BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

DUKE ENERGY FLORIDA, LLC'S RESPONSE TO AT&T'S INITIAL BRIEF IN ACCORDANCE WITH THE ENFORCEMENT BUREAU'S MARCH 8, 2021 LETTER

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April 19, 2021

EXECUTIVE SUMMARY

- There are so many factual and legal inaccuracies in AT&T's initial brief that it would be impossible to specifically rebut them all in 15 pages or less. AT&T's initial brief: (1) ignores Commission precedent (without explaining why it believes the precedent is wrong); (2) disputes facts without any contradicting evidence; (3) relies upon strawman arguments; and (4) pretends as if a data set involving tens of thousands of individual data points must be perfect to be informative.

- AT&T claims that it is "disadvantaged" by the joint use agreement ("JUA") as compared to DEF's CATV and CLEC licensees, yet compares its right and obligations under the JUA to the regulatory and statutory rights of CATVs and CLECs. This is the wrong comparative framework under the Commission's existing precedent, and as a matter of logic. DEF has no control over the regulatory and statutory rights of its CATV and CLEC licensees (and it is a moving goalpost, in any event). Moreover, AT&T continues to focus only on what it deems to be burdens and obligations under the JUA, without accounting for its benefits and rights under the JUA.

- Even if there were merit to AT&T's incorrect comparative framework, AT&T has offered absolutely no evidence at all to quantify the net benefits and burdens of the JUA. **This failure of proof is fatal to AT&T's claim for relief for any period governed by the 2011 Order.** This is especially true given that AT&T not only first advised DEF on May 22, 2019 that it took exception to the JUA, but also given that in each year at issue, AT&T specifically affirmed the correctness of the annual billing. Even for any periods governed by the 2018 Order, AT&T has failed to offer any evidence to contradict the detailed, quantified net benefits analysis submitted by DEF.

- AT&T also continues to rely upon the Commission's space allocation presumptions without any evidence whatsoever to contradict the evidence submitted by DEF. AT&T claims that it occupies only one foot of space, even though the JUA allocates [redacted] feet of space to AT&T, and even though DEF's make-ready survey data reveals that AT&T is actually occupying at least [redacted] of space. AT&T also claims that there are 5 attaching entities per pole, even though DEF's survey of all poles to which AT&T is attached demonstrate that the actual average is well below [redacted]

- Rather than offering its own evidence, AT&T merely takes pot shots at DEF's data. This is remarkable given that AT&T, in essence, has had nearly a decade to plan and prepare for its case against DEF. DEF, on the other hand, had roughly 60 days to respond to AT&T's complaint with its entire case in chief. AT&T either (1) is not serious about its space occupancy positions, or (2) actually developed data in preparation for this proceeding that it knows corroborates DEF's data.

- AT&T's reflex, since it first objected to the JUA cost-sharing methodology in May 2019, has been to reject any evidence or idea that challenged its narrow understanding of the facts and law. This resistance to legitimate engagement on important issues of fact and law was the reason pre-complaint discussions were fruitless, and it is the reason the parties have made virtually no progress on settlement since that time. AT&T's initial brief is, unfortunately, more of the same. Due to space constraints, this response focuses only on the key points at issue. Any failure to address an allegation raised by AT&T in its initial brief should not be construed as acquiescence. DEF also incorporates by reference its answer and initial brief in this proceeding.

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Pursuant to the Enforcement Bureau's March 8, 2021 letter issued pursuant to 47 C.F.R. § 1.732, Duke Energy Florida, LLC ("DEF") hereby submits this response to AT&T's initial brief.

ARGUMENT

I. AT&T'S ARGUMENT THAT THE JUA "DISADVANTAGES" AT&T VIS-À-VIS DEF'S CATV AND CLEC LICENSEES IS WRONG BOTH FACTUALLY AND LEGALLY.

AT&T focuses solely on its obligations and perceived burdens under the JUA, while failing to account for (or even acknowledge) a single benefit of the JUA. For that reason, AT&T failed to submit a net benefit valuation, and thus failed to meet its burden of proof. *This failure of proof is fatal to AT&T's claim with respect to any period governed by the 2011 Order.*[1] Even for any

[1] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 17-84, GN Docket No. 09-51, 26 FCC Rcd 5240, 5331-37 at ¶¶ 214-19 (Apr. 7, 2011) ("2011 Order") (placing burden of proof on ILECs to demonstrate that their joint use rates are unreasonable); *Verizon Florida LLC v. Florida Power and Light Co.*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1149-50

periods governed by the 2018 Order,[2] AT&T has failed to offer any evidence to contradict the detailed, quantified net benefits analysis submitted by DEF, which demonstrates that the net per pole benefits to AT&T vastly exceed the "rate" paid by AT&T under the JUA.[3]

A. AT&T's Focus on Its Statutory and Regulatory Status, rather than the JUA

A major flaw in AT&T's argument is revealed in the second paragraph of its initial brief: "As compared to the contractual, **statutory**, and **regulatory** rights enjoyed by AT&T's competitors, the JUA disadvantages AT&T…."[4] AT&T argues that it is disadvantaged vis-à-vis CATVs and CLECs because: (1) AT&T lacks a statutory right of mandatory access to DEF poles; (2) the Commission's regulations establishing make-ready timelines, one-touch make-ready ("OTMR"), and self-help remedies are inapplicable to AT&T; (3) AT&T is not guaranteed the new telecom rate by statute or regulation.[5]

DEF cannot control the statutory and regulatory status of AT&T or of DEF's CATV and CLEC licensees. Whatever advantages or disadvantages may inure to AT&T or DEF's CATV and CLEC licensees under statute or regulation are of no consequence to the analysis of their relative rights and obligations under the contracts. The proper comparative framework is contract-to-contract. This comparative framework was explicitly acknowledged in the recent *Verizon*

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at ¶ 24 (Feb. 11, 2015) ("*Verizon Florida Order*") (dismissing complaint because ILEC failed to quantify the benefits it receives under the joint use agreement).

[2] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705, 7770-71 at ¶¶ 128 (Aug. 3, 2018) ("2018 Order") ("Utilities can rebut the presumption we adopt today…by demonstrating that the [ILEC] receives net benefits that materially advantage the [ILEC] over other telecommunications attachers.").

[3] *See, e.g.*, DEF's Answer, Ex. E at DEF000203-243 (Metcalfe Decl.); *id.* at Ex. A, DEF000130-36 (Freeburn Decl. ¶¶ 9-20); *id.* at Ex. B, DEF000153-54 (Hatcher Decl. ¶¶ 9-11).

[4] AT&T's Initial Br. at 1 (emphasis added).

[5] *See id.* at 3, 5-6, 11-12.

Maryland Order, wherein the Commission determined that the ILEC's right to remain attached to existing joint use poles following termination of the joint use agreement provided it with a "material advantage[] over [CLEC] and [CATV] attachers on the same poles."[6] The Commission contrasted this right under the joint use agreement to the electric utility's pole license agreements, which required the electric utility's CATV and CLEC licensees "to remove all attachments prior to any specified termination date."[7]

B. AT&T Access to DEF Poles under the JUA

AT&T argues that the JUA allows DEF to deny AT&T access to any pole DEF deems unsuitable for joint use and to terminate AT&T's ability to deploy facilities on future DEF pole lines.[8] However, each party's right to exclude poles from joint use is limited to "poles which have been installed for purposes other than or in addition to normal distribution of electric or telephone service…"[9] Further, the JUA specifically provides a process for obtaining access to such poles.[10]

In addition, while it is true that either party can terminate the JUA with respect to "the further granting of joint use of poles" upon six months' written notice, this is no different than DEF's license agreements, which also allow DEF to terminate those agreements upon sixty (60) days' notice.[11] While the practical effect of termination is different for AT&T as compared to a

[6] *Verizon Maryland LLC v. Potomac Edison Co.*, Memorandum Opinion and Order, Proceeding No. 19-355, 35 FCC Rcd 13607, 13615 at ¶ 20 (Nov. 23, 2020) ("*Verizon Maryland Order*").
[7] *See id.*; *see also Verizon Florida LLC v. Florida Power and Light Co.*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1148-49, 1150-51 at ¶¶ 21, 24 (Feb. 11, 2015) ("*Verizon Florida Order*") (comparing "unique benefits" ILEC enjoyed under joint use agreement to rights afforded under electric utility's pole license agreements); *accord BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Co.*, Memorandum Opinion and Order, Proceeding No. 19-187, 35 FCC Rcd 5321, 5328-29 at ¶ 14 (May 20, 2020).
[8] *See* AT&T's Initial Br. at 3.
[9] DEF's Answer, Ex. 1 at DEF000248 (JUA, Section 2.2).
[10] *See id.* at DEF000248 (JUA, Sections 2.2, 3.1).
[11] *See, e.g.*, DEP's Answer, Ex. 7 at DEF000297 (Ex. Pole License Agreement, "Term of Agreement").

licensee given AT&T's lack of a federal mandatory access right, that is beyond DEF's control and thus irrelevant. In any event, the key distinction with respect to termination is that under the JUA, AT&T is authorized to remain attached to DEF poles following termination, while CATV/CLEC licensees must remove their attachments within a set number of days following termination.[12]

AT&T also argues that it is disadvantaged because, unlike the JUA, DEF's pole license agreements with CATVs and CLECs require DEF to replace existing poles with taller poles to accommodate licensees.[13] To the contrary, *none* of DEF's license agreements require DEF to expand capacity upon a CATV or CLEC licensee's request.[14] Moreover, the specific license agreement quoted by AT&T explicitly reserves DEF's right to deny attachment requests for any lawful reason.[15] In contrast, the JUA obligates DEF to expand capacity at AT&T's request.[16]

C. AT&T's Alleged Pole Ownership and Maintenance Obligations

AT&T complains that, unlike DEF's CATV and CLEC licensees, under the JUA, AT&T must own and maintain joint use poles.[17] It is painfully obvious, though, that nothing in the JUA has required AT&T to own or maintain poles because AT&T owns less than 8% of the jointly used poles, and the poles that AT&T does own are inadequately maintained. AT&T argues that it has invested $234 million in its pole network in Florida and has expended "tens of millions of dollars" each year covered by this dispute to own and maintain poles there.[18] However, AT&T's foregoing figures only confirm what DEF already knew—that DEF is shouldering the *vast* majority of the

[12] *Compare* Answer, Ex. 1 at DEF000258-59 (JUA, Section 16.1) *with id*. at Ex. 7, DEF000321 (Exemplar Pole License Agreement, Section 17).
[13] *See* AT&T's Initial Br. at 3-4.
[14] *See generally* DEF's Suppl. Interrog. Resp., Ex. 2 at DEF000345-1391 (DEF's Pole License Agreements).
[15] *See* CATV-1 at DEF000013 (Section 0.2).
[16] *See* DEF's Answer, Ex. 1 at DEF000250-51 (JUA, Section 4.4.3(B)).
[17] *See* AT&T's Initial Br. at 4-5.
[18] *Id*. at 4.

cost of the parties' joint use pole network. DEF, as of 2020, had invested $837,220,681 in its poles in Florida.[19] Further, for every year of this dispute, DEF incurred pole maintenance expenses of between $64 million (2015) and $80 million (2020).[20] In addition, the figures AT&T provided appear incorrect. For example, in 2020, according to the data AT&T submitted in docket 86-182, AT&T's pole maintenance cost was ~$5 million (and thus not in the "tens of millions of dollars").

D. AT&T's Guaranteed Lowest Position in the Communications Space

AT&T focuses on the limited costs and risks associated with its guaranteed lowest position in the communications space on DEF's poles, while failing to acknowledge or account for the advantages of that position.[21] AT&T has never sought to abandon its right to the lowest position in the communications space.[22]

E. AT&T's [redacted] Space Allocation Under the JUA

AT&T claims: "For the last 25 years, the JUA's space allocations were unlawful, unenforceable, and unobserved."[23] However, AT&T relies on precedent that prohibit ILECs from reserving space on their own poles.[24] As explained in DEF's answer, the very same precedent upon which AT&T relies explicitly allows electric utilities to reserve space on their own poles.[25] AT&T's argument that the JUA's space allocation is unlawful and unobserved is also undermined by at least four facts. First, AT&T agreed to the [redacted] space allocation in Section 1.1.6(B) by

[19] DEF's Answer, Ex. D at DEF000187 (Olivier Decl. Ex. D-1).
[20] *Id.* at DEF000177- DEF000183, DEF000185 (Olivier Decl. Ex. D-1).
[21] *See* AT&T's Initial Br. at 6-8.
[22] *See* DEF's Answer at ¶ 19; *id.* at Ex. A, DEF000134-35 (Freeburn Decl. ¶ 17); *id*. at Ex. 1, DEF000246 (JUA, Section 1.1.6(B) (allocating AT&T lowest [redacted] feet of usable space on pole). AT&T's argument that it has attempted to do so via the position taken by its affiliate in the CTIA proceeding is simply false. *See* AT&T's Initial Br. at 8 & n.32. As explained in DEF's Answer, AT&T's affiliate argued there that it should be permitted to make wireless attachments *in the unusable space* on the pole. *See* DEF's Answer at ¶ 18.
[23] AT&T's Initial Br. at 8-9.
[24] *See id.* at 9 n. 38.
[25] *See* DEF's Answer at ¶ 25 & n.86.

executing the JUA.[26] Second, AT&T essentially ratified that space allocation on two subsequent occasions when it executed amendments to the JUA in 1980 and 1990.[27] Third, AT&T actually occupies [redacted] per DEF pole on average—*i.e.*, virtually all its allocated space under the JUA.[28] Fourth, AT&T never raised an objection to its space allocation until these proceedings. And in any event, since the beginning of joint use with AT&T, DEF has constructed its pole network to accommodate AT&T's [redacted] of allocated space (as well as the required safety space).

F. The JUA's Perpetual License Provision

AT&T argues that the JUA's perpetual license provision (which it incorrectly denominates as an "evergreen" provision)[29] disadvantages AT&T by locking in the JUA's rental rates even after termination, while CLECs and CATVs are guaranteed the new telecom rate/cable rate.[30] The Commission has previously determined that perpetual license provisions materially advantage ILECs over CATV/CLECs.[31] In addition, DEF has provided unrefuted evidence that the net value of the perpetual license provision to AT&T is $[redacted] (or $[redacted] per pole) annually.[32]

II. AT&T's RELIANCE ON THE COMMISSION'S SPACE ALLOCATION PRESUMPTIONS IS AT ODDS WITH SIGNIFICANT RECORD EVIDENCE REBUTTING THOSE PRESUMPTIONS.

Though there are still a few minor points of disagreement between the parties with respect to the calculation of DEF's annual pole cost (net cost of a bare pole x annual carrying charge rate),

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[26] *See* DEF's Answer at Ex. 1 at DEF000246 (JUA, Section 1.1.6(B)).
[27] *See* DEF's Answer, Ex. 2 at DEF000262-63 (1980 Amendment); *id.* at Ex. 3, DEF000265-67 (1990 Amendment).
[28] *See* DEF's Suppl. Interrog. Resp., Ex. 4 at DEF001409. DEF's calculation of AT&T's average feet of space occupied has increased to [redacted] from [redacted] *See* Section II.A.1.a. *infra*.
[29] *See* DEF's Answer at ¶¶ 11, 15, 27, 38; *id.* at Ex. A, DEF000136 (Freeburn Decl. ¶ 19).
[30] AT&T Initial Br. at 11 (citing DEF's Answer, Ex. 1 at DEF000258-59 (JUA, Section 16.1)).
[31] *See Verizon Maryland Order*, 35 FCC Rcd at 13615, ¶ 20 (finding perpetual license provision to be "material advantage" over other attachers, who "are required to remove all attachments prior to any specified termination date").
[32] DEF's Answer, Ex. E at DEF000212-13, DEF000235 (Metcalfe Decl. ¶¶ 18-21, Ex. E-2).

the main dispute relates to how those costs should be allocated. AT&T has presented no evidence at all on this issue, and instead merely attempts to undermine the evidence presented by DEF regarding (1) the space AT&T actually occupies on DEF's poles, and (2) the average number of attaching entities on DEF poles occupied by AT&T.[33]

A. AT&T, Without Evidence to Rebut DEF's Evidence, Continues to Argue that It Actually Occupies Only One Foot of Space on DEF's Poles.

1. AT&T's Attack on DEF's Make-Ready Survey Data

DEF presented data demonstrating that, on average, AT&T occupies [redacted] (now determined to actually be [redacted]) of space feet on DEF poles.[34] This data was gathered by DEF's make-ready survey contractor during make-ready surveys performed at the request of third-party attaching entities during the 2019-2020 time frame.[35] This data corroborates, and is corroborated by, AT&T's space allocation of the lowest [redacted] feet of space within the communications space.[36] AT&T presented no evidence whatsoever to contradict the evidence submitted by DEF or to contradict the legitimacy of its space allocation.[37] Instead, AT&T merely attacks DEF's make-

[33] AT&T's failure of evidence on these issues is remarkable given that it had nearly a decade to pull together its "case in chief". If AT&T was intent on insisting that the Commission's presumptions were correct, AT&T should have gathered at least some evidence on this point—especially knowing that DEF would have evidence given its routine make-ready surveys and cyclical pole audits. AT&T's complete lack of evidence speaks volumes: AT&T either (a) did not take its position seriously enough to develop any evidence to support it; or (b) AT&T actually developed evidence, but is withholding it due to the fact that it would corroborate DEF's evidence.
[34] *See* Section II.A.1.a. *infra*.
[35] *See* DEF's Answer, Ex. A at DEF000132 (Freeburn Decl. ¶ 12).
[36] *See* DEF's Answer, Ex. 1 at DEF000246 (JUA, Section 1.1.6(B)).
[37] AT&T argues that the only data point the Commission should consider from DEF's make-ready survey is data related to average pole height, which AT&T alleges would drive down the annual rental rate. *See* AT&T's Initial Br. at 15. However, pole height does not affect the space occupied by AT&T's attachment(s). AT&T attaches at the same height whether the pole is 40 or 50 feet. And even more importantly, DEF is not attempting to rebut the Commission's 37.5 foot pole height presumption. If AT&T wanted to rebut that presumption, it should have offered evidence on this point.

ready survey data with four arguments: (1) the data presented contains errors; (2) the data is not statistically valid; (3) the data was gathered prior to the performance of any make-ready work; (4) the data is not geographically representative of the area covered by the JUA. For the reasons set forth below, none of these arguments discredits the overarching point of the data—AT&T is actually occupying space consistent with its space allocation in the JUA and, in any event, far greater than the Commission's 1-foot presumption.

a. Alleged Errors in DEF's Make-Ready Survey Data

AT&T is correct that the DEF make-ready survey data does not represent 941 unique poles. DEF incorrectly understood the "Unique ID" assigned by the make-ready survey contractor as unique to each pole, when in fact it is unique to each measurement on a pole. These unique measurements, for example, capture all of AT&T's attachments on each pole (not just the highest attachment). The measurements also duplicate attachment height at the pole for purposes of associating a mid-span clearance with a particular pole (given that mid-span measurements are a function of a "span" which involves two poles). AT&T is correct in noting that the make-ready survey data is derived from [redacted] unique poles. Among these [redacted] unique poles, as AT&T has no doubt figured out, AT&T's actual space usage is *greater* than DEF initially thought. The average height of AT&T's highest attachment on each of these [redacted] poles is [redacted] ([redacted]), rather than the [redacted] ([redacted]) DEF initially thought, which means AT&T is actually occupying [redacted] ([redacted]) of space, as opposed to [redacted] ([redacted]). In either case, AT&T is vastly exceeding the one-foot presumption on which it relies, without evidence.

b. The Alleged Unreliability of DEF's Make-Ready Survey Data

AT&T also argues that make-ready surveys are an inherently unreliable means of determining AT&T's average attachment height because the surveys precede make-ready, and that

AT&T "routinely lowers its facilities as part of the make-ready process."[38] However, the fact that a make-ready *survey* has been performed does not mean that *make-ready* has been performed; one of the purposes of the survey is to determine whether make-ready is required at all. Nor does the fact that make-ready has been performed mean that AT&T has actually moved its attachments. In any event, between 2019-2020 only [redacted] of the 62,363 DEF poles to which AT&T is attached were even the subject of a make-ready survey.

c. The Statistical Significance of DEF's Make-Ready Survey Data

AT&T argues that DEF's make-ready survey data is invalid because it was "collected for an entirely different purpose"—i.e., make-ready surveys of third-party attachments.[39] However, the fact that this data was collected for purposes wholly unrelated to this case, and that the data points within the sample were selected by a disinterested party (third party attaching entities), validates—rather than undermines—the sample. That is because the key principle of any statistical sampling is that the selection process for generating the data is independent of the variable of interest, as is the case here. In other words, these poles were not selected to make a point—in fact, they were selected by third parties for other purposes well before the need to make the point.

AT&T, in essence, is arguing that the only valid data is data generated by a survey specifically designed to address the variable of interest (in this case, average height of AT&T's highest attachment). This standard would be impossible for DEF or any other electric utility to meet given the short timeframe within which DEF was required to answer the complaint and present all of its evidence.[40] DEF had no choice other than to use data that already existed to verify

[38] AT&T's Initial Br. at 12-13.
[39] AT&T's Initial Br. at 12.
[40] If AT&T has legitimate concerns regarding the accuracy of this data, then DEF is willing to work with AT&T on designing and performing a new survey to ascertain the average height of

a point that should not even be credibly in dispute. AT&T, on the other hand, had nearly a decade to plan and gather evidence on this point. Notably, it produced none.

d. The Geographic Scope of DEF's Make-Ready Survey Data

AT&T also challenges the statistical validity of DEF's make-ready survey data by arguing that it "includes several poles down a single pole lead and includes poles in just [redacted] counties covered by the JUA."[41] However, more than [redacted] of the DEF poles to which AT&T is attached are within those [redacted] counties [redacted] and several of the counties covered by the JUA have [redacted] DEF poles to which AT&T is attached.

2. Ground Clearance Method for Determining Actual Space Occupied

AT&T also argues that DEF's methodology for determining the space actually occupied by AT&T's attachments on average—i.e., subtracting the minimum ground clearance presumed by the Commission (18') from the average height of AT&T's highest attachment on each DEF pole ([redacted]) is legally impermissible.[42] AT&T argues that Commission precedent does not permit DEF to charge AT&T for the space below its attachments if AT&T's "facilities are not attached at the absolutely lowest point possible on the poles."[43] However, as set forth above, some of the poles have multiple AT&T attachments. In addition, many of AT&T's attachments have significant sag which has the effect of displacing other potential wireline attachments.[44] Further, because the JUA allocates AT&T the lowest position in the communications space, DEF cannot, under the JUA, allow other parties to attach below AT&T.[45]

AT&T's highest attachment on DEF's poles. DEF is confident that any survey will corroborate the findings that are part of the record evidence in this case.

[41] AT&T's Initial Br. at 13.
[42] *See id.* at 15, 18-19.
[43] *Id.* at 18.
[44] *See* Section II.A.1.a. *supra*.
[45] *See* Section I.E *supra*.

AT&T also argues that instead of relying upon the Commission's 18' ground clearance presumption when determining the amount of space AT&T occupies, DEF should have determined actual ground clearance for each pole surveyed.[46] But the Commission has previously stated:

> [A] presumptive average 18 feet of the pole space is reserved for ground clearance… In the Usable Space Order, we determined that the selection of the 18 foot figure reflected various elements such as differing pole heights, as well as NESC standards that vary depending on the physical environment of the pole. Factors used to determine the NESC standard of minimum ground clearance include whether the wires or cables cross over railroad tracks, roads, or driveways and the amount of voltage transferred through the cables…In the Usable Space Order we carefully considered numerous studies submitted to us before concluding that the 18 foot figure was an appropriate tool to estimate usable space.[47]

Here, DEF has not sought to rebut the Commission's 18-foot ground clearance presumption, and neither has AT&T. AT&T certainly has not submitted any evidence to rebut that presumption.

Finally, AT&T argues that mid-span sag is irrelevant because "under the Commission's rate formula, 'space occupied' means space 'actually occupied' on—*i.e.*, the 'actual physical attachment' to—the poles."[48] However, none of the authority cited by AT&T actually supports its argument.[49] AT&T's characteristic heavily bundled legacy copper sags significantly more than the fiber optic cable used by CATVs and CLECs.[50] AT&T's sag matters because in order to meet code for midspan clearance, AT&T much attach significantly higher than 18 feet at the pole in order to meet mid-span clearance requirements. This has the effect of displacing any third-party

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[46] *See* AT&T's Initial Br. at 18-19.
[47] *Amendment of Rules and Policies Governing Pole Attachments, Report and Order,* CS Docket No. 97-98, 15 FCC Rcd 6453, 6468-69 at ¶ 23 (Apr. 3, 2000).
[48] AT&T's Initial Br. at 18.
[49] *See id.* at n.86 & n.87 (citing authority that addresses overlashing, the allocation of safety space, and space attributable to clearance requirements).
[50] *See* DEF's Answer, Ex. A at DEF000132-33 (Freeburn Decl. ¶¶ 12-14); *see also* DEF's Suppl. Interrog. Resp., Ex. 4 at DEF001409 (Survey Results). In rebutting DEF's sag data, AT&T only offers two Google street view photos from 2018. *See* AT&T's Initial Br. at 15 n.68 & Ex. 11. This "evidence" is not only clearly inadmissible—it is patently absurd.

use of the space beneath AT&T's facilities, even is such use were contractually permissible. For example, if AT&T's facilities sag three feet at mid-span, a third-party could not attach a through-bolt one foot below AT&T's through-bolt (even if contractually permitted) because it would either (a) violate midspan ground clearance requirements, or (b) violate mid-span clearance requirements between communications facilities.

B. AT&T's Failure to Address DEF's Safety Space Arguments

AT&T once again ignores the arguments raised in DEF's answer regarding the safety space and, instead, merely trots out the same arguments it raised in its complaint and reply. Rather than repeating its responses to AT&T's recycled safety space arguments here, DEF hereby incorporates its counterarguments on this issue from its answer and initial supplemental brief.[51] In summary, AT&T should bear the cost of the safety space because: (1) but for AT&T's attachments (which were the first to DEF's poles) there would have been no safety space on DEF's poles;[52] (2) the Commission's statement from the *FPL I Order*, upon which AT&T relies, is only correct insofar as AT&T-owned joint use poles are concerned; on poles owned by DEF, it is the presence of *communications attachments*—not the presence of *electric lines*—that makes the safety space necessary;[53] (3) DEF does not need and does not use the safety space on its own poles, thus making this case factually distinct from the precedent upon which AT&T relies.[54] AT&T's reliance on the *FPL I Order* is also misplaced because the pre-2011 Order precedent cited in that *FPL I* was

[51] *See* DEF's Answer at ¶ 25; DEF's Initial Br. at 9-10, 21.
[52] *See* DEF's Answer at ¶¶ 16, 22, 25; *id.* at Ex. A DEF000133-34 (Freeburn Decl. ¶¶ 15-16); *id*. at Ex. B, DEF000152-53, DEF000156-57 (Hatcher Decl. ¶¶ 7, 16); *id.* at Ex. C, DEF000163-64 (Burlison Decl. ¶¶ 7-11); *id*. at Ex. D, DEF000309 (Harrington Decl. ¶ 17); *id.* at Ex. E, DEF000339-40 (Metcalfe Decl. ¶ 33); *see also 2011 Order*, 26 FCC Rcd at 5302, ¶ 144 n.433 (it would be irrational to install taller poles in anticipation of future third-party attachments).
[53] *See* DEF's Answer at ¶ 25; *id.* at Ex. A, DEF000133-34 (Freeburn Decl. ¶ 15).
[54] *See* DEF's Answer at ¶ 25; *see also supra* note 52.

premised on prior Commission precedent which assumed that *ILECs and electric utilities already shared the cost of the safety space*.[55]

C. AT&T Does Not Seriously Dispute that the Appropriate Average Number of Attaching Entities Is [redacted]

AT&T raises two half-hearted arguments in opposition to the use of [redacted] as the average number of attaching entities on DEF poles jointly used by AT&T. First, AT&T argues that the average is *too specific*, because it only captures poles to which AT&T is attached: "Duke Florida instead asks to single-out AT&T for a [redacted] attaching entity value, but this selective use of a generally applicable input is not permitted under the Commission's regulations."[56] However, just three months ago—in a case involving AT&T—the Commission specifically accepted an average number of attaching entities based exclusively on the electric utility's poles jointly used by AT&T.[57] AT&T does not even mention this authority. This is not new authority, either. In one of the earliest cases addressing the average number of attaching entities, the Commission held:

> "For example, an attacher is only responsible to pay its Telecom Formula share of the costs of unusable space for the poles to which it is actually attached….In order to be a reasonable reflection of the actual poles to which an attacher is affixed, the average must reflect only those poles in areas where the attacher is actually affixed."[58]

The Commission thus encourages a methodology that ensures an attaching entity is charged based on "the actual poles to which [it] is affixed." This is precisely what the [redacted] average reflects.

Second, AT&T argues:

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[55] *See* DEF's Answer at ¶ 25.
[56] AT&T's Initial Br. at 20 (internal citations omitted).
[57] *See BellSouth Telecomm., LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Mem. Opinion and Order, Pro. No. 19-187, 2021 FCC LEXIS 124, at *20-21, ¶ 18 (Jan. 14, 2021) ("We find that FPL has rebutted the Commission's presumptions by providing survey results establishing that … the average number of attachers on its JUA distribution poles is 2.99.").
[58] *Teleport Communications of Atlanta, Inc. v. Georgia Power Co.*, Order on Review, File No. PA 00-005, 17 FCC Rcd. 19859, 19869 at ¶ 25 (Oct. 8, 2002).

> Duke Florida also lacks accurate and reliable data to support its alleged [redacted] value. It relies on a table with the findings of its contractor, VentureSum, without any of the information needed to assess the reliability or accuracy of those findings absent a full field review of [redacted] poles. Some flaws, however, are apparent without a field review. VentureSum's findings, for example, state that [redacted] poles surveyed have 5 or more attaching entities, but the data that is supposed to substantiate that report includes more than twice as many poles with 5 or more attaching entities. VentureSum's data is also incomplete, as it omits over [redacted] Duke poles with AT&T attachments. [59]

As an initial matter, DEF did not rely on a "table" for purposes of the [redacted] average attaching entities; DEF relied on an audit of every pole in its system. The "table" prepared by VentureSum merely summarized the results of a specific query in the 214 MB Microsoft Access database produced to AT&T in January 2021. Further, this data is not new to AT&T; the results of this audit were made available in real time to AT&T and all other attaching entities (with each entity receiving the audit results regarding its own attachments).

The claim that the data "omits over [redacted] Duke poles with AT&T attachments" simply is not true. The actual data, as AT&T presumably knows, contains records for these additional [redacted] poles. The approximately [redacted] poles used to calculate the average number of attaching entities focused solely on the DEF poles within AT&T's ILEC service area. These other [redacted] poles were so-called "out of exchange" poles that AT&T asked to be added as poles within the JUA upon the conclusion of the audit (otherwise, they were poles to which AT&T had attached without authorization). In any event, adding these [redacted] poles to the average has a de minimis impact on the average, and AT&T—even with the benefit of the entire database—has not alleged otherwise.[60]

With respect to the claim that there are "twice as many poles with 5 or more attaching entities" than the [redacted] identified in the "table," DEF has no idea what AT&T is talking about.

[59] AT&T's Initial Br. at 20-21.
[60] Including these additional poles would change the average from [redacted] to [redacted].

Without understanding the specific queries AT&T used to reach this conclusion, it is impossible to identify AT&T's error with any specificity. In any event, adding another [redacted] attaching entities to the more than [redacted] poles used to determine the average would have a less-than-1% effect on the average. Whatever the case, the average number of attaching entities is well below [redacted], and it is nowhere close to the 5 alleged by AT&T without a shred of supporting evidence.

CONCLUSION

For those reasons set forth above, as well as in DEF's initial brief and its answer, the Commission should deny all relief sought by AT&T. AT&T has failed to meet its burden of proof with respect to period governed by the *2011 Order*. With respect to the period covered by the *2018 Order*, AT&T failed to even voice an objection to the cost-sharing methodology in the JUA until May 22, 2019. Further, the rates charged by DEF under the JUA are just, reasonable, and non-discriminatory in light of the significant, quantified, net material benefits AT&T receives under the JUA. If the Commission unwinds the cost-sharing provisions of the JUA at all, any alternative rates that the Commission sets should be consistent with the rates set forth in paragraphs 37 or 38 of DEF's Answer.

Respectfully submitted this 19th day of April 2021.

s/ *Eric B. Langley*
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VERIFICATION

I, Eric B. Langley, as signatory to this submission, hereby verify that I have read Duke Energy Florida, LLC's Response to AT&T's Initial Brief and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded and in fact is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

s/ *Eric B. Langley*
Eric B. Langley

CERTIFICATE OF SERVICE

I hereby certify that on this day, April 19, 2021, a true and correct copy of Duke Energy Florida, LLC's Response Brief was filed with the Commission via ECFS and was served on the following (service method indicated):

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