C at ATT00037-38, ATT00039-40 (Peters Aff. ¶¶ 13, 17); Reply Ex. C at ATT00291-293 (Peters Reply Aff. ¶¶ 32-34); Reply Ex. D at ATT00297-298 (Davis Reply Aff. ¶¶ 4-5).

[23] Reply Ex. C at ATT00280 (Peters Reply Aff. ¶ 10); Reply Ex. D at ATT00297-300 (Davis Reply Aff. ¶¶ 4-5, 7).

[24] Compl. Ex. 1 at ATT00092, ATT00094-95 (JUA §§ 3.3, 4.4); Compl. Ex. C at ATT00037-38, ATT00039-40 (Peters Aff. ¶¶ 13, 17); Reply Ex. C at ATT00291-292 (Peters Reply Aff. ¶¶ 32-33); Reply Ex. D at ATT00297-298 (Davis Reply Aff. ¶¶ 4-5).

[25] *See* Answer ¶¶ 14, 17.

comparable to its competitors in performing that service."[26] This is true even if Duke Florida decides to double-check AT&T's work, as this is work Duke Florida need not perform under the JUA and does not perform because of it.[27]

Third, Duke Florida's theory that AT&T would have replaced every Duke Florida pole because it would have been the "first communications attachment" is incompatible with the reality of increased competition in the communications marketplace and the resultant incremental development of the communications network by AT&T's competitors.[28] Cable companies and CLECs have used space on Duke Florida's poles for decades and in greater numbers.[29] One of Duke Florida's license agreements from 1991 shows that a cable company was using over [redacted] more of Duke Florida's poles than AT&T's predecessor used that same year.[30] It is simplistic and incorrect to assume AT&T was the first to attach to each of Duke Florida's poles.[31]

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[26] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18 & n.67); *see also* Compl. Ex. D at ATT00068 (Dippon Aff. ¶ 42).

[27] *See* Compl. Ex. 1 at ATT00092 (JUA § 3.3); Compl. Ex. C at ATT00037-38 (Peters Aff. ¶ 13); Reply Ex. C at ATT00291-292 (Peters Reply Aff. ¶¶ 32-33); Reply Ex. D at ATT00298 (Davis Reply Aff. ¶ 5); *see also* Letter Order at 4, *Verizon Md. v. The Potomac Edison Co*., Proceeding No. 19-355 (EB May 22, 2020) (alleged advantages must "derive from the terms and conditions of the joint use agreement"). It is not clear what uncompensated work Duke Florida claims to perform for AT&T, particularly when it admits that it does *not* perform "pre-construction and post-construction inspections" out of "deference" to ILECs. *See* Answer ¶ 14.

[28] *See* Duke Br. at 5.

[29] *Potomac Edison Order*, 35 FCC Rcd at 13619-20 (¶ 32) ("By 1978, cable attachments were so common that Congress saw fit to regulate their rates, and, by 1996, section 224 of the Act was amended to provide cable and [C]LECs a statutory right of access."); *see also FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); Reply Ex. A at ATT00256 (Rhinehart Reply Aff. ¶ 31).

[30] *See* Duke Florida's Resp. to AT&T's First Set of Interrog., Ex. 2 at DEF000025-27 (certifying [redacted] attachments by the cable company to Duke Florida's distribution poles); Compl. Ex. 5 at ATT00172 (1990 Invoice) (invoicing AT&T's predecessor for 48,278 attachments on Duke Florida's poles); *see also* Reply Ex. C at ATT00278 (Peters Reply Aff. ¶ 8).

[31] It is also incorrect to assume that AT&T attached to every Duke Florida pole under the JUA because the joint network *predates* the JUA. *See* Compl. Ex. 1 at ATT00103 (JUA § 18.1).

Fourth, Duke Florida's quantifications are hypothetical and grossly inflated.[32] Contrary to reality, Duke Florida assumes replacement of 100% of Duke Florida's poles[33] and then prices those replacements, which would have occurred years or decades ago, using *current day* materials and costs.[34] Duke Florida also inflates those current costs with pole replacements of all types and heights, rather than the lower-cost pole replacements that would be consistent with its theory that 30- or 35-foot poles would have been replaced with 40-foot poles.[35] The result is an absurd quantification suggesting that AT&T should have paid [redacted] per pole—or [redacted]—to replace less than 6% of Duke Florida's distribution network, when that same amount reflects nearly [redacted] of Duke Florida's entire investment in 1.1 million distribution poles.[36]

In addition to the pole replacement costs, Duke Florida claims that AT&T should have paid unsubstantiated current-day permitting and inspection fees of over [redacted], which it says translates to an annual cost of [redacted] per pole.[37] Of course, Duke Florida did *not* perform work that could justify these fees, so Duke Florida may not embed retroactive or prospective recovery of them

[32] Reply Ex. A at ATT00254 (Rhinehart Reply Aff. ¶ 28); Reply Ex. E at ATT00331-337 (Dippon Reply Aff. ¶¶ 46-55).

[33] *See* Initial Comments of Duke Energy Corp., et al. at 16-17, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17- 84 (Sept. 2, 2020); *see also* Reply Ex. C at ATT00280 (Peters Reply Aff. ¶ 10); Reply Ex. E at ATT00331-336 (Dippon Reply Aff. ¶¶ 46-53).

[34] *Ala. Cable Telecommcn's Ass'n v. Ala. Power Co.*, 16 FCC Rcd 12209, 12234 (¶ 57) (2001) ("Respondent's final attempt … using replacement costs … fails."); Reply Ex. A at ATT00254 (Rhinehart Reply Aff. ¶ 28); Reply Ex. E at ATT00337 (Dippon Reply Aff. ¶ 55).

[35] Duke Florida's Supp. Resp. to AT&T's Interrog. (pdf titled "DEF 2019 Pole Replacement Expenditures"); Answer Ex. A at DEF000139 (Freeburn Decl. ¶ 29); Answer Ex. C at DEF000164-165 (Burlison Decl. ¶ 12) ("In other words, where Florida Power Corp [now DEF] installed 40-foot poles to meet the [JUA]'s requirements, in the absence of the [JUA], it could have installed 30 or 35-foot poles."); Reply Ex. E at ATT00336-337 (Dippon Reply Aff. ¶ 54).

[36] Reply Ex. A at ATT00254-255 (Rhinehart Reply Aff. ¶ 28); Answer Ex. E at DEF000239 (Metcalfe Aff., Ex. E-3.1).

[37] *See* Answer Ex. E at DEF000240 (Metcalfe Aff., Ex. E-3.2).

in AT&T's rate.[38] Equally important, in claiming that AT&T should have paid [redacted] per pole when deploying its facilities years or decades ago, Duke Florida ignores that AT&T *did* pay Duke Florida JUA rates that were up to [redacted] per pole *higher* than the regulated rates AT&T's competitors paid.[39] Duke Florida has been excessively over-compensated.

2. Evergreen Provision. Duke Florida next claims that AT&T is advantaged by a contractual right to maintain its existing attachments on Duke Florida's poles should the JUA terminate.[40] This is not a competitive advantage either—Duke Florida admits that AT&T's competitors have an "extracontractual" right to remain attached to Duke Florida's poles.[41]

Indeed, the statutory right of access enjoyed by AT&T's competitors is *more valuable* than AT&T's contractual right.[42] If Duke Florida terminates a license agreement, AT&T's competitor still has a federally protected right to maintain its attachments on Duke Florida's poles *and* deploy on new Duke Florida pole lines.[43] But if Duke Florida terminates the JUA, AT&T will have no continuing right of access to new pole lines and will need to identify, fund, and deploy alternate

[38] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18); *Heritage Cablevision*, 6 FCC Rcd at 7105 (¶ 29); Reply Ex. C at ATT00292 (Peters Reply Aff. ¶ 33); Reply Ex. D at ATT00297-298 (Davis Reply Aff. ¶¶ 4-5).

[39] Compl. Ex. A at ATT00007 (Rhinehart Aff. ¶ 12); Reply Ex. C at ATT00293 (Peters Reply Aff. ¶ 34); Reply Ex. E at ATT00340-342 (Dippon Reply Aff. ¶¶ 61-65).

[40] Duke Br. at 6-7 (Argument B), 12-13 (Argument F).

[41] Answer ¶ 30 n.128.

[42] *See* AT&T Br. at 2-4, 11; *see also* Answer Ex. E at DEF000208 (Metcalfe Aff. ¶ 9); Reply Ex. A at ATT00253 (Rhinehart Reply Aff. ¶ 27); Reply Ex. C at ATT00281-283 (Peters Reply Aff. ¶¶ 13-15); Reply Ex. E at ATT00329-330 (Dippon Reply Aff. ¶ 42). Indeed, electric utilities, including Duke Energy, previously argued that rental rates should increase to account for the higher value of statutory access versus the less advantageous access AT&T has via contract. *See Ala. Power Co. v. FCC*, 311 F.3d 1357, 1365 (11th Cir. 2002).

[43] 47 U.S.C. § 224(f).

infrastructure going forward—provided governmental entities would allow such unnecessarily duplicative infrastructure in the public rights-of-way.[44]

Duke Florida ignores federal law and instead points to language in its license agreements stating that attachments must be removed upon termination of the agreement.[45] But this language is invalid and unenforceable; a federal statutory right to attach "may not be defeated by private contractual provisions."[46] As a matter of law, Duke Florida cannot "impede … the installation and maintenance of telecommunications and cable equipment" on its poles.[47]

Duke Florida's alleged quantification is contrary to precedent as well because an alleged advantage cannot be valued "by assuming that, without the JUA, AT&T would have built a duplicative pole network."[48] Duke Florida goes even further—assuming that AT&T would incur the cost of a duplicative network *and* additional costs to "acquir[e] land and … equipment to store [62,000+] poles in inventory" to protect against the risk that the JUA may terminate.[49]

This is an exercise in make-believe. No company has or will deploy a duplicative network.[50] Duke Florida does not claim its CLEC or cable attachers have stockpiles of poles in case

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[44] *See* Answer ¶ 11 n.25 ("[I]LECs have no right of access to utilities' poles) (citation omitted).

[45] Duke Br. at 7.

[46] *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50).

[47] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16059-60 (¶ 1123) (1996) ("*Local Competition Order*"); *id*. at 16074 (¶ 1160) ("[A] utility's obligation to permit access under section 224(f) does not depend upon the execution of a formal written attachment agreement").

[48] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *Ala. Cable Telecommcn's Ass'n*, 16 FCC Rcd at 12232 (¶ 52) (the same rate "provides just compensation" regardless of "whether the [pole] attachment is obtained through voluntarily signed contracts or through mandatory access.").

[49] *See* Duke Br. at 8, 12.

[50] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15) ("[A]s Congress has found, owing to a variety of factors, including environmental and zoning restrictions, there is 'often no practical alternative except to utilize available space on existing poles'"); *see also* Reply Ex. A at ATT00253 (Rhinehart Reply Aff. ¶ 27); Reply Ex. C at ATT00282 (Peters Reply Aff. ¶ 14).

Duke Florida terminates their license agreements. And so Duke Florida bases its quantification on "dummy work orders," claiming AT&T should pay Duke Florida amounts that no entity has ever incurred.[51] And even the "dummy work orders" lack credulity, as Duke Florida assumes each pole would be installed as a standalone job, without the efficiencies of scale that would necessarily be part of such a massive project. Duke Florida's value quantification, "using replacement costs[,] … fails."[52]

3. Space on Duke Florida's Poles. Duke Florida next claims that AT&T is advantaged by 3.33 feet of safety space on its poles and 3 feet of space allocated by the JUA to, but not used by, AT&T.[53] These are not competitive advantages.[54] The Commission invalidated contractual space allocations a quarter-century ago[55] and has "long held that the … safety space is for the benefit of the electric utility, not communications attachers."[56]

Duke Florida tries to salvage its allegations about space by claiming that AT&T pays for space on a per-pole basis when its competitors pay "a per-attachment rate premised upon a single

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[51] *See* Duke Florida's Supp. Resp. to AT&T's Interrog. at DEF001412-1463.

[52] *Ala. Cable Telecommcn's Ass'n*, 16 FCC Rcd at 12234 (¶ 57); *see also* Reply Ex. A at ATT00253-254 (Rhinehart Reply Aff. ¶¶ 26-27); Reply Ex. E at ATT00328-331, ATT00338-339 (Dippon Reply Aff. ¶¶ 41-45, 58).

[53] Duke Br. at 9-11 (Argument D), 11-12 (Argument E).

[54] *See* AT&T Br. at 8-10, 16-19; *see also* Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 25); Compl. Ex. D at ATT00070-71 (Dippon Aff. ¶ 46); Reply Ex. A at ATT00255 (Rhinehart Reply Aff. ¶ 29); Reply Ex. C at ATT00283-290 (Peters Reply Aff. ¶¶ 16-29); Reply Ex. E at ATT00320-325 (Dippon Reply Aff. ¶¶ 22-32).

[55] *Local Competition Order*, 11 FCC Rcd at 16079 (¶ 1170).

[56] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("*Consolidated Partial Order*") (holding "the 40-inch safety space … is usable and used by the electric utility"); *Television Cable Serv. v. Monongahela Power Co*., 88 FCC.2d 63, 68 (¶¶ 10-11) (1981) (rejecting argument that "the 40-inch safety space" should be added "to the 12 inches regularly allotted to [a cable attacher] to compute the space occupied"); Answer ¶ 12 n.34 ("[T]he Commission has already determined that CATV and CLEC attachers should not bear this cost…").

foot of occupancy."[57] Of course, there is no valid evidence that AT&T uses more than the one foot of space presumptively occupied by AT&T and its competitors.[58] And regardless, federal law and Duke Florida's license agreements, which [redacted],[59] entitle AT&T's competitors to rates calculated using the Commission's new telecom rate formula, which "determine[s] the maximum just and reasonable rate *per pole*."[60] A per-pole rate is not a competitive benefit provided to AT&T by the JUA; it is a right federal law extends to all communications attachers.

Duke Florida's alleged valuation also fails. Safety space cannot "be attributed to AT&T."[61] And there is no valid basis for adding a premium to the new telecom rate based on pole space, as new telecom rates are already calculated with a "space occupied" input.[62]

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[57] Duke Br. at 11.

[58] *See* AT&T Br. at 12-15; *see also* Section II.C, below. Recent decisions confirm the accuracy of the 1-foot presumption for ILEC facilities. *See Potomac Edison Order*, 35 FCC Rcd at 13624 (¶ 37) (finding that, when field data is adjusted to subtract 6 inches of clearance improperly added to the space occupied by Verizon, the field data's "conclusion [falls] within the Commission's default input"); *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16 n.70) (stating that "FPL admits … AT&T's attachments occupy only 1.18 feet of space" without considering whether FPL improperly assumed AT&T occupies 6 inches of space below its facilities).

[59] *See* AT&T Br., Ex. 2 line 7.

[60] *See Consolidated Partial Order*, 16 FCC Rcd at 12122 (¶ 31) (emphasis added). If a pole owner has sufficient survey data to show that an attacher occupies more than 1 foot of space, on average, it may adjust the "space occupied" input in the rate formula to account for that additional space. A pole owner may not multiply a 1-foot telecom rate (new or old) by the amount of space occupied. *See* 47 C.F.R. § 1.1406(d); 47 U.S.C. § 224(e)(2) (requiring that unusable space be equally divided among "attaching *entities*," not attachments) (emphasis added); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6805 (¶ 57) (1998) (rejecting proposal "that entities using more than one foot be counted as a separate entity for each foot or increment thereof").

[61] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16).

[62] *See* 47 C.F.R. § 1.1406(d)(2). Duke Florida also significantly and inappropriately inflates its valuation by using a per-attachment rate methodology that violates federal law. *See* Answer Ex. E at DEF000242-243 (Metcalfe Aff., Ex. E-4); *see also* Reply Ex. A at ATT00246-247 (Rhinehart Reply Aff. ¶¶ 13-14); Reply Ex. E at ATT00319-320 (Dippon Reply Aff. ¶ 20).

4. Typical Location on Duke Florida's Poles. Finally, Duke Florida claims that AT&T's typical location as the lowest communications attacher is a competitive advantage, even though it has conceded that there are "costs and risks attendant to the lowest position" on its poles.[63] It nonetheless seeks an unquantified rental rate premium based on claims of benefits derived by the lowest pole attacher that are contradicted by the record. First, AT&T's competitors sometimes attach below AT&T's facilities and are not *obligated* to attach above AT&T's facilities as Duke Florida wrongly contends.[64] Second, AT&T cannot access its facilities easier, or transfer them to replacement poles sooner, as higher-placed facilities are transferred first.[65] Third, there is zero evidence that AT&T's facilities uniformly sag more mid-span than the facilities of its competitors or Duke Florida.[66] AT&T's typical location on Duke Florida's poles does not warrant an increase from the fully compensatory new telecom rate.

C. Duke Florida's Description of Its Field Data Confirms It Is Not Statistically Valid, Representative, or Accurate.

Duke Florida's brief confirms that the field measurements on which it relies for many of its allegations and rate inputs are fundamentally flawed, statistically invalid, and inherently unreliable. Duke Florida did not design or conduct a pole sample or survey that could satisfy the Commission's rules,[67] but seeks to use measurements its contractor purportedly collected during the third-party attachment application process. Perhaps for that reason, Duke Florida seems oblivious to the

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[63] Answer ¶ 19.

[64] Duke Br. at 5 (row G). *But see* Answer Ex. C at DEF000166 (Burlison Decl. ¶ 17) (stating AT&T is "almost always" the lowest communications attacher); Compl. Ex. C at ATT00041-42 (Peters Aff. ¶¶ 20-21); Reply Ex. C at ATT00284-285, ATT00290 (Peters Reply Aff. ¶¶ 19, 30); Reply Ex. D at ATT00306-307 (Davis Reply Aff., Ex. D-1).

[65] Duke Br. at 13. *But see* Compl. Ex. C at ATT00042 (Peters Aff. ¶ 22); Reply Ex. C at ATT00290-291 (Peters Reply Aff. ¶ 31).

[66] Duke Br. at 13. *But see* AT&T Br., Ex. 11; Reply Ex. C at ATT00287-289 (Peters Reply Aff. ¶¶ 24-28); Reply Ex. D at ATT00303-308 (Davis Reply Aff. ¶ 14 & Ex. D-1).

[67] *See* 47 C.F.R. § 1.363.

obvious flaws in its data. Surveys were performed on [redacted] poles, not 941.[68] The poles were clustered in [redacted] counties covered by the JUA, not "distributed throughout [Duke Florida]'s service area."[69] And using data collected during the third-party attachment process did *not* "contribute[ ] to the randomness of the sample," but ensured the opposite, filling the record with skewed data from measurements about long lines of adjacent poles.[70]

Duke Florida's flawed data should not be used for any purpose. But even if it were valid, Duke Florida cannot cherry-pick the part of the data it wants to use, while asking the Commission to ignore data that is unfavorable. Yet that is precisely what it has done, asking the Commission to ignore the data's pole height measurements—showing poles of at least [redacted]-feet in height—and use the Commission's 37.5-foot pole height presumption instead.[71] Duke Florida's selective and results-oriented use of its data must be rejected.

D. Duke Florida's New and Old Telecom Rate Calculations Violate Commission Orders and Regulations.

To simplify this case, AT&T stipulated to several inputs, including net cost of a bare pole and use of accumulated deferred income taxes as a zero-cost item in the rate of return, because of their minimal impact on the resulting rate.[72] Although Duke Florida confusingly briefs these stipulated (though disputed) inputs, they need not be resolved on the merits.[73] AT&T's stipulation eliminated the need for further briefing and decision on them.

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[68] Duke Br. at 19. *But see* AT&T Br., Ex. 7. Although Duke Florida refers to 941 poles in the survey, the data produced in discovery contains 943 records. *See* Duke Florida's Supp. Response to Interrogatory No. 8, Ex. 4 at DEF001394-1409.

[69] Duke Br. at 20. *But see* AT&T Br., Exs. 5, 6

[70] Duke Br. at 20. *But see* Ex. 1 (Example of adjacent poles); AT&T Br., Exs. 5, 6.

[71] AT&T Br., Ex. 12.

[72] *See* AT&T Br., Ex. 3.

[73] Duke Br. at 16, 17-18,

The parties' remaining disputes are few but showcase the ways Duke Florida seeks to manipulate the Commission's rate formulas to artificially increase rates.[74] With respect to cost inputs, Duke Florida increased rates with the values it selected for the 3 remaining inputs in dispute.[75] Duke Florida then substantially increases rates with its space factor inputs—arguing that AT&T should pay rates calculated based on space AT&T does not occupy and an average number of attaching entities input that it does *not* use for "other telecommunications carriers or cable television systems providing telecommunications services on the same poles."[76] The result is an old telecom rate that far exceeds the rate intended to "account for particular arrangements that provide net advantages to [I]LECs relative to cable operators or telecommunications carriers" at about 1.51 times the new telecom rate.[77] And, likely because the Commission precluded such gamesmanship with respect to the new telecom rate formula, Duke Florida asks the Commission to "adopt *DEF's methodology* for calculating the new telecom rate" so it could charge new telecom rates about [redacted] *higher* than its old telecom rates.[78] None of this is possible. By regulation, AT&T "may be charged no higher than the rate determined in accordance with § 1.1406(d)(2)" and its presumptive inputs,

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[74] *See Cost Allocator Order*, 30 FCC Rcd at 13740 (¶ 20) ("[I]t remains our policy to minimize disincentives to investment, including artificially high pole attachment rates.").

[75] Specifically, (1) AT&T uses Duke Florida's reported "*Total* Utility Plant" investment for the "Gross Plant Investment (*Total* Plant)" input to the administrative and taxes elements of the carrying charge versus Duke Florida's use of a lesser value; (2) AT&T uses the 2014 value for general and administrative expense from Duke Florida's revised FERC Form 1 versus Duke Florida's use of the original value it replaced in the revision; and (3) AT&T uses the FCC's methodology to calculate the numerator of the taxes element versus Duke Florida's use of its own unexplained approach. *See* AT&T Br. at 21-23 & n.112 & Exs. 3-4; Duke Br. at 18; *see also* Ex. 2 (original FERC Form 1 page 323); Ex. 3 (revised FERC Form 1 page 323).

[76] 47 C.F.R. § 1.1413(b); *see also* AT&T Br. at 16-21; Reply Ex. A at ATT00243-247 (Rhinehart Reply Aff. ¶¶ 10-15).

[77] *Pole Attachment* Order, 26 FCC Rcd at 5337 (¶ 218); *see also* Reply Ex. A at ATT00241 (Rhinehart Reply Aff. ¶ 5).

[78] *See* Duke Br. at 23; Reply Ex. A at ATT00247 (Rhinehart Reply Aff. ¶ 15); *Cost Allocator Order*, 30 FCC Rcd at 13741-43 (¶¶ 22-25) (eliminating "artificial marketplace distortions" resulting from average number of attaching entities input).

which also set the just and reasonable rate for all "other telecommunications carriers or cable television systems providing telecommunications services on the same poles."[79]

III. CONCLUSION

For the foregoing reasons, and those detailed in AT&T's other filings, AT&T respectfully requests that the Commission grant AT&T's Pole Attachment Complaint in full.

Respectfully submitted,

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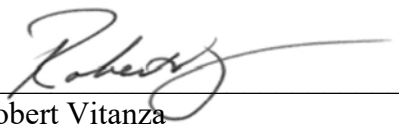
Dated: April 19, 2021

[79] 47 C.F.R. § 1.1413(b); *see also In the Matter of Views on Learning, Inc*., FCC 21-1, 2021 WL 100415, at *15 (FCC Jan. 7, 2021) ("[I]t is elementary that an agency must adhere to its own rules and regulations."). Duke Florida claims that proper application of the new telecom rate formula would discriminate against AT&T's cable competitors. It would not, as the new telecom rate is the maximum rate for use of Duke Florida's poles by "any telecommunications carrier *or cable operator* providing telecommunications services." *See* 47 C.F.R. § 1.1406(d)(2).

RULE 1.721(M) VERIFICATION

I, Robert Vitanza, as signatory to this submission, hereby verify that I have read this Reply Supplemental Brief and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.



Robert Vitanza

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2021, I caused a copy of the foregoing Reply Supplemental Brief to be served on the following (service method indicated):

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Federal Communications Commission
Office of the Secretary
9050 Junction Drive
Annapolis Junction, MD 20701
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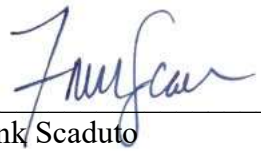
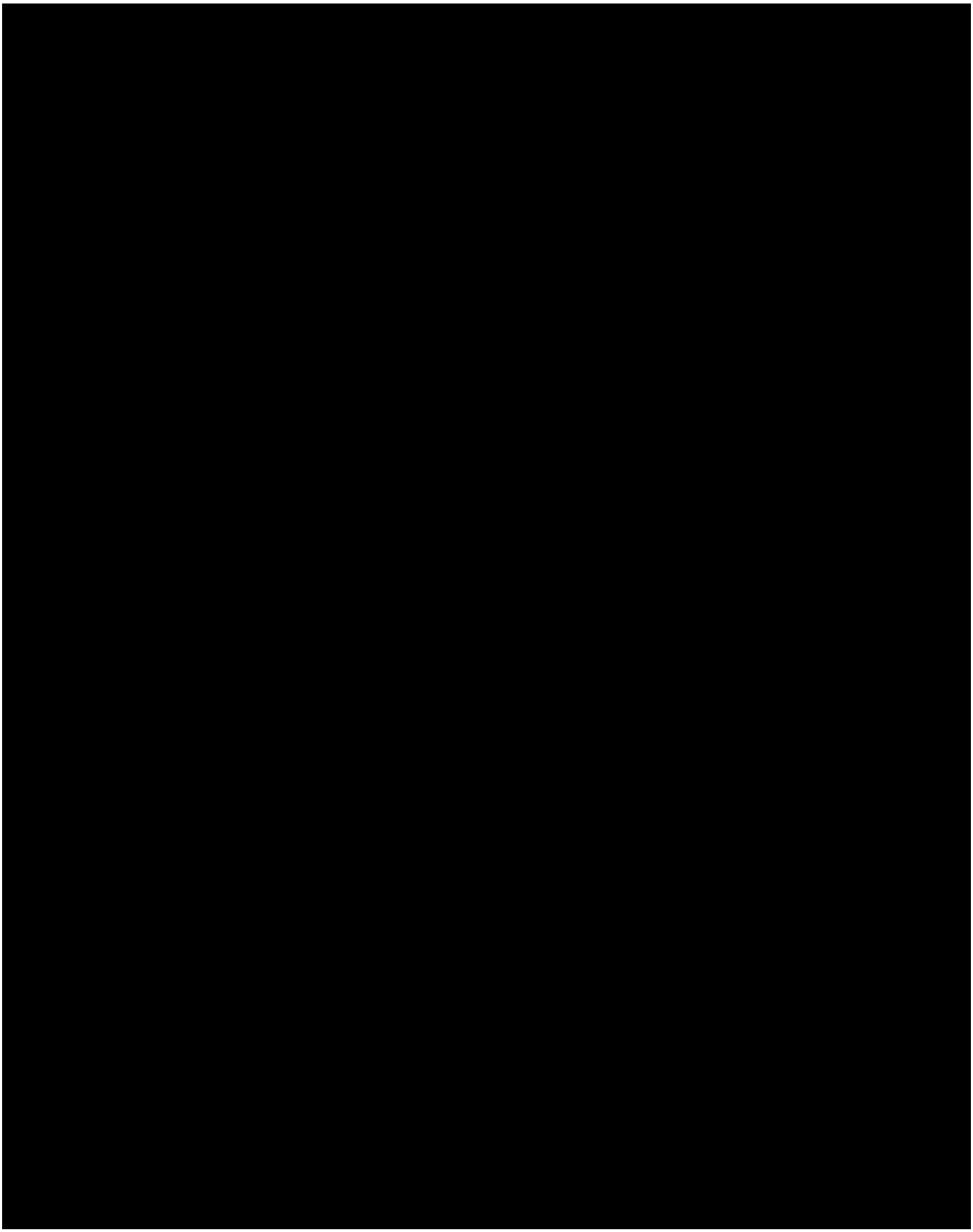
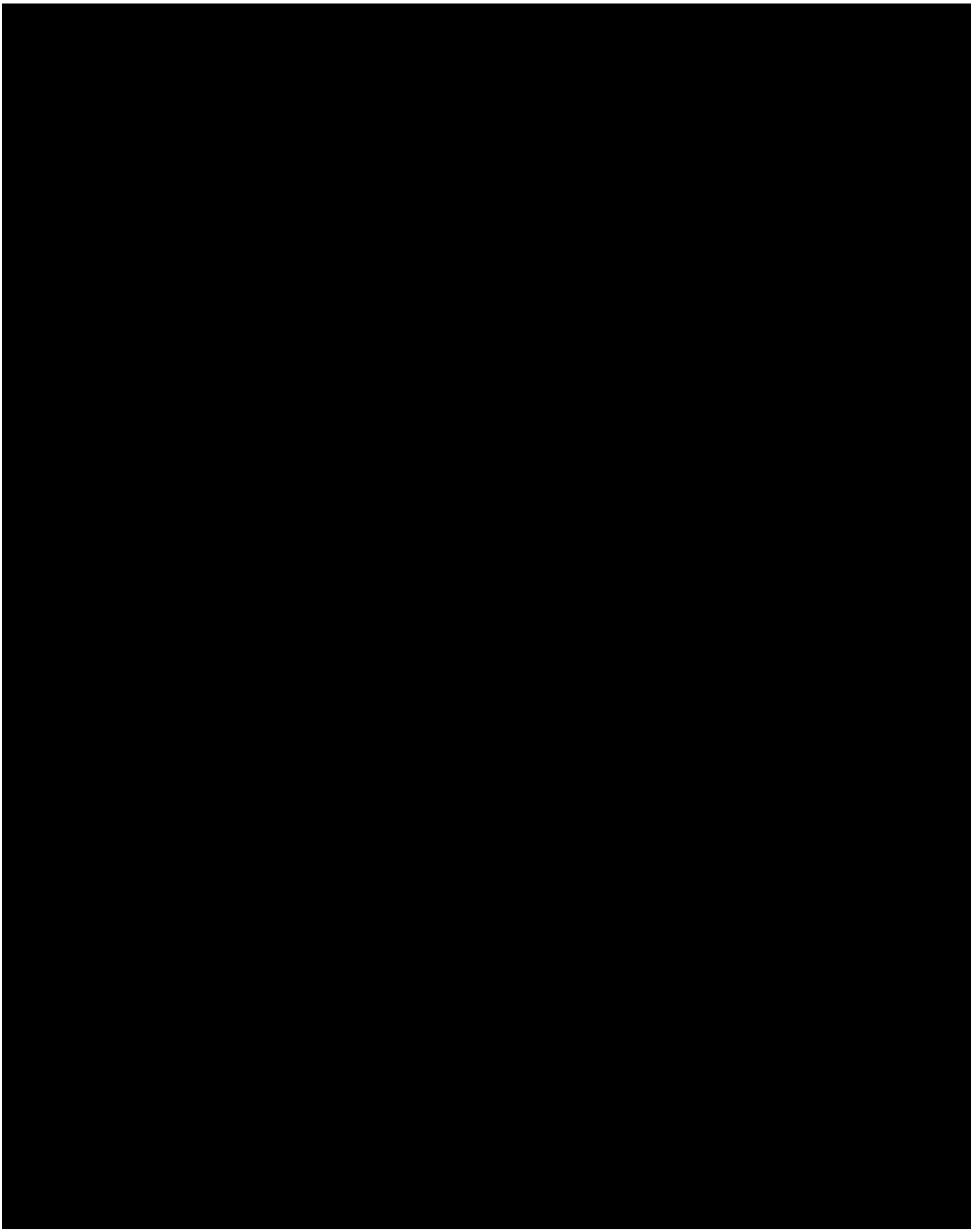
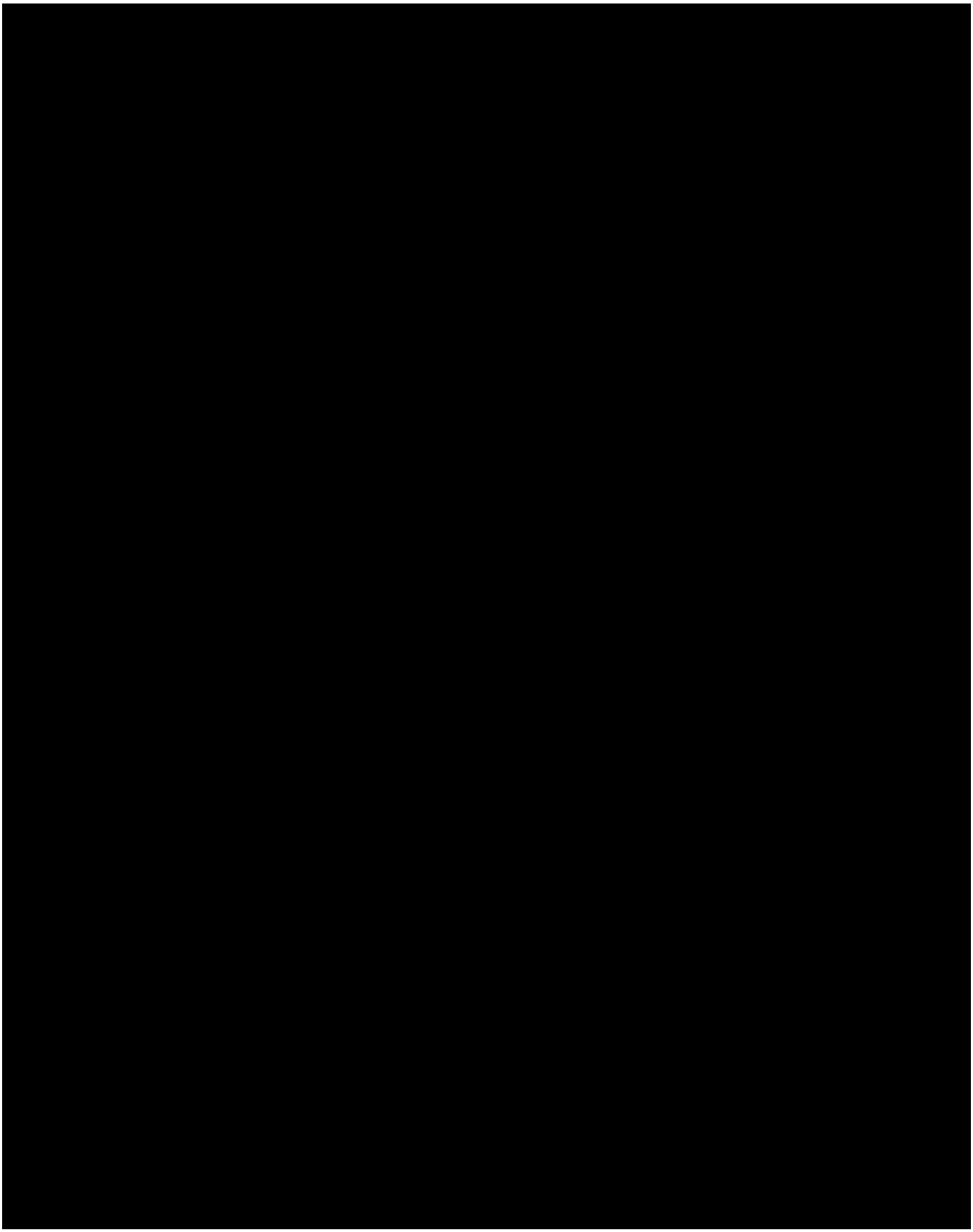


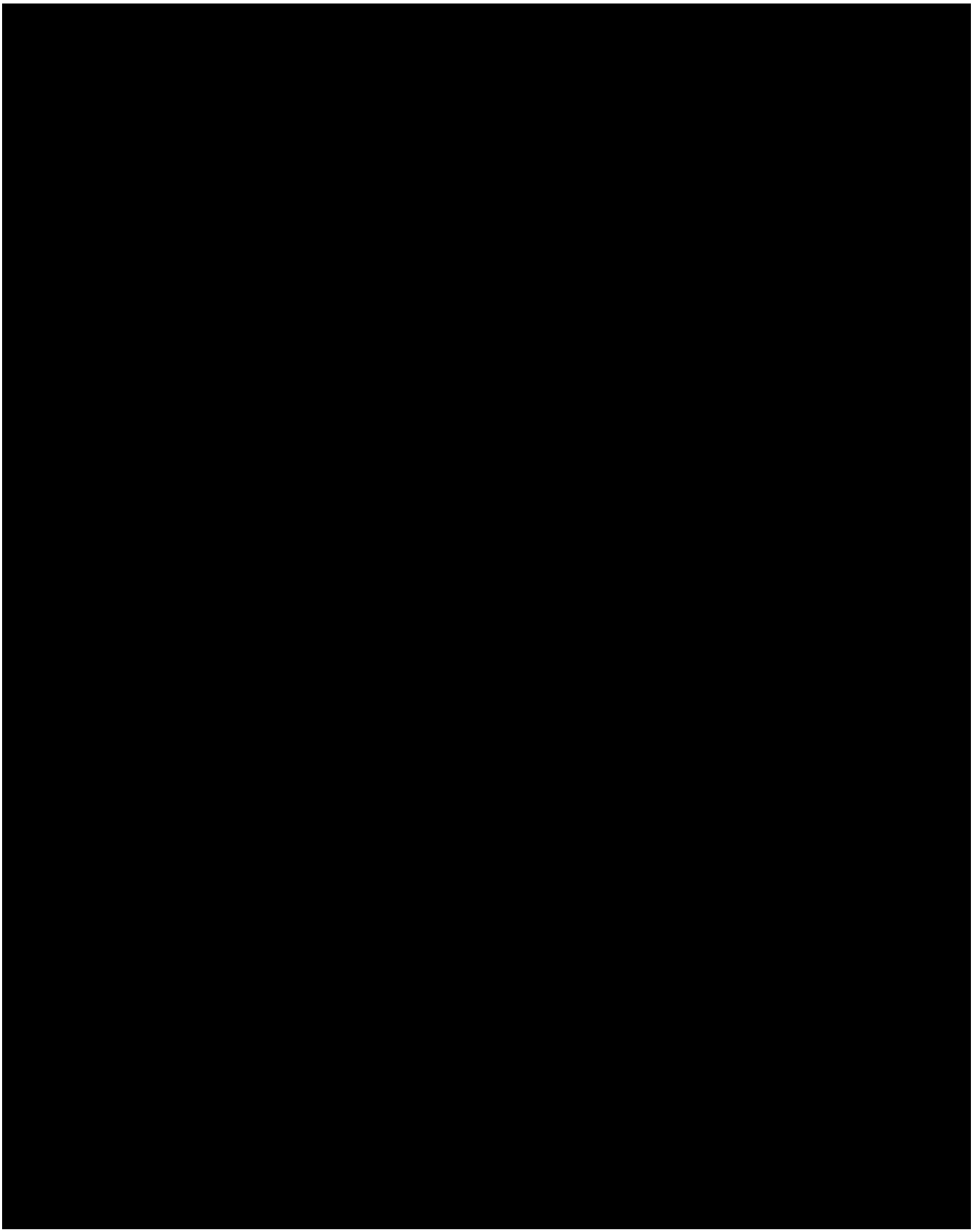
Frank Scaduto

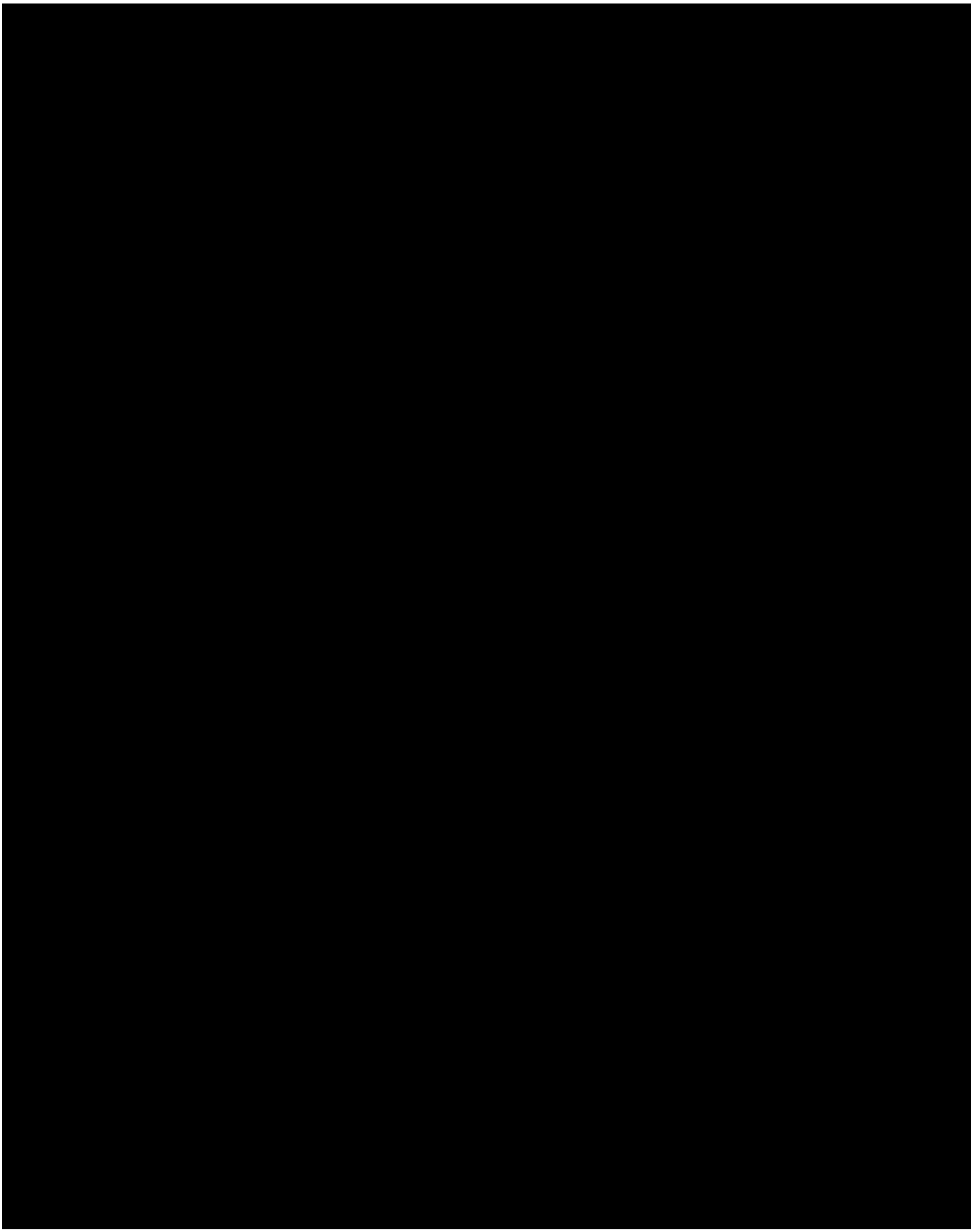
Exhibit 1

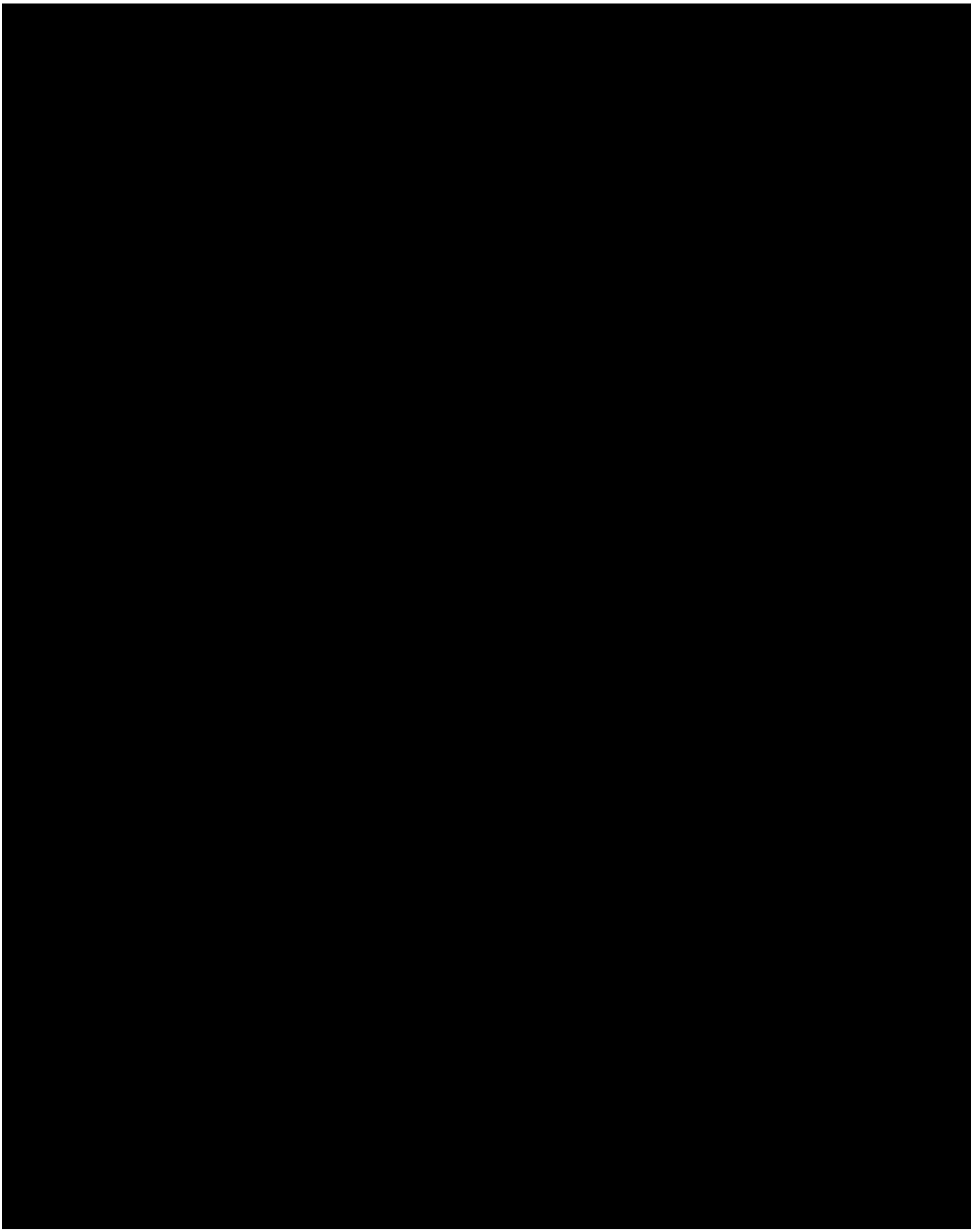


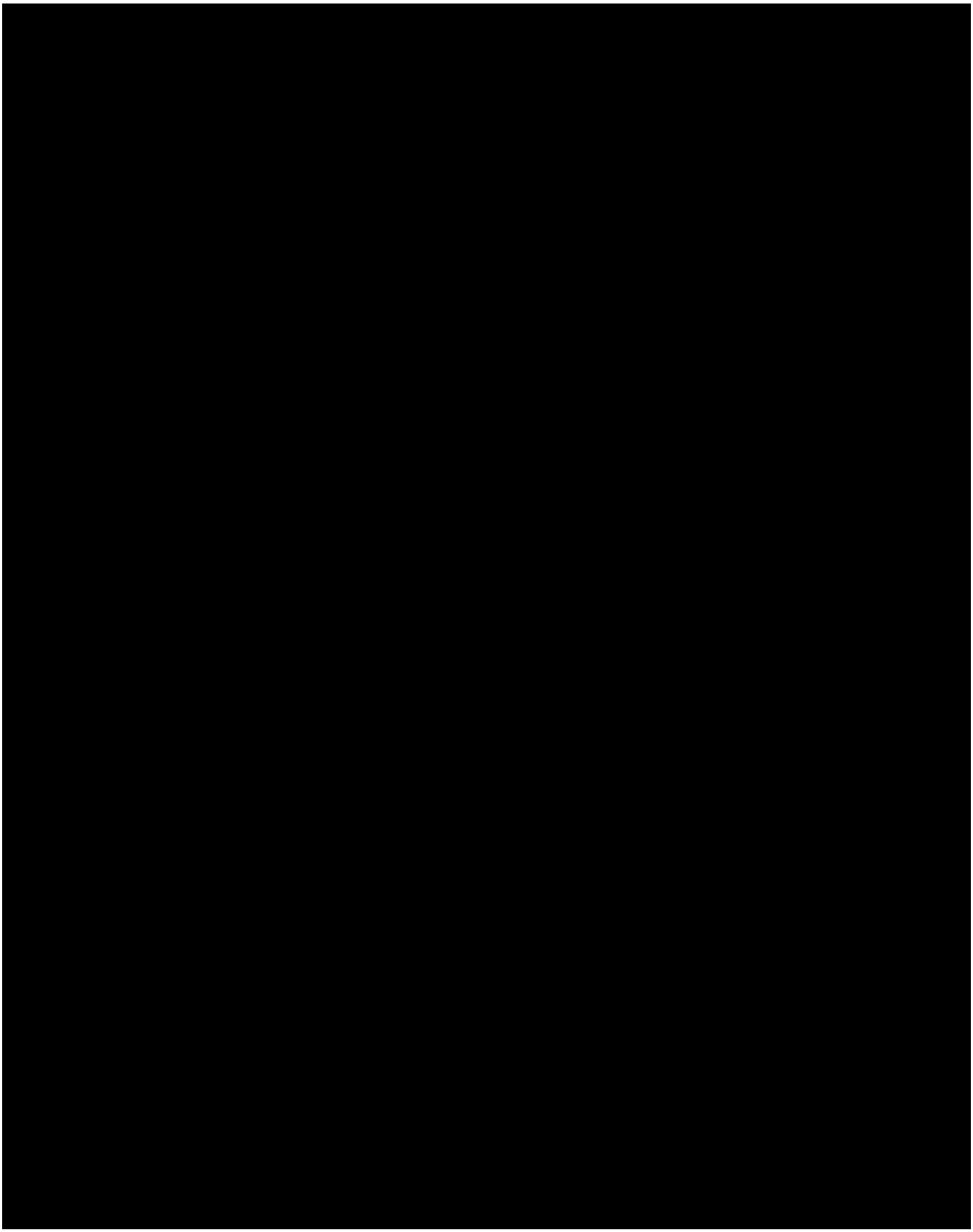


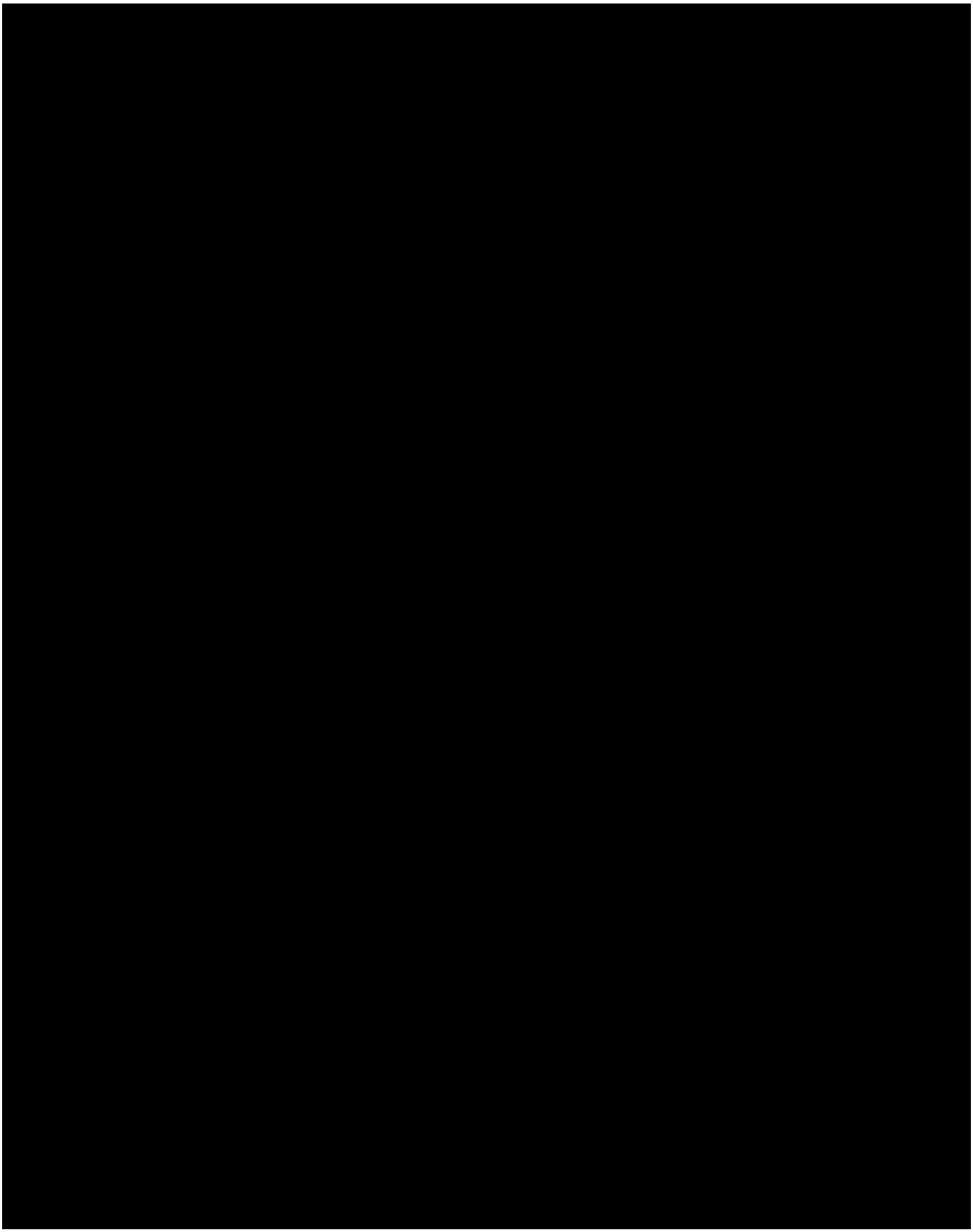


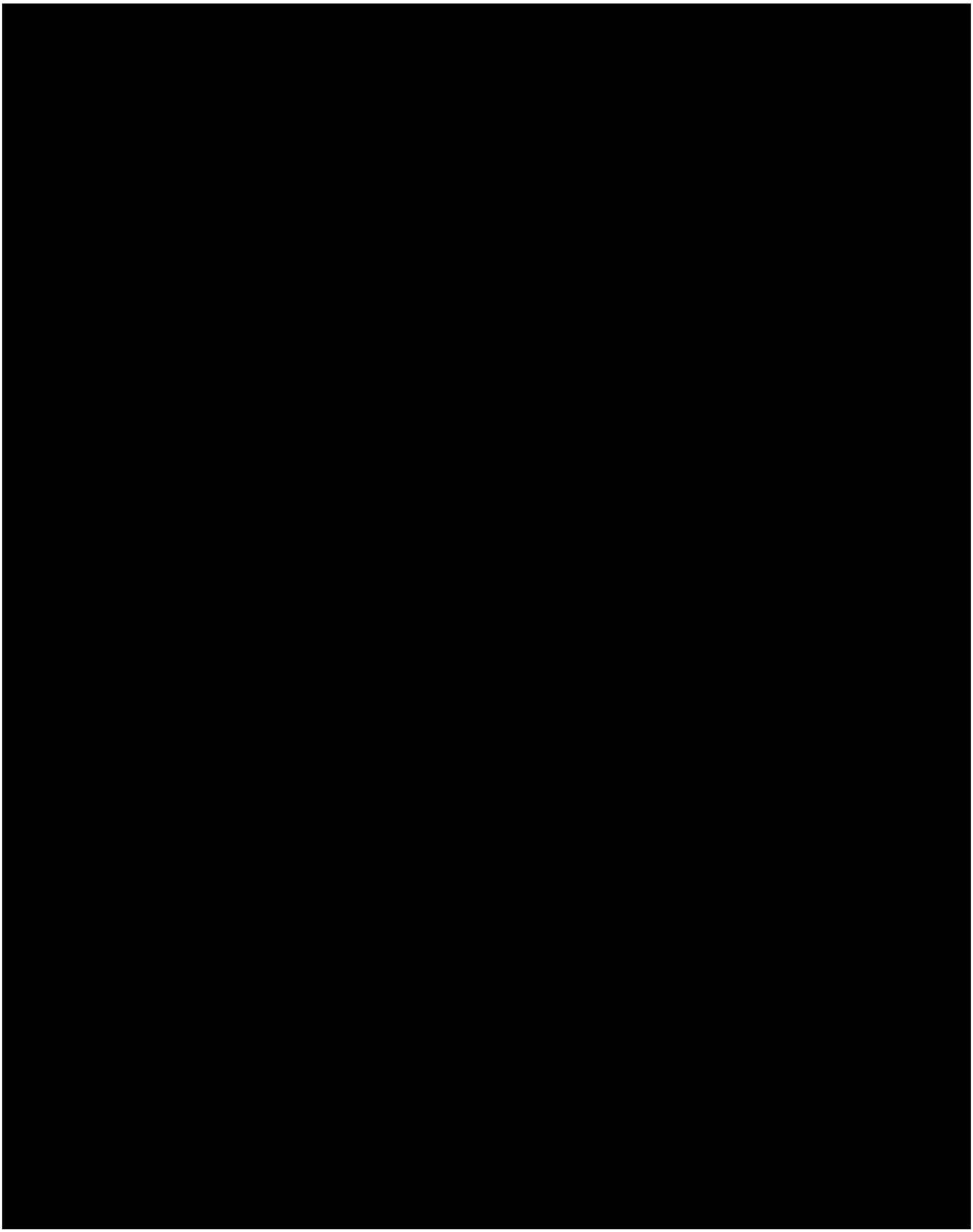


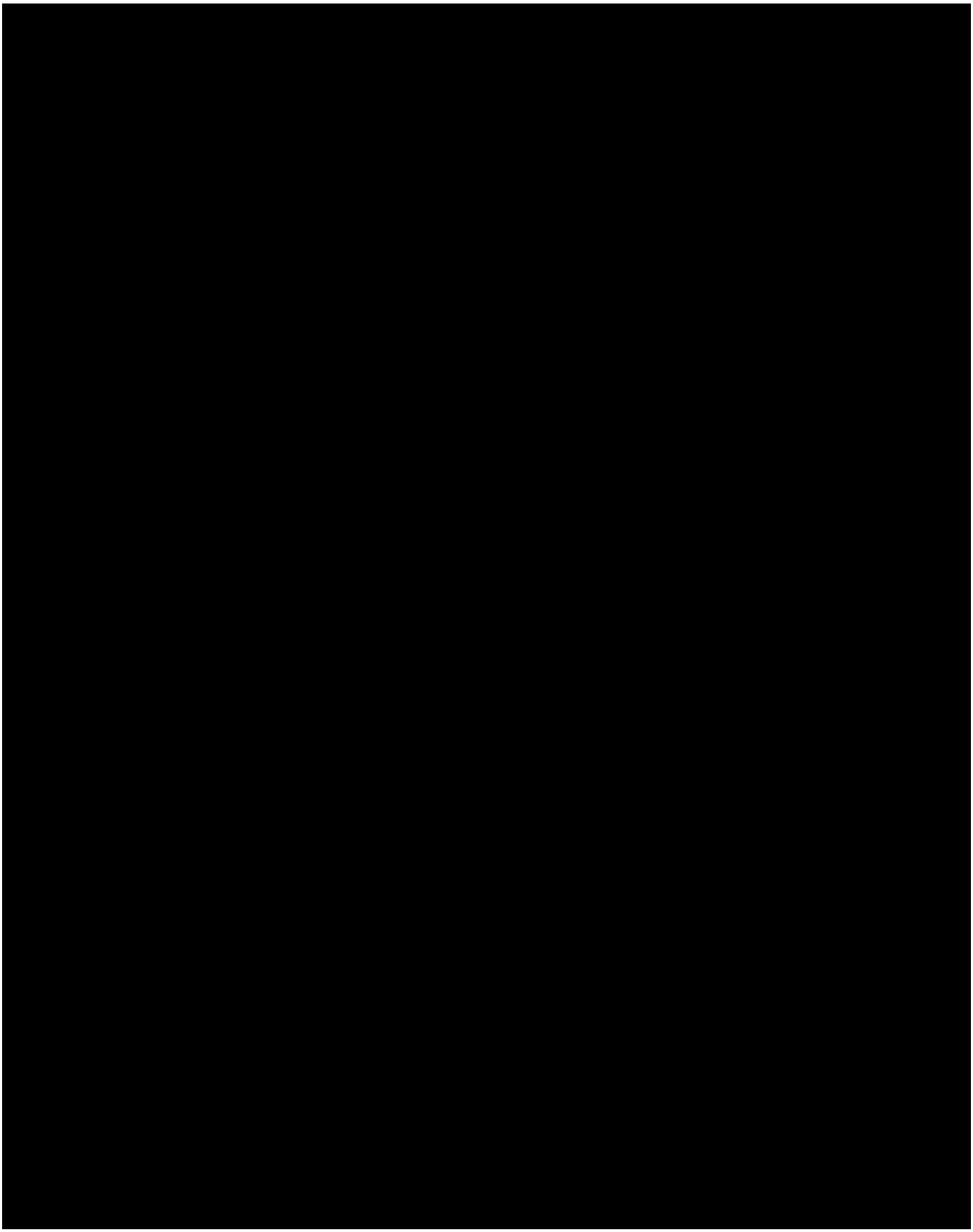


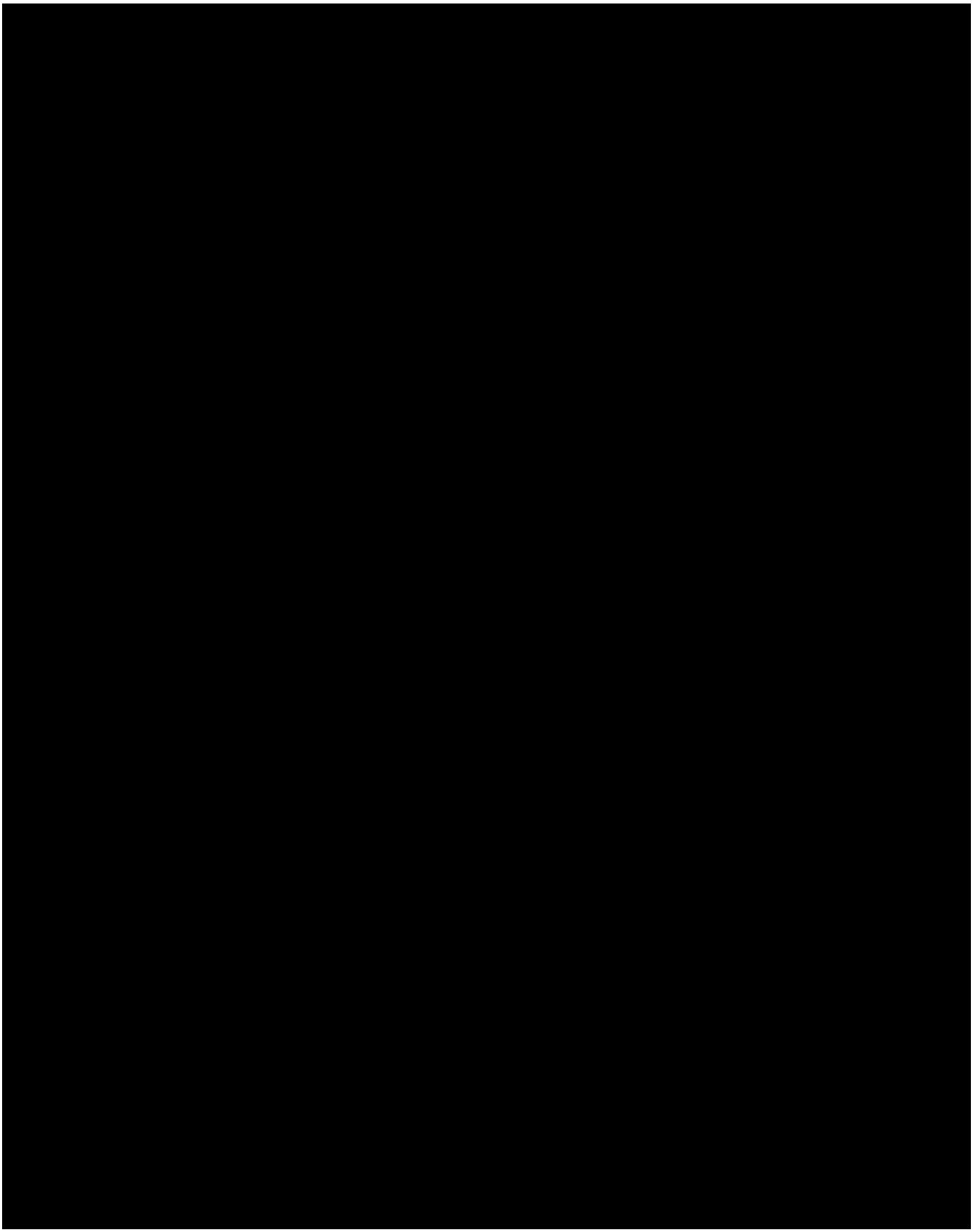












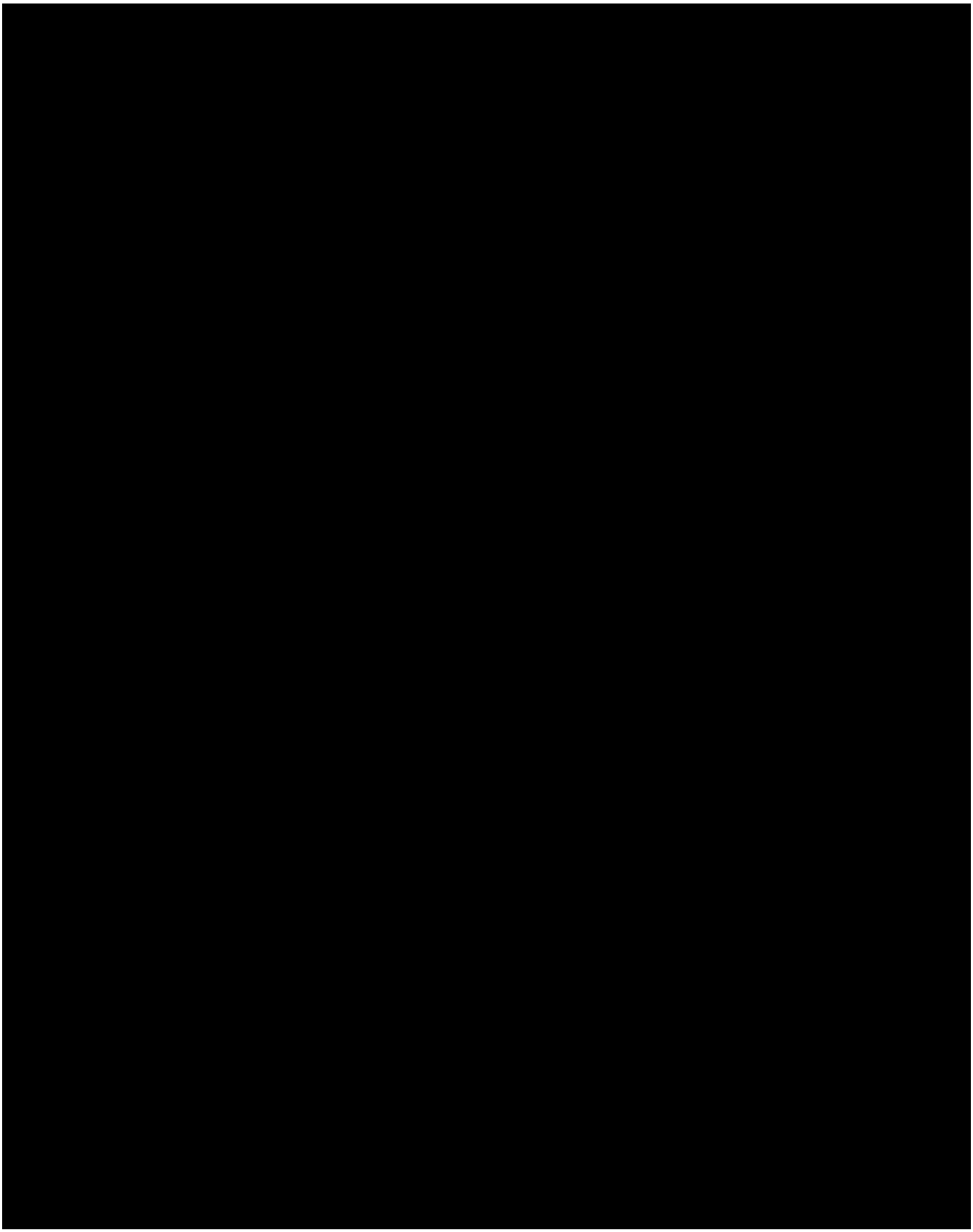


Exhibit 2

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Form 1 Approved
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(Expires 11/30/2016)

Form 1-F Approved
OMB No.1902-0029
(Expires 11/30/2016)

Form 3-Q Approved
OMB No.1902-0205
(Expires 11/30/2016)

FERC FINANCIAL REPORT
FERC FORM No. 1: Annual Report of Major Electric Utilities, Licensees and Others and Supplemental Form 3-Q: Quarterly Financial Report

These reports are mandatory under the Federal Power Act, Sections 3, 4(a), 304 and 309, and 18 CFR 141.1 and 141.400. Failure to report may result in criminal fines, civil penalties and other sanctions as provided by law. The Federal Energy Regulatory Commission does not consider these reports to be of confidential nature

Exact Legal Name of Respondent (Company)	Year/Period of Report
Duke Energy Florida, Inc.	End of 2014/Q4

Name of Respondent	This Report Is:	Date of Report (Mo, Da, Yr)	Year/Period of Report
Duke Energy Florida, Inc.	(1) [X] An Original (2) [ ] A Resubmission	04/17/2015	End of 2014/Q4

PUBLIC VERSION

ELECTRIC OPERATION AND MAINTENANCE EXPENSES (Continued)

If the amount for previous year is not derived from previously reported figures, explain in footnote.

Line No.	Account (a)	Amount for Current Year (b)	Amount for Previous Year (c)
165	6. CUSTOMER SERVICE AND INFORMATIONAL EXPENSES		
166	Operation		
167	(907) Supervision		
168	(908) Customer Assistance Expenses	110,107,306	88,100,153
169	(909) Informational and Instructional Expenses	1,014,041	5,283,837
170	(910) Miscellaneous Customer Service and Informational Expenses	4,348,105	1,441,083
171	TOTAL Customer Service and Information Expenses (Total 167 thru 170)	115,469,452	94,825,073
172	7. SALES EXPENSES		
173	Operation		
174	(911) Supervision		
175	(912) Demonstrating and Selling Expenses	1,990,134	1,436,544
176	(913) Advertising Expenses	341,041	446,166
177	(916) Miscellaneous Sales Expenses		54,283
178	TOTAL Sales Expenses (Enter Total of lines 174 thru 177)	2,331,175	1,936,993
179	8. ADMINISTRATIVE AND GENERAL EXPENSES		
180	Operation		
181	(920) Administrative and General Salaries	63,859,462	83,717,608
182	(921) Office Supplies and Expenses	37,032,083	37,120,264
183	(Less) (922) Administrative Expenses Transferred-Credit		-269
184	(923) Outside Services Employed	50,181,534	47,062,203
185	(924) Property Insurance	12,831,843	11,283,040
186	(925) Injuries and Damages	10,480,344	8,673,304
187	(926) Employee Pensions and Benefits	54,945,079	95,886,241
188	(927) Franchise Requirements		
189	(928) Regulatory Commission Expenses	4,276,269	3,997,496
190	(929) (Less) Duplicate Charges-Cr.	6,460,081	7,632,208
191	(930.1) General Advertising Expenses	1,206,987	867,906
192	(930.2) Miscellaneous General Expenses	11,419,344	-9,233,147
193	(931) Rents	20,911,079	5,727,989
194	TOTAL Operation (Enter Total of lines 181 thru 193)	260,683,943	277,470,965
195	Maintenance		
196	(935) Maintenance of General Plant	120,322	2,130,704
197	TOTAL Administrative & General Expenses (Total of lines 194 and 196)	260,804,265	279,601,669
198	TOTAL Elec Op and Maint Expns (Total 80,112,131,156,164,171,178,197)	3,057,517,879	3,030,149,849

Exhibit 3

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PUBLIC VERSION

ELECTRIC OPERATION AND MAINTENANCE EXPENSES (Continued)

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193	(931) Rents	20,911,079	5,727,989
194	TOTAL Operation (Enter Total of lines 181 thru 193)	237,191,868	277,470,965
195	Maintenance		
196	(935) Maintenance of General Plant	120,322	2,130,704
197	TOTAL Administrative & General Expenses (Total of lines 194 and 196)	237,312,190	279,601,669
198	TOTAL Elec Op and Maint Expns (Total 80,112,131,156,164,171,178,197)	3,046,532,566	3,030,149,849