PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 19-187 Bureau ID No. EB-19-MD-006 Proceeding No. 20-214 Bureau ID No. EB-20-MD-002

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

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Together, these *Bureau Orders* could require AT&T, while attached to FPL's poles, to annually pay FPL a [redacted] premium above rent calculated at the rates AT&T's competitors pay, while risking ejection from FPL's poles based on how a Federal District Court reads an agreement entered nearly a half-century ago.

No communications company should be forced to pay exorbitant and non-competitive pole attachment rates or risk having to build a duplicate pole network (and then rebuild its communications network) simply because it exercised its right to request the just and reasonable rates federal law and the Commission's policy goals require. That is a Hobson's choice. The Commission "*shall hear and resolve* complaints concerning [pole attachment] rates, terms, and conditions" to "provide that such rates, terms, and conditions are just and reasonable."[3] The *Bureau Orders* fail to meet this statutory obligation. The Commission should grant review, require FPL to provide AT&T the competitively neutral just and reasonable pole attachment rates that are essential to the Commission's policy objectives, and enjoin FPL's unprecedented and unreasonable pole attachment practices, which are squarely at odds with the Commission's longstanding work to reduce infrastructure costs, promote competition, and foster broadband deployment.

II. ARGUMENT

A. The *Rate Orders* Create 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.[4] For 10 years, the Commission has worked to promote competition and broadband deployment by ensuring that these "just and reasonable"

[3] 47 U.S.C. § 224(b) (emphasis added).

[4] *Id.*

requiring FPL to properly calculate a rate for AT&T using the same generally applicable inputs that FPL used to calculate rates for AT&T's competitors.

1. The *Rate Orders* Apply the Wrong Standard for Reviewing Rates Charged to ILECs.

The Commission's regulations include a presumption that the just and reasonable pole attachment rate for AT&T is the same new telecom rate guaranteed its competitors. Under the presumption, FPL 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."[8] The Commission adopted this "new telecom rate presumption" in 2018 to streamline complaint proceedings and accelerate the competitively neutral rates it ordered in 2011.[9] It applies where an electric utility charges rates under a new or newly renewed agreement, including agreements that were "automatically renewed, extended, or placed in evergreen status" after the presumption's March 2019 effective date.[10] The presumption applies here, both under the recent *Potomac Edison* decision[11] and because FPL placed the JUA in "evergreen status" after the presumption took effect.[12]

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[8] 47 C.F.R. § 1.1413(b).

[9] *See In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order, 33 FCC Rcd 7705, 7767-68 (¶ 123) (2018) ("*Third Report and Order*").

[10] 47 C.F.R. § 1.1413(b); *see also Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475).

[11] *Compare Verizon Md. LLC v. The Potomac Edison Co.*, 35 FCC Rcd 13607, 13613 (¶ 15) (2020) ("*Potomac Edison Order*") (agreement "shall continue in force thereafter…") *with* Complaint, Proceeding No. 19-187 ("Rate Compl."), Ex. 1 at ATT00128 (JUA, Art. XVI) (JUA "shall continue in force thereafter…").

[12] *See* Rate Compl. Ex. 23 at ATT00250 (Notice of Termination (Mar. 25, 2019)) ("[P]ursuant to Article XVI of the Agreement, FPL hereby provides notice that it is terminating all rights related to the further granting of joint use of poles…").

unlike its competitors, "AT&T must provide FPL many of the same advantages that FPL provides AT&T[.]"[20] These reciprocal JUA terms impose costs on AT&T that its competitors do not bear.[21] The *Rate Orders*' "failure to weigh, and account for, the[se] different … *responsibilities*" in the JUA when determining whether the JUA provides a *net* material competitive advantage is an error that will perpetuate, rather than eliminate, the "marketplace distortions" that frustrate the Commission's competition and deployment goals.[22]

And, each of the "advantages" identified in the *Rate Orders* is not a *material competitive* advantage as required. The first identified advantage—contractual access to FPL's poles—sets AT&T at a material *disadvantage* compared to its competitors, which enjoy broader and permanently guaranteed statutory access to FPL's poles.[23] As an ILEC, AT&T has "no statutory right of nondiscriminatory access to poles," so its pole access is purely a matter of contract under the JUA.[24] The JUA allows FPL to deny AT&T access to poles FPL deems unsuitable for joint use[25] and to terminate—at any time and for any reason—AT&T's ability to deploy facilities on

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at 7770 (¶ 127) (requiring "net benefits"); *id.* at 7771 (¶ 128) (requiring "net benefits"); *id.* (¶ 129) (requiring "net advantages"); *id.* (requiring "net material advantages"); *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218) (requiring "net advantages").

[20] *May 2020 Rate Order* at 5329 (¶ 15).

[21] *See Verizon Va. v. Va. Elec. and Power Co.*, 32 FCC Rcd 3750, 3760 (¶ 21) (EB 2017) ("*Dominion Order*") (holding that electric utility did not justify a rate higher than the new telecom rate "[b]y identifying as alleged 'benefits' to Verizon services that Verizon is likewise required to extend to Dominion under the Joint Use Agreements").

[22] *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654).

[23] *See* FPL Br. at 60, Proceeding No. 19-187 ("FPL Rate Br.") (FPL is under a "legal obligation to provide mandatory access" to its poles to "CLECs and CATV providers"); 47 U.S.C. § 224(f).

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

[25] Rate Compl. Ex. 1 at ATT00113 (JUA, § 2.2).

Yet FPL continues to rely on the provision in the 1975 JUA to charge AT&T far higher rates for excess space that AT&T does not want, use, or require.[32] In contrast, AT&T's competitors have a statutory right to use as much space on FPL's poles as they require—*including* the excess space AT&T already paid for—at rates covering only the space they "*actually*" occupy.[33] The JUA's excess space allocation thus lets FPL double- and triple-collect for space already paid for by AT&T, but does not and cannot materially or competitively advantage AT&T.

The third and fourth identified "advantages"—the JUA's different approach to permitting new attachments and conducting post-attachment inspections—cannot competitively advantage AT&T because AT&T performs the work itself.[34] And, under prior Commission precedent, where AT&T incurs the cost to "perform a particular service itself," FPL "may not embed in [AT&T]'s rental rate costs that [FPL] does not incur."[35] AT&T also performs the relevant work

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the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers."); Answer, Proceeding No. 19-187 ("Rate Answer"), Ex. A at FPL00007 (Kennedy Decl. ¶ 11) ("[A]fter AT&T has already made its first attachment, FPL cannot deny access to attachers requesting to attach in the remaining amount of AT&T's reserved space.").

[32] *See, e.g.*, Rate Compl. Ex. B at ATT00062 (Miller Aff. ¶ 30); Rate Compl. Ex. C at ATT00069 (Peters Aff. ¶ 11); Rate Reply Ex. C at ATT00975-976 (Peters Reply Aff. ¶¶ 26-27); *see also AT&T Fla. v. Duke Energy Fla., LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003, Memorandum Opinion & Order ¶ 44 (Aug. 27, 2021) ("*Duke Florida Order*") (finding reservation of excess space "of limited value" where the ILEC does not "actually occup[y] the full amount of space allocated to it under the JUA").

[33] *See May 2020 Rate Order*, 35 FCC Rcd at 5330 (¶ 16) (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").

[34] *See, e.g.*, *May 2020 Rate Order*, 35 FCC Rcd at 5330 (¶ 15) ("[E]ven though AT&T is exempt from FPL's permitting process, it must still perform some of the same engineering work involved in that process before it can attach."); *see also* Rate Compl. Ex. C at ATT00068 (Peters Aff. ¶ 9); Rate Reply Ex. C at ATT00969, ATT00977-978 (Peters Reply Aff. ¶¶ 15, 30-32).

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

AT&T's typical location—which is about 1 foot below the facilities of AT&T's competitors[41]—is also a location that resulted from history rather than choice.[42] And the location 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.[43] AT&T is not better positioned than its competitors.

The sixth and final identified "advantage"—a different rental payment schedule—is also immaterial and fails to competitively advantage AT&T. The record showed that, if AT&T and its competitors both paid new telecom rates, AT&T would pay the full annual rental amount in March that its competitors would pay semi-annually 3 months earlier in December and 3 months later in June.[44] The difference in timing would average out and eliminate any "time value of

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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* Rate Compl. Ex. B at ATT00060-61 (Miller Aff. ¶¶ 27-28); Rate Compl. Ex. C at ATT00069 (Peters Aff. ¶ 11); Rate Reply Ex. C at ATT00978-979 (Peters Reply Aff. ¶¶ 33-34).

[41] *See, e.g.*, Rate Reply Ex. 3 at FPL-002820. 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 FPL made that the *May 2020 Rate Order* accepted. *See* 33 FCC Rcd at 5321 (¶ 14).

[42] 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* 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.").

[43] Rate Compl. Ex. B at ATT00060 (Miller Aff. ¶ 27); Rate Reply Ex. C at ATT00979 (Peters Reply Aff. ¶ 34).

[44] FPL's Resp. to AT&T's Rate Interrog. No. 5 (showing FPL billed CLECs a $[redacted] per pole rate, and cable companies a $[redacted] per pole rate, in December 2014 and June 2015); Rate Compl. Ex. A at ATT00008 (Rhinehart Aff. ¶ 14) (calculating a $10.46 per pole new telecom rate for the 2014 rental year, which would have been invoiced in March 2015).

or an automatically applied, rate, even if an ILEC receives net material competitive benefits.[49] 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."[50] 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."[51] So, regardless of whether this case is reviewed under the standard the Commission adopted in 2011 or 2018, the *Rate Orders* should have placed the burden on FPL to "justify 'the rate … alleged in the complaint not to be just and reasonable.'"[52]

This quantification requirement is essential to protect against "artificial, non-cost-based differences" in pole attachment rates that "are bound to distort competition."[53] By rule, the old telecom rate is about 1.5 times the new telecom rate[54]—meaning that, if the presumptive inputs in the Commission's regulations are used, a $10 new telecom rate becomes a $15 old telecom

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[49] *Duke Florida Order* ¶¶ 5, 8; *Potomac Edison Order*, 35 FCC Rcd at 13610 (¶ 8); *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).

[50] *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 at 1149 (¶ 24) (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").

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

[52] *Heritage Cablevision Assocs. v. Tex. Utils. Elec. Co.*, 6 FCC Rcd 7099, 7105 (¶ 29) (1991); *see also Dominion Order*, 32 FCC Rcd at 3758-59 (¶¶ 17-20) (requiring electric utility to "justify charging rates" higher than the new telecom rate).

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

[54] *See* Rate Reply Ex. A at ATT00913-941 (Rhinehart Reply Aff. ¶ 3).

and (2) an annual pole cost. "[T]o avoid excessive cost and burden," the Commission adopted presumptive inputs for the space factor, which include space occupied by a communications attacher (1 foot) and average number of attaching entities (5 in urbanized areas).[60] And to ensure rates reflect the pole owner's actual costs, the Commission uses an electric utility's current rate of return in the pole cost calculation.[61] For each of these, FPL used [redacted] to calculate the 2014–2018 pole attachment rates it charged AT&T's competitors.[62] Yet, for AT&T's use of the same poles used by those competitors during the same rental years, the *Rate Orders* select 3 different inputs for FPL to use when calculating the rate:

Inputs to the FCC's Pole Attachment Rate Formulas	Inputs FPL Uses to Charge AT&T's Competitors	Inputs the *Rate Orders* Adopt for FPL to Use to Charge AT&T[63]
Space Occupied (in feet)	1	1.18
Number of Attaching Entities (average)	[redacted]	2.99
Rate of Return (varies by year; maximum value listed)	[redacted]%	11.25%
Average 2014–2018 rate (per pole)	$[redacted]	$[redacted]

By departing from competitively neutral inputs, the *Rate Orders* allow FPL to collect substantially more than its costs, producing an average 2014–2018 old telecom rate that is more than [redacted] *times* (versus the standard 1.5 times) the "just, reasonable, and fully compensatory"[64] new telecom rate FPL charged AT&T's competitors. Just like the JUA rates the Enforcement

[60] *Jan. 2021 Rate Order*, 36 FCC Rcd at 259 (¶ 17); *see also* 47 C.F.R. §§ 1.1409, 1.1410.

[61] *Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co.*, 11 FCC Rcd 11202, 11215 (¶ 36) (1996).

[62] *See* FPL's Resp. to AT&T's Rate Interrog. Nos. 5, 9 and Attachment R-9; *see also* Rate Reply Ex. 5 at FPL-003481, FPL-003482, FPL-003478, FPL-003479, FPL-003483.

[63] *Jan. 2021 Rate Order*, 36 FCC Rcd at 258-61 (¶¶ 17-23).

[64] *Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137).

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."[72] Pole owners cannot mix and match values, as the *Rate Orders* do here, as it would require one attacher to pay a greater share of the unusable space costs, contrary to law.[73]

The presumptive input for average number of attaching entities is also required because FPL "did not have any data to contradict" the presumption during the 2014–2018 rental years.[74] And the data FPL relies upon is not "probative direct evidence" sufficient to rebut the Commission's presumption in any event.[75] In response to AT&T's complaint, FPL quickly collected the number of governmental attachers on about 0.5% of the joint use poles, which it used to try to fill holes in outdated data about other poles.[76] FPL did not count the *actual* number of attaching entities on any specific pole, so could not have "probative direct evidence" about the attaching entities on its poles.[77] The *Rate Orders* should not have relied on such a litigation-motivated merging of data to allow FPL to retroactively and artificially prop up its rates.[78]

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[72] 47 C.F.R. § 1.1409(d) (emphasis added).

[73] *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (¶ 49) (1998) ("Congress concluded that the unusable space 'is of equal benefit to all entities attaching to the pole'") (citation omitted).

[74] Rate Answer Ex. F at FPL00262 (Davis Decl. ¶ 4).

[75] *See In the Matter of Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, 2 FCC Rcd 4387, 4394 (¶ 52 n.27) (1987); *see also Consolidated Partial Order*, 16 FCC Rcd at 12139 (¶ 70).

[76] Rate Reply Ex. A at ATT00921-922 (Rhinehart Reply Aff. ¶¶ 18-19); Rate Reply Ex. D at ATT00994-996 (Dippon Reply Aff. ¶¶ 28-31).

[77] *But see Jan. 2021 Rates Order*, 36 FCC Rcd at 260 (¶ 21) ("FPL is not required to provide the actual number of attachers on specific poles in order to rebut the presumption.").

[78] *See Cost Allocator Order*, 30 FCC Rcd at 13740 (¶ 19) (a "fundamental purpose[ ] for using presumptions" is "to provide a level of *predictability* and efficiency in calculating the appropriate rate") (emphasis added).

Service Commission (PSC) that does not establish a rate of return."[83] This is irrelevant under Commission precedent. FPL's "weighted average cost of debt and equity" (*i.e.*, its rate of return) is "the proper cost of capital figure" even if the Florida PSC does not "announce[ ] this figure."[84] Nevertheless, FPL's settlement agreement with the Florida PSC does in fact establish a rate of return by ordering FPL to apply a specific methodology to calculate its value.[85] The PSC settlement agreement need not enumerate the rate of return value if it explains how that rate of return should be calculated. Finding otherwise elevates form over substance. FPL should use its actual rate of return, set using the PSC's required methodology, to calculate rates for AT&T just as it did when calculating rates for AT&T's competitors.

B. The *Terms and Conditions Order* Risks the Building of a Duplicate Network of Over 425,000 Poles and the Rebuilding of AT&T's Communications Network.

FPL's response to AT&T's request for just and reasonable rates—and to AT&T's 2019 pole attachment complaint seeking just and reasonable rates—was so improper, unprecedented and unreasonable that it required a second complaint in 2020 to challenge FPL's unjust and unreasonable pole attachment terms, conditions, and practices.[86] AT&T challenged 2 FPL practices that were based on novel, tortured, and frankly vengeful readings of JUA terms. *First*,

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[83] *Jan. 2021 Rate Order*, 36 FCC Rcd at 260-261 (¶ 23).

[84] *Multimedia Cablevision, Inc.*, 11 FCC Rcd at 11215 (¶ 36). The Commission decided to no longer require a "state authorized rate of return" when it amended the pole attachment rules in 2018. *See In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings*, 33 FCC Rcd 7178, 7186-87 (¶ 24) (2018) (deleting use of a default rate of return in the absence of a state authorized rate of return).

[85] *See Order Approving Stipulation and Settlement Agreement*, Docket Nos. 120001-EI, 120002-EG, 120007-EI (Fla. PSC Aug. 16, 2012).

[86] *See* 47 U.S.C. § 224(b); *Fla. Cable Telecommunications Ass'n v. Gulf Power Co.*, 18 FCC Rcd 9599, 9603 (¶ 8) (2003) ("The terms and conditions of pole attachments … include not only the reasonableness of the contract provisions themselves, but also the reasonableness of pole owner practices in implementing contract provisions.").

costs at a time when the Commission seeks to "mak[e] access to this critical infrastructure faster, easier, safer, more predictable, and more affordable" in its longstanding effort to "close the digital divide and further broadband deployment."[90]

The *Terms and Conditions Order* makes an "ad hoc procedural ruling" to dismiss the claim with prejudice.[91] But a procedural ruling *must* be consistent with the governing statute.[92] And here, the statute requires a decision; it states that the Commission "*shall hear and resolve* complaints concerning [pole attachment] rates, terms, and conditions" to "provide that such rates, terms, and conditions are just and reasonable."[93] Just and reasonable pole attachment terms, conditions and practices cannot be thwarted based on procedure alone.

The procedural ruling also misses the mark. The *Terms and Conditions Order* finds that AT&T improperly split a claim when it challenged FPL's rates separately from FPL's terms, conditions, and practices. But this "claim splitting doctrine" can only apply if a party splits a single substantive *claim*, such that a decision in the first case will also resolve the second.[94] That is impossible here. AT&T's rate complaint sought a just and reasonable *rate*; AT&T's terms and conditions complaint sought just and reasonable *terms, conditions, and practices*. The claims are substantively different.[95]

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[90] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, 36 FCC Rcd 776, 776 (¶ 1) (2021).

[91] *Terms and Conditions Order* ¶ 13 (quoting *FCC v. Schreiber*, 381 U.S. 279, 289 (1965)).

[92] *See Schreiber*, 381 U.S. at 291.

[93] 47 U.S.C. § 224(b) (emphasis added); *see also Pole Attachment Order*, 26 FCC Rcd at 5338 (¶ 220) ("Section 224 ensures incumbent LECs of appropriate Commission oversight of their pole attachments").

[94] *See, e.g., Horia v. Nationwide Credit & Collection, Inc.*, 944 F.3d 970, 974 (7th Cir. 2019) ("Discrete and independently wrongful acts produce different claims, even if the same wrongdoer commits both offenses and the second wrong is similar to the first.")

[95] In contrast, the *Terms and Conditions Order* relies on cases where the plaintiff repeated "identical" substantive claims in a second lawsuit or filed a second complaint that was

unreasonable."[100] In other words, "many of the central events" underlying AT&T's complaint "had not even taken place" when the rate complaint was filed.[101] The "claim splitting" doctrine cannot apply.[102]

Nor could AT&T have added the new claim to the rate proceeding or, as the *Terms and Conditions Order* suggests, appropriately placed the issue before the Bureau merely by mentioning it on Reply.[103] Each "alleged violation" must be "stated in a separate count" *in the complaint*,[104] and "[a]mendments or supplements to complaints to add new claims or requests for relief *are prohibited.*"[105] As a result, if "a complainant wishes to introduce new issues in a pole attachment proceeding, … it may file a separate complaint, which will receive its own file number and start the normal pleading cycle."[106] It does not lose the claim. Indeed, the Commission's rules clarify that "[t]wo or more grounds of complaint involving substantially the same facts ***may*** be included in one complaint," but do not need to be.[107] This makes sense. The Commission's rules "encourage[ ] parties to attempt to settle or narrow their disputes"[108] and

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[100] T&C Compl. ¶¶ 21, 23 (emphasis added).

[101] *Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002) ("What is particularly noteworthy here is that many of the central events underlying FAA II had not even taken place at the time when Drake instigated *FAA I*.... Accordingly, the District Court's conclusion that Drake should, or could, have raised these claims in *FAA I* was misguided.").

[102] *Id. See also Waad v. Farmers Ins. Exch.*, 762 F. App'x 256, 260 (6th Cir. 2019) (The "claim splitting" doctrine does "not apply to claims that were not ripe at the time of the first suit.").

[103] *See Terms and Conditions Order* ¶ 19.

[104] 47 C.F.R. § 1.722(d).

[105] 47 C.F.R. § 1.721(p) (emphasis added).

[106] *RCN Telecom Servs. of Philadelphia, Inc. v. PECO Energy Co.*, 16 FCC Rcd 11857, 11858 (¶ 4) (2001).

[107] 47 C.F.R. § 1.725(b); *see also* 47 C.F.R. § 1.727 (precluding counterclaims and cross-complaints and stating they "may be filed as a separate complaint").

[108] 47 C.F.R. § 1.737(a).

nothing of E-911 and other emergency services. And use of existing poles is indispensable.[115] "[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.'"[116] The Commission enforces just and reasonable pole attachment terms and conditions to "minimize 'unnecessary and costly duplication of plant for all pole users.'"[117] It cannot stay silent about FPL's effort to do the exact opposite.

The Enforcement Bureau's silence about FPL's effort to eject AT&T from the poles has also created doubt about the just and reasonable rate for 2019 and subsequent rental years.[118] The *Rate Orders* stop with the 2018 rental year, claiming AT&T must prove "a right under the JUA to attach to FPL's poles" before the Commission can set a just and reasonable rate for subsequent years.[119] But, this finding ignores the fact that AT&T and FPL continue to jointly use each other's poles,[120] as the JUA's evergreen provision[121] allows the JUA to remain in full force and effect with respect to those poles despite FPL's notice of termination.[122] The Commission should have set the rate for 2019 and all subsequent years in which the poles are in joint use.

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[115] *Pole Attachment Order*, 26 FCC Rcd at 5243 (¶ 6) ("Obtaining access to poles and other infrastructure is critical to deployment of telecommunications and broadband services.").

[116] *May 2020 Rate Order*, 35 FCC Rcd at 5330 (¶ 15) (quoting S. Rep. No. 580, 95th Congress, 1st Sess. at 13 ("1977 Senate Report"), reprinted in 1978 U.S.C.C.A.N. 109)).

[117] *See Pole Attachment Order*, 26 FCC Rcd at 5242 (¶ 4) (citation omitted).

[118] *See Aug. 2021 Rate Order* ¶ 4.

[119] *See Terms and Conditions Order* ¶ 14; *Aug. 2021 Rate Order* ¶ 4.

[120] *See, e.g.*, Rate Answer Ex. E at FPL00167 (Murphy Decl. ¶ 6) ("AT&T occupies 401,919 FPL distribution poles in Florida.").

[121] *See* Rate Compl. Ex. 1 at ATT00128 (JUA, Art. XVI).

[122] The Commission is also not constrained to rule only in cases where there is pole attachment agreement, as its rules allow complaints so long as "the cable television system operator or telecommunications carrier currently has attachments on the poles." 47 C.F.R. § 1.1404(d).

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2021, I caused a copy of the foregoing Application for Review to be served on the following (service method indicated):

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