PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA, Complainant, v. DUKE ENERGY PROGRESS, LLC, Defendant.	Proceeding No. 20-293 Bureau ID No. EB-20-MD-004

AT&T'S REPLY TO DUKE ENERGY PROGRESS'S ANSWER

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA

By Counsel:

Robert Vitanza
Gary Phillips
David Lawson
AT&T SERVICES, INC.
1120 20th Street NW, Suite 1000
Washington, DC 20036
(214) 757-3357

Christopher S. Huther
Claire J. Evans
Frank Scaduto
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevans@wiley.law
fscaduto@wiley.law

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AT&T'S REPLY TO DUKE ENERGY PROGRESS, LLC'S ANSWER

Set forth below are the specific replies of BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina ("AT&T") to the numbered paragraphs set forth in the Answer of Duke Energy Progress, LLC ("Duke Progress" or "DEP"). Any claims not specifically addressed are denied for reasons detailed in AT&T's Pole Attachment Complaint ("Complaint"), Reply Legal Analysis, and supporting affidavits and exhibits.[1]

I. PARTIES AND JURISDICTION

1. In its response to paragraph 1, Duke Progress admits AT&T is an ILEC within some parts of the states of North Carolina and South Carolina, including parts of Duke Progress's service territory, that AT&T provides telecommunications and other services in North Carolina and South Carolina, and that AT&T is a Georgia limited liability company with its principal place of business at One CNN Center, 1424C, Atlanta, GA 30303, so no response is required. AT&T denies the rest of Duke Progress's response to paragraph 1 because it does not

[1] Unless otherwise indicated, references to AT&T's Complaint and Reply Legal Analysis also refer to those documents' supporting affidavits and exhibits.

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respond to the allegations of paragraph 1. To the extent a response is required, AT&T denies that its commercial success is due to a "power of incumbency" or to alleged "benefits under the joint use agreement" ("JUA") because AT&T does not enjoy net material competitive benefits under the JUA and has instead been competitively disadvantaged by the JUA, including the JUA's pole attachment rates that are over [redacted] times the new telecom rates, for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply. The last sentence of Duke Progress's response to paragraph 1 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

2. The first sentence of Duke Progress's response to paragraph 2 admits the allegations of paragraph 2, so no response is required. On information and belief, AT&T admits that Duke Progress's service area "includes the densely populated areas around Asheville, Raleigh and Wilmington" in North Carolina and "the densely populated areas around Florence and Myrtle Beach" in South Carolina. AT&T lacks sufficient information to admit or deny the rest of Duke Progress's response to paragraph 2, which does not respond to the allegations of paragraph 2, so AT&T denies.

3. The first 2 sentences of Duke Progress's response to paragraph 3 admit that AT&T and Duke Progress are parties to a 2000 JUA and that the JUA may be updated annually "to address changes" in the costs listed in Exhibits B and D,[2] so no response is required. AT&T denies the rest of the second sentence of Duke Progress's response to paragraph 3 because Exhibit C does not contain costs, and so is not updated annually to address changes in costs,[3] and because the JUA states that the costs listed in Exhibits B and D reflect "the cost" to perform the

[2] *See* Compl. Ex. 1 at ATT00099 (JUA, Art. VII.K).

[3] *See* Compl. Ex. 1 at ATT00109 (JUA, Ex. C).

work, provides for annual updates to reflect cost trends, and authorizes "actual cost" billing should a party refuse a request to update the cost schedules.[4] The costs listed in Exhibits B and D, therefore, are not "lower-than-actual-cost"—let alone "drastically lower-than-actual-cost"—for reasons further detailed in Section III.A.2 of AT&T's Complaint, Section II.A.3 of AT&T's Reply Legal Analysis, and this Reply.

The third through seventh sentences of Duke Progress's response to paragraph 3 contain legal conclusions to which no response is required. To the extent a response is required, AT&T denies these five sentences because the JUA automatically renewed and extended after the March 11, 2019 effective date of the *Third Report and Order* for reasons detailed in Section III.A.1 of AT&T's Complaint, Section II.A.1 of AT&T's Reply Legal Analysis, and this Reply. The new telecom rate presumption applies to agreements that "automatically renewed [or] *extended*" after the *Order*'s effective date,[5] and by its terms, the JUA automatically extended after that date. It "*shall continue* in force" until it is terminated upon one year's written notice.[6] The words "continue" and "extend" are synonyms,[7] and Duke Progress admits the JUA "continues in effect today."[8] That is only possible because the JUA automatically renewed and extended after the March 11, 2019 effective date of the *Third Report and Order*.[9]

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[4] *See* Compl. Ex. 1 at ATT00096-100 (JUA, Art. VII); *see also* Reply Ex. C at ATT00406 (Peters Reply Aff. ¶¶ 33-34).

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

[6] Compl. Ex. 1 at ATT00104 (JUA, Art. XVII).

[7] *See* Compl. ¶ 11 ("'Continue' means '[t]o carry further in time, space or development: *extend*' and 'extend' means 'to lengthen, prolong; to *continue* …'") (citations omitted).

[8] Answer ¶ 21.

[9] *See* Memorandum Opinion and Order at 6-7 (¶ 15), *Verizon Md. LLC v. The Potomac Edison Co.*, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (Nov. 23, 2020) ("*Potomac Edison Order*").

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AT&T also denies the third through seventh sentences of Duke Progress's response to paragraph 3 because the Commission did not require a "right to terminate the agreement" for the new telecom rate presumption to apply[10] and, in any event, the parties have the right to terminate the JUA.[11] AT&T further states that the JUA's evergreen provision speaks for itself.[12]

The eighth sentence of Duke Progress's response to paragraph 3 admits the parties share approximately 179,000 jointly used poles, with Duke Progress owning approximately 148,000 and AT&T owning approximately 31,000, so no response is required, except to note that Duke Progress's 2019 rental invoice includes 178,662 joint use poles, with Duke Progress owning 148,064 (83%) and AT&T owning 30,598 (17%).[13] The last sentence of Duke Progress's response to paragraph 3 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

4. Duke Progress's response to paragraph 4 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies Duke Progress's allegation that the Commission has jurisdiction over some, but not all, of the issues raised by AT&T's complaint. The FCC's statutory authority to regulate the rates, terms, and conditions of incumbent local exchange carrier ("ILEC") pole attachments was settled in the 2011 *Pole Attachment Order*, which was affirmed on appeal.[14] AT&T also denies Duke Progress's claim

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

[11] Compl. Ex. 1 at ATT00104 (JUA, Art. XVII).

[12] *Id.*

[13] Compl. Ex. 3 at ATT00163 (Invoice dated Dec. 4, 2019 for North Carolina); Compl. Ex. 4 at ATT00167 (Invoice dated Dec. 4, 2019 for South Carolina).

[14] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) ("*Pole Attachment Order*"), *aff'd, Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013); *see also Potomac Edison Order* at 6, 23 (¶¶ 14 n.43, 50).

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that the Commission should forbear from exercising its jurisdiction for reasons detailed in Section II.D of AT&T's Reply Legal Analysis, paragraphs 10 and 35 of this Reply, and AT&T's denials of Duke Progress's affirmative defenses. The Enforcement Bureau recently rejected this same argument because it "is without merit."[15]

5. Duke Progress's response to paragraph 5 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies that North Carolina or South Carolina has jurisdiction over this dispute because neither State has reverse-preempted the Commission's authority pursuant to 47 U.S.C. § 224(c). AT&T states that Duke Progress's claim that it may "seek the intervention of the North Carolina Utilities Commission and/or the Public Service Commission of South Carolina, if necessary" is speculative and requires no response, but if a response is required, it is denied. AT&T denies that the FCC's enforcement of AT&T's federal statutory right to "just and reasonable" rates could result in "a massive shift of the cost of the jointly used network to [Duke Progress]'s electric customers." Rather, a new telecom rate is "fully compensatory" to the pole owner.[16] AT&T also denies that the FCC's enforcement of AT&T's federal statutory right to "just and reasonable" rates could result in Duke Progress "being 'assigned' the cost of any space on its own poles that has no relevance to the provision of electric service." This is an apparent reference to Duke Progress's refusal[17] to

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[15] *FPL 2020 Order*, 35 FCC Rcd at 5331-32 (¶ 19).

[16] *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (quoting Omnibus Broadband Initiative, FCC, Connecting America: The National Broadband Plan at 110 (2010) ("*National Broadband Plan*")) (emphasis added); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987).

[17] *See, e.g.*, Answer ¶ 25.

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accept the Commission's longstanding precedent holding that 3.33 feet of safety space on a utility pole is "is usable and used *by the electric utility*."[18]

AT&T denies Duke Progress's categorization of this proceeding as involving "at least four 'buckets' of substantive issues: (1) the rates AT&T pays for access to DEP's poles; (2) the rates DEP pays for access to AT&T's poles; (3) AT&T's access rights to DEP's poles; and (4) DEP's access rights to AT&T's poles." The parties have access to each other's poles under the JUA and Duke Progress did not challenge AT&T's calculation of the proportional rates that would apply to Duke Progress's use of AT&T's poles if AT&T is provided a refund of its overpayments at the just and reasonable rates it requests.[19] This proceeding, therefore, only involves a dispute over the "just and reasonable" rate for AT&T's use of Duke Progress's poles, an issue squarely within the Commission's jurisdiction.[20] The last sentence of Duke Progress's response to paragraph 5 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

6. The first two sentences of Duke Progress's response to paragraph 6 admit that there is a related pole attachment complaint proceeding, so no response is required. With respect to the rest of the first two sentences of Duke Progress's response to paragraph 6, AT&T denies that AT&T filed the related complaint against Duke Progress's Florida affiliate, because AT&T's Florida affiliate filed the related complaint. AT&T also denies that the related complaints do not involve, at least in part, the "same set of facts" because the record shows that

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[18] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); *see also In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("*Consolidated Partial Order*") (holding "the 40-inch safety space … is usable and used by the electric utility").

[19] *See, e.g.*, Answer ¶ 38 & nn.167-168 ("presum[ing] the accuracy of AT&T's calculation").

[20] 47 U.S.C. § 224(b).

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the parties consolidated their negotiations of the two disputes.[21] AT&T admits that a different joint use agreement is at issue in each case, that the JUA at issue in this case took effect in 2000, and that the joint use agreement at issue in the related case was entered into in 1969, before the merger of Duke Energy and Progress Energy. Duke Progress admits the third sentence of paragraph 6, so no response is required.

With respect to the last three sentences of Duke Progress's response to paragraph 6, AT&T admits that electric utilities have sought review of the Commission's *Third Report and Order* adopting the new telecom rate presumption in a petition for reconsideration at the FCC, and notes that AT&T disclosed that fact in its Complaint.[22] AT&T denies that the relevant question under Rule 1.722(h) is whether there is any "overlap with any issue" in those proceedings[23] and states that the pending petition does not impact the effectiveness of the new telecom rate presumption and cannot impact AT&T's statutory right to "just and reasonable" pole attachment rates for use of Duke Progress's poles.

7. The first sentence of Duke Progress's response to paragraph 7 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. With respect to the second sentence, AT&T states that the Enforcement Bureau's September 4, 2020 letter speaks for itself and denies that the May 22, 2019 letter was the only time AT&T notified Duke Progress about

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[21] *See, e.g.*, Compl. Ex. A at ATT00029-30 (Miller Aff. ¶ 11); Compl. Ex. 8 at ATT00204-05 (Letter from D. Miller, AT&T, to S. Freeburn, Duke (May 22, 2019)); *see also* Answer Ex. 4 at DEP000171-76.

[22] Compl. ¶ 6 n.10.

[23] 47 C.F.R. § 1.722(h) ("A formal complaint shall contain … [a] statement explaining whether a separate action has been filed with the Commission, any court, or other government agency that is based on the same claim or same set of facts, in whole or in part, or whether the complaint seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment rulemaking proceeding that is concurrently before the Commission.").

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the allegations that form the basis of its Complaint and invited a response within a reasonable period of time.[24] AT&T further states that any concern related to the parties' Rule 1.722(g) negotiations was cured by compliance with the Enforcement Bureau's September 4, 2020 letter,[25] and that Duke Progress waived an affirmative defense related to Rule 1.722(g) by omitting it from its affirmative defenses.[26]

With respect to the third sentence of Duke Progress's response to paragraph 7, AT&T denies Duke Progress's suggestion that AT&T's participation in the parties' two executive-level meetings was in bad faith[27] and states that the 2 Duke Progress executives who participated in the meetings do not allege "bad faith" in their declarations.[28] With respect to the fourth sentence of Duke Progress's response to paragraph 7, AT&T admits that it is entitled to a new telecom rate calculated using the Commission's presumptive inputs (including 1 foot of space occupied) for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply, but denies that Duke Progress has collected or provided "data regarding the actual amount of space occupied by AT&T," denies that AT&T refused to consider Duke Progress's arguments during the negotiations, and denies that AT&T failed to try to negotiate a business compromise.[29]

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[24] *See, e.g.*, Compl. Ex. B at ATT00028-33 (Miller Aff. ¶¶ 10-17); Compl. Ex. C at ATT00037-48 (Peters Aff. ¶¶ 6-26); Compl. Ex. 10 at ATT00211 (Letter from D. Miller, AT&T to S. Freeburn, Duke (Sept. 5, 2019)); Compl. Ex. 17 at ATT00230-32 (Emails between D. Miller, AT&T and S. Freeburn, Duke) (Jan. 30-Feb. 18, 2020)).

[25] *See, e.g.*, Answer Ex. 4 at DEP000171-76.

[26] *See* Answer, Affirmative Defenses; 47 C.F.R. § 1.726(e) ("Affirmative defenses to allegations in the complaint shall be specifically captioned as such and presented separately from any denials made in accordance with paragraph (b) of this section.").

[27] Reply Ex. A at ATT00359-362 (Rhinehart Reply Aff. ¶¶ 22-26); Reply Ex. B at ATT00376 (Miller Reply Aff. ¶ 2); Reply Ex. C at ATT00387-389 (Peters Reply Aff. ¶¶ 3-5).

[28] *See* Answer Ex. A (Freeburn Decl.); Answer Ex. B (Hatcher Decl.).

[29] Reply Ex. A at ATT00359-362 (Rhinehart Reply Aff. ¶¶ 13, 22-26); Reply Ex. B at ATT00380 (Miller Reply Aff. ¶ 7); Reply Ex. C at ATT00387-389, ATT00394-401 (Peters

With respect to the fifth and sixth sentences of Duke Progress's response to paragraph 7, AT&T denies Duke Progress's characterization of Duke Progress's position during negotiations, when Duke Progress took the position that AT&T should forever pay the JUA rates for existing attachments.[30] AT&T further states that Duke Progress was *not* willing to negotiate rates that complied with the Commission's regulations and orders, which is the only relevant standard,[31] as it refused to honor relevant FCC precedent,[32] refused to make an offer for over 15 months,[33] and ultimately offered rates [redacted].[34] Duke Progress has now stated it

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Reply Aff. ¶¶ 3-5, 14-27); *see also*, *e.g.*, Compl. Ex. 17 at ATT00230 (Email from D. Miller, AT&T to S. Freeburn, Duke (Feb. 18, 2020)) ("AT&T prefers a negotiated resolution…").

[30] *See, e.g.*, Answer ¶ 9 ("In two separate face-to-face meetings between representatives of the parties, DEP offered numerous valid reasons to retain the existing cost-sharing relationship…"); Answer Ex. B at DEP000289 (Hatcher Decl. ¶ 17) (during negotiations, Duke Progress would consider the new telecom rate *only* for "poles that are not already in joint use").

[31] *See, e.g.*, *FPL 2020 Order*, 35 FCC Rcd at 4327 (¶ 12) ("AT&T has shown that its attempts to negotiate a new rate with FPL in light of the *Pole Attachment Order* were unsuccessful.").

[32] *See, e.g.*, Answer Ex. B at DEP000290 (Hatcher Decl. ¶ 18) (stating that any rate proposal that required Duke Progress to "bear[ ] the entire cost of the safety space … was a nonstarter"); Answer Ex. 4 at DEP000173 (Letter from S. Freeburn, Duke, to D. Miller, AT&T (Sept. 10, 2020)) [redacted]

[33] *See* Compl. Ex. B at ATT00028-33 (Miller Aff. ¶¶ 10-17); *see also* Answer Ex. 4 at DEP000173 (Letter from S. Freeburn, Duke, to D. Miller, AT&T (Sept. 10, 2020)) [redacted]

[34] *See* Answer Ex. 4 at DEP000176 (Letter from S. Freeburn, Duke, to D. Miller, AT&T (Sept. 10, 2020)) [redacted] *see also Pole Attachment Order*, 26 FCC Rcd at 5297 (¶ 131 n.399) (stating an attacher pays about 7.4% of a pole owner's annual pole costs under the new telecom rate formula and about 11.2% of a pole owner's annual pole costs under the old telecom rate formula in urbanized areas); Reply Ex. A at ATT00359-362 (Rhinehart Reply Aff. ¶¶ 22-26).

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"would never … negotiate[ ] an agreement like [the JUA] if the most it could recover was the one-foot CATV or telecom rate (old or new)."[35]

Because AT&T is "not required to engage in extended negotiations where the parties apparently are far apart in their analysis of the issues," the Commission's negotiation requirement has been satisfied.[36] But even if there were "any procedural aspect of the rule with which [AT&T] may not have strictly complied," there is "good cause to waive" it given AT&T's "executive-level, pre-Complaint coordination and preview of substantive allegations."[37]

II. DUKE PROGRESS HAS LONG CHARGED AT&T UNJUST AND UNREASONABLE POLE ATTACHMENT RENTAL RATES.

8. The first sentence of Duke Progress's response to paragraph 8 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of the first paragraph of Duke Progress's response to paragraph 8 because AT&T does *not* attach "to DEP's poles on terms and conditions that materially advantage AT&T over DEP's CATV and CLEC licensees" for reasons detailed in Section III.A-B of AT&T's Complaint, Section II.A-B of AT&T's Reply Legal Analysis, and Sections II.A-B this Reply.

AT&T specifically denies that the 5 alleged "advantages" Duke Progress describes as "significant" are net material competitive advantages. *First*, AT&T denies that it has a net material competitive advantage based on the allegation that "DEP has built and maintained, and continues to build and maintain, poles of sufficient height and strength to accommodate AT&T

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[35] Answer ¶ 21.

[36] *Nev. State Cable Tel. Ass'n v. Nev. Bell*, 13 FCC Rcd 16774 (¶¶ 4-6) (1998).

[37] *Verizon Va. v. Va. Elec. and Power Co.*, 32 FCC Rcd 3750, 3764 (¶ 28 n.105) (EB 2017) ("*Dominion Order*"); *see also* Compl. Ex. B at ATT00028-33 (Miller Aff. ¶¶ 10-17); Compl. Ex. C at ATT00037-48 (Peters Aff. ¶¶ 6-26); Reply Ex. A at ATT00359-362 (Rhinehart Reply Aff. ¶¶ 22-26); Reply Ex. B at ATT00376-381 (Miller Reply Aff. ¶¶ 2-9); Reply Ex. C at ATT00387-389 (Peters Reply Aff. ¶¶ 3-5).

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with de minimis make-ready cost to AT&T." The Enforcement Bureau already rejected this argument, finding that an electric utility "did not build its poles just to accommodate AT&T."[38] In addition, Duke Progress's allegation is based entirely on Duke Progress's claim that it installed joint use poles "taller and stronger than necessary to provide electric service,"[39] which is not true,[40] occurred primarily *before* the parties' entered the JUA in 2000,[41] and, regardless, is not a relevant comparison under the Commission's principle of competitive neutrality because AT&T *and* its competitors require Duke Progress's joint use poles.[42] AT&T further states that AT&T and its competitors require materially comparable make-ready when attaching to Duke Progress's poles today.[43] AT&T further notes that the JUA did not require Duke Progress to install 40-foot poles[44] because the JUA permits the use of shorter poles,[45] and Duke Progress points to a 40-foot pole when describing Duke Progress's "typical" construction *without* AT&T or any other third party attached.[46] AT&T also denies this allegation for reasons detailed in Section II.A.3 of AT&T's Reply Legal Analysis and Paragraphs 10, 15, 16, 22, and 25 of this Reply.

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[38] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *see also Potomac Edison Order* at 13-14 (¶ 32).

[39] *See, e.g.*, Answer, Executive Summary at ii.

[40] *See, e.g.*, Reply Ex. C at ATT00390-394 (Peters Reply Aff. ¶¶ 8-13); Reply Ex. F at ATT00457-463 (Dippon Reply Aff. ¶¶ 46-54).

[41] *See* Compl. Ex. B at ATT00027 (Miller Aff. ¶ 7); Compl. Ex. 7 at ATT00201-02 (Historic pole count records).

[42] *See, e.g.*, Reply Ex. C at ATT00390-394 (Peters Reply Aff. ¶¶ 8-13); Reply Ex. F at ATT00462 (Dippon Reply Aff. ¶ 51).

[43] Reply Ex. C at ATT00401-405 (Peters Reply Aff. ¶¶ 28-32); Reply Ex. D at ATT00417-418 (Dalton Reply Aff. ¶ 14); Reply Ex. E at ATT00427-428 (Oakley Reply Aff. ¶ 9).

[44] *See, e.g.*, Answer Ex. A at DEP000131 (Freeburn Decl. ¶ 10).

[45] Compl. Ex. 1 at ATT00094 (JUA, Art. I.K).

[46] Answer Ex. C at DEP000298 (Burlison Decl. ¶ 14).

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Second, AT&T denies that it has a net material competitive advantage based on Duke Progress's allegation that it "contractually agreed that, even in the event of a termination [of the JUA], AT&T can remain attached to DEP's poles" because AT&T's competitors have a statutory right of access to Duke Progress's poles, which means that they can remain attached to Duke Progress's poles even if their license agreements are terminated.[47] AT&T also denies this allegation for reasons detailed in Section II.A.3 of AT&T's Reply Legal Analysis and Paragraphs 10, 15, 21, and 30 of this Reply.

Third, AT&T denies that it has a net material competitive advantage based on Duke Progress's allegations that "AT&T occupies space on DEP poles in a much different way than DEP's CATV and CLEC licensees" and that "AT&T does not occupy one foot of space like CATV and CLEC licensees" because AT&T "installs light-weight copper and fiber optic cables that are comparable in size to the facilities of AT&T's competitors and occupy about the same amount of space across Duke Progress's poles, which is presumed to be 1 foot of space."[48] AT&T states that the parties 1977 joint use agreement, which was superseded by the current JUA, speaks for itself, and denies that its allocation of 3 feet of space to AT&T is relevant when the parties' current JUA does not allocate or reserve to AT&T any specific amount of space.[49] AT&T denies that it occupies, uses, wants, or needs 3 feet of space, or "significantly more" than

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[47] 47 U.S.C. § 224(f); *see also* Answer Ex. E at DEP000329 (Metcalfe Decl. ¶ 9) ("Duke Energy Progress is required by the FCC to provide mandatory access to CLECs and CATVs, but is not required to provide mandatory access to AT&T, which is an ILEC. This represents a fundamental difference between CLECs or CATVs, as compared to ILECs.... ILECs are at a material disadvantage compared to CLECs and CATVs.").

[48] Compl. Ex. C at ATT00046-47 (Peters Aff. ¶ 24); *see also* Reply Ex. C at ATT00398-401 (Peters Reply Aff. ¶¶ 23-26); Reply Ex. D at ATT00418-419 (Dalton Reply Aff. ¶¶ 15-17, 20); Reply Ex. E at ATT00432-433 (Oakley Reply Aff. ¶¶ 11-13 & Ex. O-1).

[49] *See* Compl. Ex. 1 at ATT00091-110 (JUA).

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3 feet of space, across Duke Progress's poles for its existing facilities, for future facilities, or for any other purpose, and states that it cannot sublet space to others.[50] AT&T further states that Duke Progress does not and cannot reserve extra space for AT&T on its poles[51] and that even if space were allocated to AT&T under the JUA (it is not), it would be irrelevant when setting rates under the Commission's rate formulas because they require that rates be set based on "space that is 'actually occupied'" on the pole.[52] AT&T denies that Duke Progress provided any data to substantiate its allegations, let alone data about the space "AT&T is actually occupying" on the pole. Instead, Duke Progress's claim is based on *where* AT&T's facilities are placed on a pole, arguing that AT&T should pay for unoccupied space below its facilities if they are not placed as low as possible on the pole.[53] But Duke Progress does not even have data to corroborate this allegation, as it pairs uncorroborated hearsay about 1,039 poles (0.7% of the Duke Progress's joint use poles) with a presumptive value to manufacture its claim about constructively occupied pole space.[54] AT&T also denies this allegation for reasons detailed in Section II.A.2 and II.A.3

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[50] *See* Reply Ex. C at ATT00401 (Peters Reply Aff. ¶ 27); Reply Ex. D at ATT00418-419, ATT00421 (Dalton Reply Aff. ¶¶ 16-17, 20); Reply Ex. E at ATT00428-430, ATT00432-433 (Oakley Reply Aff. ¶¶ 11-12, 14 & Ex. O-1).

[51] Reply Ex. C at ATT00401 (Peters Reply Aff. ¶ 27); Reply Ex. D at ATT00421 (Dalton Reply Aff. ¶¶ 20); Reply Ex. E at ATT00430, ATT00432-433 (Oakley Reply Aff. ¶ 14 & Ex. O-1); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16053 (¶ 1170) (1996) ("Permitting an incumbent LEC, for example, to reserve space for local exchange service … would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.").

[52] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) (citing authorities).

[53] *See, e.g.*, Reply Ex. F at ATT00444-451 (Dippon Reply Aff. ¶¶ 18-32); *see also* Answer ¶ 12. *But see Potomac Edison Order* at 18 (¶ 37) (rejecting assumption that an ILEC occupies space below its attachments).

[54] *See, e.g.*, Reply Ex. C at ATT00396-397 (Peters Reply Aff. ¶¶ 18-20); Reply Ex. F at ATT00444-451 (Dippon Reply Aff. ¶¶ 18-32); *see also* Answer ¶ 12 & Answer Ex. A at DEP000250-51 (Freeburn Decl. ¶ 13) (stating that [redacted] feet is the difference between the

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of AT&T's Reply Legal Analysis and Paragraphs 10, 12, 15, 18, 22, 24, 25, 31, and 37 of this Reply.

Fourth, AT&T denies that it has a net material competitive advantage based on Duke Progress's allegation that "AT&T is not required to go through DEP's permitting process" before making attachments to Duke Progress's poles. This is not a net benefit because Duke Progress does not have to use a permitting process before attaching to AT&T's poles and there is no evidence that the parties are deploying their facilities in materially different amounts each year.[55] It also is not a competitive benefit because AT&T must collect and compile the same information reflected in Duke Progress's permitting form, must complete the same work before attaching to Duke Progress's poles, and often must wait *longer* than its competitors to begin the work it requires, which delays AT&T's ability to deploy its facilities.[56] In addition, Duke Progress alleges that licensees who use the permitting process pay the "costs … incurred by DEP."[57] Duke Progress does not incur these costs under the JUA because AT&T completes the work at AT&T's cost,[58] so Duke Progress cannot "embed in [AT&T]'s rental rate [these alleged] costs that [Duke Progress] does not incur."[59] AT&T lacks sufficient information to admit or

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"average height of AT&T's highest attachment" on a set of 1,039 unidentified poles and 18 feet, which is the FCC's minimum ground clearance presumption).

[55] *See, e.g.*, Compl. Exs. 2-6 (2011-2019 Invoices); Reply Ex. C at ATT00401-405 (Peters Reply Aff. ¶¶ 28-32); Reply Ex. D at ATT00413 (Dalton Reply Aff. ¶ 5); Reply Ex. E at ATT00426 (Oakley Reply Aff. ¶ 5).

[56] Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 17); Reply Ex. C at ATT00401-405 (Peters Reply Aff. ¶¶ 28-32); Reply Ex. D at ATT00414-15 (Dalton Reply Aff. ¶ 8); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 7).

[57] *See* Answer Ex. A at DEP000254 (Freeburn Decl. ¶ 20).

[58] Reply Ex. C at ATT00401-405 (Peters Reply Aff. ¶¶ 28-32); Reply Ex. D at ATT00413-14 (Dalton Reply Aff. ¶ 6); Reply Ex. E at ATT0042-27 (Oakley Reply Aff. ¶ 6).

[59] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18 & n.67); *see also* Reply Ex. F at ATT00468 (Dippon Reply Aff. ¶ 63).

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deny the allegation that "DEP's CATV and CLEC licensees must fully comply" with Duke Progress's permitting requirements because Duke Progress has not corroborated its allegations or produced a complete set of its approximately 50 license agreements. AT&T also denies this allegation for reasons detailed in Section III.A.2 of AT&T's Complaint, Section II.A.3 of AT&T's Reply Legal Analysis, and Paragraphs 10 and 17 of this Reply.

Fifth, AT&T denies that it has a net material competitive advantage based on Duke Progress's allegation that AT&T pays scheduled (or "tabulated") costs under the JUA instead of "the actual cost of make-ready work." The JUA states that the scheduled costs *are* "the costs" to perform the relevant work.[60] Moreover, the JUA provides for the costs to be updated annually to reflect cost trends and authorizes "actual cost" billing should a party refuse a request to update the cost schedules.[61] The scheduled costs, therefore, are not "lower" or "significantly lower" than the "actual cost of make-ready work" for reasons further detailed in Section III.A.2 of AT&T's Complaint, Section II.A.3 of AT&T's Reply Legal Analysis, and Paragraphs 3, 10, 15, 17 and 20 of this Reply.[62]

AT&T denies the second paragraph of Duke Progress's response to paragraph 8 because the new telecom rate *does* apply to AT&T's use of Duke Progress's poles[63] and Duke Progress *has* continued to charge AT&T pole attachment rates significantly higher than the new telecom rates that apply to AT&T's similarly situated competitors, as the following table shows:

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[60] *See* Compl. Ex. 1 at ATT00096-100 (JUA, Art. VII); *see also* Reply Ex. C at ATT00406 (Peters Reply Aff. ¶¶ 33-34).

[61] *See* Compl. Ex. 1 at ATT00096-100 (JUA, Art. VII); *see also* Reply Ex. C at ATT00406 (Peters Reply Aff. ¶¶ 33-34).

[62] *See also* Reply Ex. D at ATT00415-16 (Dalton Reply Aff. ¶¶ 9-10); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8).

[63] *See* Compl.; Reply Legal Analysis; Reply.

Comparison of per-pole rates[64]	2017	2018	2019
Properly calculated new telecom rate	$7.16	$7.30	$7.84
Rate Duke Progress charged AT&T	[redacted]	[redacted]	[redacted]

AT&T also denies Duke Progress's allegation that the Commission should charge a new telecom rate on a "per foot" basis "to avoid discriminatory effect on CATV licensees" because doing so would be contrary to Commission precedent. The Commission's new telecom rate formula (which applies to cable providers providing telecommunications services) and its cable rate formula (which applies to cable providers providing cable services) produce "per pole" rates, and not "per foot" rates.[65] In addition, the Commission rejected use of the cable rate formula as the comparable rate for competitive neutrality purposes when it incorporated the new telecom rate formula into its ILEC rate rule.[66] This is not the appropriate place to reconsider that decision.[67]

With respect to the last two sentences of the second paragraph of Duke Progress's response to paragraph 8, AT&T admits it sent Duke Progress a letter dated May 22, 2019 requesting the just and reasonable rates required by law, but denies that the letter was Duke Progress's first notice that the JUA rates are unjust and unreasonable, as Duke Progress's parent company was an active participate in the rulemakings that resulted in the 2011 *Pole Attachment*

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[64] *See* Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1); Compl. Ex. B at ATT00028 (Miller Aff. ¶ 8); Reply Ex. A at ATT00348, ATT00368 (Rhinehart Reply Aff. ¶ 4 & Ex. R-5).

[65] *See* 47 C.F.R. § 1.1406(d); *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12122 (¶ 31) (2001) ("*Consolidated Partial Order*"); *id.* at 12173-74 (App'x D-1, D-2) (showing calculation of "maximum rate per pole" under cable formula); *see also* Reply Ex. A at ATT00347-349 (Rhinehart Reply Aff. ¶¶ 3-5); Reply Ex. F at ATT00445 (Dippon Reply Aff. ¶ 20).

[66] *See* 47 C.F.R. § 1.1413(b).

[67] *See In the Matter of Improving Pub. Safety Commcns in the 800 Mhz Band New 800 Mhz Band Plan for Puerto Rico & the U.S. Virgin Islands*, 26 FCC Rcd 1058, 1063 (¶¶ 12-13) (2011).

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Order and the 2018 *Third Report and Order*. AT&T further denies that the timing of its request for just and reasonable rates is relevant to Duke Progress's obligation to comply to the law, and notes that the Commission expressly "decline[d] the invitation … to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge."[68] With respect to Duke Progress's reliance on JUA Article XIII.D, which states that "[e]ither party may make a request for review of the pricing methodology and the costs set forth in the Exhibits to this Agreement no sooner than at five (5) year intervals," AT&T states that the JUA speaks for itself and denies that the JUA rental rate formula at Article XIII.C is a "pricing methodology [or] cost[ ] set forth in the Exhibits" to the JUA.[69]

9. The first sentence of Duke Progress's response to paragraph 9 admits the existence of the Commission's new telecom rate presumption, so no response is required. AT&T denies the second sentence of Duke Progress's Answer to paragraph 9 because the JUA is a pole attachment contract that governs each party's attachments to the other party's poles[70] that automatically renewed and extended after March 11, 2019 for reasons detailed in Section III.A.1 of AT&T's Complaint, Section II.A.1 of AT&T's Reply Legal Analysis, and Paragraph 3 of this Reply. With respect to the third, fourth, and fifth sentences of Duke Progress's Answer to paragraph 9, AT&T states that the JUA speaks for itself and admits the JUA contains the quoted language.[71] With respect to the sixth sentence of Duke Progress's Answer to paragraph 9, AT&T admits that neither party has terminated the agreement. The last sentence of the first

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[68] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

[69] Compl. Ex. 1 at ATT00102, ATT00108-110 (JUA, Art. XIII.D & Exs. B-D).

[70] *See* Compl. Ex. 1 at ATT00091-110 (JUA).

[71] *See* Compl. Ex. 1 at ATT00091, ATT000104 (JUA, Cover Page & Art. XVII).

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paragraph of Duke Progress's response to paragraph 9 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

AT&T denies the first 3 sentences of the second paragraph of Duke Progress's response to paragraph 9 because Duke Progress did not offer "numerous valid reasons to retain the existing cost-sharing relationship" during the parties' executive level meetings because there is no "valid reason" under the Commission's regulations to charge AT&T [redacted] per pole rates that average over [redacted] times the presumptive new telecom rate and [redacted] times the "hard cap" set by the pre-existing telecom formula.[72] AT&T also denies Duke Progress has identified "actual, quantifiable competitive advantages" because it instead has relied on hypotheticals and theories already rejected by the Commission and Enforcement Bureau for reasons detailed in Section III.A.2 of AT&T's Complaint, Section II.A.2-3 of AT&T's Reply Legal Analysis, and Paragraphs 8, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 24, 25, 28, 29, 30, 31, 37 of this Reply. AT&T admits upon information and belief that Duke Progress did not "endeavor[ ] to perform any kind of precise economic quantification of those competitive advantages" during the parties' negotiations and states that Duke Progress's refusal to do so prior to an FCC pole attachment complaint proceeding establishes that Duke Progress made no attempt to comply with the Commission's 2011 *Pole Attachment Order* or the 2018 *Third Report and Order*, had no legal basis for invoicing the rental rates it charged AT&T, and thwarted the Commission's effort to

[72] 47 C.F.R. § 1.1413(b); *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); *see also* Compl. Ex. A at ATT00007, ATT00009-10, ATT00013-14 (Rhinehart Aff. ¶¶ 11-12, 17-18 & Ex. R-1); Reply Ex. A at ATT00348-349, ATT00368 (Rhinehart Reply Aff. ¶¶ 4-5 & Ex. R-5); Reply Ex. F at ATT00436-437, ATT00475 (Dippon Reply Aff. ¶¶ 3-5, Conclusion).

"'reduce the number of disputes' regarding pole attachment rates" by "'enabl[ing] *better informed* pole attachment negotiations.'"[73]

AT&T denies the first five sentences of the third paragraph of Duke Progress's response to paragraph 9 because AT&T did not refuse to negotiate or insist on Duke Progress's "entire 'case in chief'" during negotiations; instead, AT&T negotiated in good faith, sought relevant information to make the negotiations more efficient, and repeatedly asked Duke Progress to at least make the settlement offer it promised, but did not provide until 10 months later after this case was filed.[74] AT&T denies that "good faith negotiation demands more" than the good faith that AT&T devoted to the negotiations, denies that AT&T lacked "a level of vision and intellectual honesty" or that ignoring relevant FCC precedent as Duke Progress requested would be consistent with such, and denies that AT&T was somehow not "intellectually honest or efficient" when it asked to negotiate within the framework established by the Commission's new telecom rate presumption and applicable Commission orders.[75] AT&T further denies that it was dishonest in stating that "DEP offered no valid basis to rebut the presumption" during the executive-level meetings because Duke Progress did not then, and still has not, offered a valid basis to rebut the presumption for reasons detailed in Section III.A.2 of AT&T's Complaint, Section II.A.2-3 of AT&T's Reply Legal Analysis, and this Reply. AT&T further notes that the

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[73] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129) (emphasis added) (citation omitted) (emphasis added); *see also* Reply Ex. B at ATT00376-380 (Miller Reply Aff. ¶¶ 3-7).

[74] *See* Compl. Ex. B at ATT00029-33 (Miller Aff. ¶¶ 11-17); Reply Ex. A at ATT00359-362 (Rhinehart Reply Aff. ¶¶ 22-26); Reply Ex. B at ATT00376-380 (Miller Reply Aff. ¶¶ 3-7); Reply Ex. C at ATT00387-389 (Peters Reply Aff. ¶¶ 3-5); *see also, e.g.*, Compl. Ex. 17 at ATT00230-232 (Emails between D. Miller, AT&T and S. Freeburn, Duke (Jan. 30-Feb. 18, 2020)).

[75] *See* Compl. Ex. B at ATT00029-33 (Miller Aff. ¶¶ 11-17); Reply Ex. A at ATT ATT00359-362 (Rhinehart Reply Aff. ¶¶ 22-26); Reply Ex. B at ATT00376-380 (Miller Reply Aff. ¶¶ 3-7); Reply Ex. C at ATT00387-389 (Peters Reply Aff. ¶¶ 3-5).

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third paragraph of Duke Progress's response to paragraph 9 is conclusory and unsupported,[76] and that the 2 Duke Progress executives who participated in the parties' executive level meetings do not allege "bad faith" in their declarations.[77] The last sentence of Duke Progress's response to paragraph 9 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

A. AT&T Is Entitled To The New Telecom Rental Rate Under The Commission's 2018 *Third Report And Order.*

10. With respect to the first sentence of Duke Progress's response to paragraph 10, AT&T admits "that, under the Commission's rules, similarly situated attachers should pay similar pole attachment rates for comparable access," but denies that Duke Progress has shown that AT&T is not "similarly situated to the attaching entities who pay the new telecom rate for attachments to DEP's poles" with clear and convincing evidence of net material competitive advantages sufficient to rebut the new telecom rate presumption for reasons detailed in Section III.A.2 of AT&T's Complaint, Section II.A.2-3 of AT&T's Reply Legal Analysis, and this Reply. AT&T denies the second sentence of Duke Progress's response to paragraph 10, which contains allegations that are substantially similar or identical to allegations in Duke Progress's responses to paragraphs 8, 10, 12, 15, 16, 17, 18, 21, 22, 24, 25, 30, 31, 37, and AT&T hereby incorporates its response to those allegations. AT&T further denies that AT&T's competitors bear any "risk of displacement" from Duke Progress's poles; as Duke Progress's witness explains, "Duke Energy Progress is required by the FCC to provide mandatory access to CLECs and CATVs," which is "a fundamental difference" that sets "ILECs … at a material disadvantage

[76] *In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

[77] *See* Answer Ex. A (Freeburn Decl.); Answer Ex. B (Hatcher Decl.).

compared to CLECs and CATVs."[78] AT&T denies that AT&T does not incur costs by performing work itself that other attachers pay Duke Progress to perform on their behalf during Duke Progress's permitting process because in performing that work, AT&T incurs costs comparable to its competitors.[79] The third sentence of the first paragraph of Duke Progress's response to paragraph 10 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

AT&T denies the rest of Duke Progress's response to paragraph 10 because it does not respond to the allegations of paragraph 10, but to the extent a response is required, AT&T denies that the JUA requires AT&T to own a certain percentage of the joint use poles[80] and denies that AT&T's annual "rental" payment to Duke Progress would be $0 if AT&T owned approximately [redacted]% of the joint use poles. Instead, if AT&T owned more poles, AT&T would pay lower *net* rent because it would pay rent on fewer poles, but AT&T would still pay a [redacted] + JUA per pole rate that is unjust and unreasonable and overcompensates Duke Progress.

With respect to the first two sentences of the second paragraph of Duke Progress's response to paragraph 10, AT&T denies that the "preceding joint use agreement (executed in 1977)" is relevant because it was superseded by the current JUA, which was executed in 2000[81] and states that the superseded JUA speaks for itself. AT&T lacks sufficient information to admit or deny the subjective reason for the parties' agreement to a different rental provision in 2000,

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[78] Answer Ex. E at DEP000329 (Metcalfe Decl. ¶ 9).

[79] Compl. Ex. ATT00043-44 (Peters Aff. ¶ 17); Reply Ex. C at ATT00401-405 (Peters Reply Aff. ¶¶ 28-32); Reply Ex. D at ATT00413-14 (Dalton Reply Aff. ¶ 6); Reply Ex. E at ATT00426-27 (Oakley Reply Aff. ¶ 6).

[80] *See* Compl. Ex. 1 at ATT00091-110 (JUA).

[81] *Id.* at ATT00093.

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but states that the JUA speaks for itself and denies that it includes the [redacted] figure that Duke Progress cites.[82] AT&T also denies Duke Progress's unsupported allegation that the cost provision of the JUA (or the superseded JUA) is "economically no different" than a pole ownership requirement or that "AT&T could not complain" about the JUA's rate provision—however described—because it has required AT&T to pay [redacted]% of Duke Progress's pole costs even though AT&T's competitors pay a new telecom rate for comparable space that covers 7.4% of Duke Progress's pole costs and is fully compensatory to Duke Progress.[83] AT&T further states that Duke Progress's response to paragraph 10 repeats arguments the Commission has considered and rejected, finding that ILECs are presumptively entitled to a new telecom rate, in part, because ILECs own fewer poles.[84] This is not the appropriate place to reconsider that decision.[85]

AT&T denies the last sentence of Duke Progress's response to paragraph 10, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 4 and 35, and AT&T hereby incorporates its response to those

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[82] *See id.* at ATT00102 (JUA, Art. XIII.C).

[83] *See, e.g.*, Compl. Ex. D at ATT00062, ATT00065-69 (Dippon Aff. ¶¶ 23, 29-35).

[84] *See Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) ("We are convinced by the record evidence showing that … incumbent LEC pole ownership has declined"); *Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206) ("aggregate incumbent LEC pole ownership has diminished relative to that of electric utilities"). Duke Progress has tried unsuccessfully to recharacterize joint use agreements for nearly a decade in its effort to avoid the Commission's rate reforms. *See, e.g.*, Reply Brief of Petitioners at 16, *Am. Elec. Power Serv. Co. v. FCC*, No. 11-1146 (D.C. Cir. Apr. 9, 2012) (arguing that "joint use agreements … are infrastructure cost sharing agreements").

[85] *See In the Matter of Improving Pub. Safety Commcns in the 800 Mhz Band New 800 Mhz Band Plan for Puerto Rico & the U.S. Virgin Islands*, 26 FCC Rcd 1058, 1063 (¶¶ 12-13) (2011).

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allegations. As the Enforcement Bureau recently held, a request for forbearance in this context "is without merit."[86]

1. The New Telecom Rate Presumption Applies, But Duke Progress Charges AT&T Rates That Are Far Higher.

11. AT&T denies the first sentence of Duke Progress's response to paragraph 11, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 3, 9, 21, and 38, and AT&T hereby incorporates its response to those allegations. With respect to the remaining allegations in the first paragraph of Duke Progress's response to paragraph 11, AT&T states that the JUA speaks for itself and denies that the JUA has an "initial (and only) term" because it has instead renewed automatically since its execution and will continue to do so unless and until either party provides one year's written notice.[87] For the same reason, AT&T denies Duke Progress's allegation that the JUA is unable to renew.[88] AT&T also denies that a "renewal" for purposes of the new telecom rate presumption requires the parties to take some affirmative action because the Commission instead applied the presumption to agreements "that are *automatically* renewed, extended, or placed in evergreen status."[89] AT&T denies that the JUA cannot be "placed in evergreen status" *because* it includes an "evergreen" provision.[90] To the contrary, the Commission found that joint use agreements *can* be placed in evergreen status where the agreement may be "terminated and the

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[86] *FPL 2020 Order*, 35 FCC Rcd at 5331-32 (¶ 19).

[87] *See* Compl. Ex. 1 at ATT00104 (JUA, Art. XVII).

[88] *See* Compl. ¶ 11 & n.18 ("Renew" means to "repeat so as to reaffirm" or "begin again") (citations omitted).

[89] *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123); *see also Potomac Edison Order* at 7-8 (¶ 17).

[90] *See* Answer ¶¶ 11, 21, 27 (arguing that the presumption should not apply because the JUA includes an evergreen provision).

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parties [will] continue to operate under an 'evergreen' clause," meaning a clause that gives "electric utilities … no right to demand removal of attachments upon termination."[91]

AT&T denies the third paragraph of Duke Progress's response to paragraph 11, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 3, 9, 21, and 38, and AT&T hereby incorporates its response to those allegations. AT&T denies that it "can remove its facilities from any or all of those 148,000 [Duke Progress] poles whenever it chooses" because, "as 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.'"[92] AT&T denies that the new telecom presumption does not apply to existing poles because the Commission found instead that the new telecom rate presumption *would* "impact privately-negotiated agreements."[93] AT&T also denies that the new telecom rate presumption "would be tantamount to forced access at regulated rates" contrary to the absence of a right of access for ILECs in the Pole Attachment Act because the Commission rejected this argument also, finding that "[a]lthough incumbent LECs have no right of access to utilities' poles pursuant to section 224(f)(1) of the Act, … where incumbent LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)."[94] AT&T denies that Duke Progress made any offer at the parties' executive level meetings, let alone an offer to provide new telecom rates for AT&T's

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[91] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475); *see also* Compl. Ex. 1 at ATT00104 (JUA, Art. XVII).

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

[93] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475); *see also id.* (¶ 127 & n.479) (rejecting argument "that we should not apply the presumption to existing agreements").

[94] *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202).

attachments.[95] Duke Progress's subsequent settlement offer [redacted].[96] The last sentence of Duke Progress's response to paragraph 11 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

12. Duke Progress's response to paragraph 12 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies the first sentence of Duke Progress's response to paragraph 12 because AT&T is entitled to a new telecom "'rate determined in accordance with Commission rule 1.1406(d)(2)' under the law and facts of this case" for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply. AT&T denies second sentence of Duke Progress's response to paragraph 12 because AT&T properly calculated the applicable new telecom rates that apply to CLECs and cable companies providing telecommunications services for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and in the supporting Affidavits of Daniel P. Rhinehart. With respect to the third and fourth sentences of Duke Progress's response to paragraph 12, Duke Progress admits AT&T has correctly stated the JUA rates, so no response is required, but AT&T denies that Duke Progress properly calculated the new telecom rates that apply to CLECs and cable companies providing telecommunications services for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and in the supporting Affidavits of Daniel P. Rhinehart. AT&T notes that, even under Duke Progress's erroneous rate calculations, Duke Progress admits it charged AT&T JUA rates averaging more than [redacted] times

[95] *See* Compl. Ex. B at ATT00029-33 (Miller Aff. ¶¶ 11-17); Reply Ex. B at ATT00376, ATT00378 (Miller Reply Aff. ¶¶ 2, 5 n.10); Reply Ex. C at ATT00387-389 (Peters Reply Aff. ¶¶ 3-5).

[96] Answer Ex. 4 at DEP000176.

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the rates it charged CLECs and cable companies for use of comparable space on Duke Progress's poles:

Comparison of per-pole rates[97]	2017	2018	2019
Properly calculated new telecom rate	$7.16	$7.30	$7.84
Duke Progress's "CATV" rate	[redacted]	[redacted]	[redacted]
Duke Progress's "CLEC" rate	[redacted]	[redacted]	[redacted]
Rate Duke Progress charged AT&T	[redacted]	[redacted]	[redacted]

With respect to the remaining sentences of the first paragraph of Duke Progress's response to paragraph 12 (following the table), AT&T denies Duke Progress's unsupported allegation that AT&T's facilities occupy "significantly more space" on Duke Progress's poles "than the one foot occupied by CATV and CLEC licensees" for reasons detailed in Section II.A.2 of AT&T's Reply Legal Analysis and Paragraphs 8, 10, 15, 18, 22, 24, 25, 31, and 37 of this Reply[98] and because Duke Progress provided *no* data about the space actually occupied by AT&T *or* by AT&T's competitors to permit this comparison.[99] AT&T admits the "preceding joint use agreement" allocated 3 feet of space to AT&T, but states that the agreement was superseded by the current JUA, which does not allocate any particular amount of space to AT&T.[100] AT&T further denies that the space allocated by any agreement is relevant to the

[97] *See* Answer ¶ 12 (listing "CATV" and "CLEC" rates, although by regulation the new telecom rate applies to both CLECs and cable companies providing telecommunications services, *see* 47 C.F.R. § 1.1406(d)(2)); *see also* Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1); Compl. Ex. B at ATT00028 (Miller Aff. ¶ 8); Reply Ex. A at ATT00348, ATT00368 (Rhinehart Reply Aff. ¶ 4 & Ex. R-5).

[98] *See also* Compl. Ex. C at ATT00046-47 (Peters Aff. ¶ 24); Reply Ex. C at ATT0000394-401 (Peters Reply Aff. ¶¶ 14-27); Reply Ex. D at ATT00418-22 (Dalton Reply Aff. ¶¶ 15-22); Reply Ex. E at ATT00428-30, ATT00432-33 (Oakley Reply Aff. ¶¶ 11-14 & Ex. O-1).

[99] *In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

[100] Compl. Ex. 1 at ATT00091-110 (JUA).

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FCC's rate formulas, which are based on "space occupied" (not merely allocated).[101] AT&T further states that Duke Progress does not and cannot reserve space for AT&T additional to the space AT&T actually occupies on its poles, which is presumed to be 1 foot.[102]

AT&T denies that field data shows that AT&T "actually currently occupies, on average, at least [redacted] feet of space on DEP's poles" for reasons detailed in Section II.A.2 of AT&T's Reply Legal Analysis and Paragraphs 8, 10, 15, 18, 22, 24, 25, 31, and 37 of this Reply.[103] Duke Progress provided no field data to substantiate its claim, and admits its unsupported allegation does not involve a measurement taken on *any* pole. Rather, Duke Progress pairs hearsay from an unnamed contractor that AT&T's "highest attachment" averaged [redacted] feet above ground on 1,039 unidentified poles (0.7% of the 148,064 Duke Progress poles to which AT&T is attached) with a presumption that the minimum ground clearance for poles is 18 feet.[104] But minimum ground clearance is highly variable and does *not* necessarily reflect the "lowest point of attachment" given topographical variations particularly in the parties' mountainous serving

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[101] 47 C.F.R. § 1.1406(d).

[102] Compl. Ex. C at ATT00046-47 (Peters Aff. ¶ 24); *see also* Reply Ex. C at ATT00401 (Peters Reply Aff. ¶ 27); Reply Ex. D at ATT00421 (Dalton Reply Aff. ¶ 20); Reply Ex. E at ATT00430, ATT00432-33 (Oakley Reply Aff. ¶ 14 & Ex. O-1); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16053 (¶ 1170) (1996) ("Permitting an incumbent LEC, for example, to reserve space for local exchange service … would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.").

[103] *See also* Compl. Ex. C at ATT00046-47 (Peters Aff. ¶ 24); Reply Ex. C at ATT00396-397 (Peters Reply Aff. ¶¶ 18-20); Reply Ex. F at ATT00444-451 (Dippon Reply Aff. ¶¶ 18-32).

[104] Answer ¶ 12 & n.36 ([redacted] – 18 = [redacted]); Answer Ex. A at DEP000250-51 (Freeburn Decl. ¶ 13).

areas,[105] rendering Duke Progress's calculation unreliable as well as hypothetical and insufficient to rebut the Commission's 1-foot space occupied presumption.[106]

AT&T further notes that Duke Progress admits it is *not* asserting that AT&T's physical attachment occupies [redacted] feet of space on a pole, but that Duke Progress instead seeks to assign AT&T unoccupied space *below* AT&T's attachment based on the factually incorrect claim that other communications attachers cannot attach below AT&T's facilities.[107] The measurement is therefore irrelevant for rate-setting purposes because "under the Commission's rate formula, 'space occupied' means space that is 'actually occupied'" on a pole[108] and AT&T by definition does not occupy unoccupied space below its facilities.[109]

AT&T denies the first sentence of the second paragraph of Duke Progress's response to paragraph 12 and footnote 38 because, as the Enforcement Bureau recently reaffirmed, AT&T is not the cost-causer of the safety space on Duke Progress's poles because the safety "space is

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[105] *See* Reply Ex. C at ATT00397 (Peters Reply Aff. ¶ 20); Reply Ex. D at ATT00419-20 (Dalton Reply Aff. ¶ 18); Reply Ex. E at ATT00429 (Oakley Reply Aff. ¶ 12). The Commission did not, as DEP alleges, "presume[ ] that the lowest point of attachment is at 18 feet." Instead, as DEP's footnote concedes, the Commission presumed "an average of 18 feet for minimum ground clearance." *See In Re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6468 (¶ 23) (2000).

[106] 47 C.F.R. § 1.1410; *see also Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19866 (¶ 18) (2002); Reply Ex. A at ATT00353-354 (Rhinehart Reply Aff. ¶ 13); Reply Ex. C at ATT00397 (Peters Reply Aff. ¶ 20); Reply Ex. D at ATT00419-20 (Dalton Reply Aff. ¶¶ 17-18); Reply Ex. E at ATT00429 (Oakley Reply Aff. ¶ 12); Reply Ex. F at ATT00447 (Dippon Reply Aff. ¶ 24).

[107] *See* Answer Ex. A at DEP000248 (Freeburn Decl. ¶ 9). *But see* Answer Ex. C at DEP000300 (Burlison Decl. ¶ 17) (admitting there are communications facilities below AT&T's facilities); Compl. Ex. C at ATT00045 (Peters Aff. ¶ 20); Reply Ex. C at ATT00395-396 (Peters Reply Aff. ¶¶ 16-17).

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

[109] *Potomac Edison Order* at 18 (¶ 37) (rejecting assumption that an ILEC occupies space below its attachments).

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usable and used by the electric utilities."[110] AT&T denies the second sentence of the second paragraph because AT&T is not "actually or constructively occupying approximately [redacted] feet of space on joint use poles owned by DEP," because these allegations are dependent on Duke Progress's unsupported attempt to assign AT&T space that AT&T does not "actually occupy" on Duke Progress's poles for reasons detailed in Section II.A.2 of AT&T's Reply Legal Analysis and Paragraphs 8, 10, 12, 15, 18, 22, 24, 25, 31, and 37 of this Reply.[111] AT&T denies the third and fourth sentences of the second paragraph of Duke Progress's response to paragraph 12 and footnote 39, which contain allegations that are substantially similar or identical to allegations in Duke Progress's responses to paragraphs 8, and AT&T hereby incorporates its response to those allegations. AT&T denies that new telecom rates can lawfully be "multiplied" by the amount of space occupied even if there were valid survey data (which there is not) because the new telecom formula includes a "space occupied" input that must instead be used to derive a "per pole" rate, not a "per foot" rate.[112] AT&T denies that the JUA rate "is significantly less than what a CATV or CLEC would have paid for the same burden on the pole" or is not "excessively and unreasonably high" because the JUA rates have averaged over [redacted] times the rates Duke Progress claims to have charged CLECs and cable companies for comparable space as follows:

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[110] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); *see also* Reply Ex. C at ATT00395 (Peters Reply Aff. ¶ 15).

[111] *See also* Compl. Ex. C at ATT00046-47 (Peters Aff. ¶ 24); Reply Ex. C at ATT00394-401 (Peters Reply Aff. ¶¶ 14-27); Reply Ex. F at ATT00444-451 (Dippon Reply Aff. ¶¶ 18-32).

[112] Reply Ex. A at ATT00355-357 (Rhinehart Reply Aff. ¶¶ 15-17); Reply Ex. F at ATT00445 (Dippon Reply Aff. ¶ 20); 47 C.F.R. § 1.1410; *Teleport Commc'ns Atlanta, Inc.*, 17 FCC Rcd at 19869 (¶ 25).

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Comparison of per-pole rates[113]	2017	2018	2019
"CATV" rate Duke Progress charged	[redacted]	[redacted]	[redacted]
"CLEC" rate Duke Progress charged	[redacted]	[redacted]	[redacted]
Rate Duke Progress charged AT&T	[redacted]	[redacted]	[redacted]

AT&T denies the next-to-last sentence of Duke Progress's response to paragraph 12, which contains a conclusory allegation that is substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22, 24, 25, 28, 29, 30, 31, 37, and AT&T hereby incorporates its response to those allegations. The last sentence of Duke Progress's response to paragraph 12 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

2. AT&T Is Entitled To The New Telecom Rate Because Duke Progress Cannot Rebut The Presumption.

13. In the first paragraph of its response to paragraph 13, Duke Progress admits the new telecom rate presumption is rebuttable and admits the Commission's regulation requires an electric utility to provide clear and convincing evidence that it provides an ILEC net material competitive benefits under the JUA to rebut the presumption, so no response is required. AT&T denies the second sentence of Duke Progress's response to paragraph 13 because Duke Progress has not rebutted, and cannot rebut, the new telecom rate presumption with "the clear language of the [JUA]" since the relevant standard requires a comparison of the JUA with the terms and

[113] *See* Answer ¶ 12 (listing "CATV" and "CLEC" rates, although by regulation the new telecom rate applies to both CLECs and cable companies providing telecommunications services, *see* 47 C.F.R. § 1.1406(d)(2)); *see also* Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1); Compl. Ex. B at ATT00028 (Miller Aff. ¶ 8); Reply Ex. A at ATT00348, ATT00368 (Rhinehart Reply Aff. ¶ 4 & Ex. R-5).

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conditions of Duke Progress's license agreements with AT&T's competitors.[114] AT&T denies the third and fifth sentences of Duke Progress's response to paragraph 13 because Duke Progress's witnesses have not provided actual verifiable data from the field, testimony, or an economic evaluation that rebuts the presumption or even a complete set of license agreements, for reasons detailed in Section II.A.3 of AT&T's Reply Legal Analysis. AT&T denies the fourth sentence and footnote 42 to the extent they seek to limit the applicability of the new telecom rate presumption to only a portion of this case because the presumptions adopted in the 2018 *Third Report and Order* apply to the entirety of a pole attachment complaint proceeding (and not just to the post-March 11, 2019 time period) if the proceeding involves a "pole attachment contract [that was] entered into or renewed after" March 11, 2019,[115] including agreements that, like the JUA, "automatically renewed [or] extended."[116] AT&T further denies footnote 42 because ILECs do not have the sole burden under the standard adopted in the 2011 *Pole Attachment Order*; rather, the burden shifts to the electric utility to justify its rates once an ILEC makes a *prima facie* case of their unreasonableness as AT&T did here, for reasons detailed in Section III.B of AT&T's Complaint, Section II.B of AT&T's Reply Legal Analysis, and this Reply.[117] AT&T denies the last sentence of Duke Progress's response to paragraph 13 because the Commission has not yet found *net material* competitive benefits in any complaint proceeding,

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[114] *See, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7770-71 (¶ 128); *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶¶ 217-18).

[115] 47 C.F.R. § 1.1413(b).

[116] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475); *see also* Reply Legal Analysis § II.A.1.

[117] *See also Dominion Order*, 32 FCC Rcd at 3759-61 (¶¶ 20-22) (requiring electric utility to justify its rates under the standard adopted in 2011); *Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co.*, 11 FCC Rcd 11202, 11207 (¶ 11) (1996) ("A *prima facie* case is established by "a statement of the specific unreasonable pole attachment rate, term or condition and all arguments used to support its claim of unreasonableness.").

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and Duke Progress instead quotes only the finding of "benefits" (not net material benefits) in 2 interim decisions and omits a third decision where the Enforcement Bureau rejected the electric utility's allegations.[118] AT&T denies the rest of Duke Progress's response to paragraph 13, which contains conclusory allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 24, 25, 28, 29, 30, 31, 37, and AT&T hereby incorporates its response to those allegations.

14. The first sentence of Duke Progress's response to paragraph 14 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. The rest of the first paragraph of Duke Progress's response to paragraph 14 contain legal conclusions to which no response is required. To the extent a response is required, AT&T states that the 2011 *Pole Attachment Order* speaks for itself and denies that the Commission acknowledged "the many benefits to ILECs under joint use agreements" or found that "giving ILECs the same one-foot rate paid by CATVs and CLECs would give ILECs an unfair advantage"—allegations that are the exact opposite of the presumptions adopted in 2018[119] and the Commission's decision in 2011 that an ILEC must be charged "*the same rate* as the comparable provider" if an electric utility does not provide the ILEC a net material competitive advantage under a JUA as compared to its license agreements.[120] AT&T further states that the Commission in 2011 and 2018 simply noted that electric utilities alleged that competitive benefits exist and reserved decision by providing

[118] *See Dominion Order*, 32 FCC Rcd at 3757-61 (¶¶ 15-22).

[119] 47 C.F.R. § 1.1413(b).

[120] *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217).

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electric utilities an opportunity to prove their allegations on a case-by-case basis in negotiations or pole attachment complaint proceedings.[121]

AT&T denies the second paragraph of Duke Progress's response to paragraph 14 because it conflicts with precedent establishing that, where an ILEC incurs costs "by performing the work itself," an electric utility "may not justify charging higher rates" based on costs it does not incur.[122] AT&T denies that the Commission's precedent is "incorrect" even if cable companies and CLECs perform some of their own work themselves (a speculative and unsupported allegation)[123] because an electric utility still has no cost-based reason to charge an ILEC for work the electric utility does not perform for the ILEC.[124] AT&T also denies that Duke Progress performs inspection work for AT&T under the JUA.[125] Duke Progress is not contractually obligated and does not need to perform any inspection work for AT&T under the JUA, so AT&T cannot be materially advantaged *by the JUA* if Duke Progress unilaterally decides to perform such work.[126] AT&T denies the last two sentences of the second paragraph of Duke Progress's response to paragraph 14 because the Commission *has* decided that internal costs incurred by an

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[121] *See, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7770 ("To the extent [I]LECs receive net benefits distinct from those given to other telecommunications attachers, a utility may rebut the presumption."); *Pole Attachment Order*, 26 FCC Rcd at 5334 (¶ 214) ("We therefore … find[ ] it more appropriate to proceed on a case-by-case basis").

[122] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18 & n.67).

[123] *In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

[124] *See id.* at 3759 (¶ 18 n.67) (requiring electric utility to prove it incurred "costs that Verizon has not covered").

[125] *See, e.g.*, Reply Ex. C at ATT00402-403 (Peters Reply Aff. ¶ 29); Reply Ex. D at ATT00414 (Dalton Reply Aff. ¶ 7); Reply Ex. E at ATT00426-27 (Oakley Reply Aff. ¶ 6).

[126] Reply Ex. C at ATT00402-403 (Peters Reply Aff. ¶ 29); Reply Ex. D at ATT00414 (Dalton Reply Aff. ¶ 7); Reply Ex. E at ATT00426-27 (Oakley Reply Aff. ¶ 6). It is not clear what uncompensated work Duke Progress claims to perform for AT&T, particularly when it admits that it does not perform inspections out of "deference" to ILECs. Answer ¶ 14.

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ILEC to complete work *are relevant* when determining a competitively neutral, just and reasonable rate.[127]

In the last paragraph of Duke Progress's response to paragraph 14, Duke Progress admits the JUA imposes "certain burdens" on AT&T "that differ from those in a CATV or CLEC license agreement," so no response is required. AT&T otherwise denies the last paragraph of Duke Progress's response to paragraph 14 because some reciprocal JUA terms have an equal effect on Duke Progress and AT&T irrespective of pole ownership numbers (such as a provision that applies to each facility a company has on a joint use pole) and others disproportionally *burden* AT&T given the parties' relative pole ownership numbers (such as a provision permitting termination of future joint use).[128] AT&T denies the rest of the last paragraph of Duke Progress's response to paragraph 14, which contains general and conclusory allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 10 and 25, and AT&T hereby incorporates its response to those allegations.

15. AT&T denies Duke Progress's response to paragraph 15, which contains conclusory allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 9, 10, 12, 15, 16, 17, 18, 21, 22, 24, 25, 28, 30, 31 and 37, and AT&T hereby incorporates its response to those allegations. AT&T also denies Mr. Metcalfe's alleged quantifications, which are hypothetical, inflated, and relate to allegations that are not competitive benefits for reasons detailed in Section III.A.2 of AT&T's Complaint, Section II.A.3 of AT&T's

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[127] *See Potomac Edison Order* at 14 (¶ 32); *see also FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

[128] *See* Reply Ex. C at ATT00388 (Peters Reply Aff. ¶ 4); Reply Ex. F at ATT00473-474 (Dippon Reply Aff. ¶¶ 73-74).

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Reply Legal Analysis, and this Reply.[129] AT&T also denies Duke Progress's allegation that it "specifically identified (by substance, if not by section) the relevant provisions of the joint use agreement and how similar subjects were addressed in DEP's CATV and CLEC license agreements,"[130] and notes that Duke Progress has still not produced over 45 of its license agreements that are necessary to allow such a comparison.[131] The last sentence of Duke Progress's response to paragraph 15 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

16. AT&T denies Duke Progress's response to paragraph 16, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 10, 15, 16, 22, and 25, and AT&T hereby incorporates its response to those allegations. AT&T also denies that Duke Progress and its predecessors "built a network of poles taller and stronger than necessary for the provision of electric service … because of the [JUA]." The JUA was not entered into until 2000 and Duke Progress's interrogatory responses show that nearly [redacted] cable company and CLEC attachments on Duke Progress's poles are governed by agreements that *pre-date* the JUA (nearly [redacted] the number of Duke Progress poles covered by the JUA).[132] AT&T also denies Duke Progress's unsupported allegations that it "does not

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[129] *See also* Reply Ex. A at ATT00362-365 (Rhinehart Reply Aff. ¶¶ 27-31); Reply Ex. C at ATT00389-406 (Peters Reply Aff. ¶¶ 6-34); Reply Ex. F at ATT00454-469 (Dippon Reply Aff. ¶ 39-64).

[130] *See* Compl. Ex. C at ATT0038 (Peters Aff. ¶ 8).

[131] Answer ¶ 30 n.134 (describing 1 recent license agreement as an "exemplar"); *see also* Duke Progress Objection to Interrog. No. 3 (stating that Duke Progress has "approximately 50" license agreements); Duke Progress Response to Interrogs., Ex. 2 at DEP000007-110 (producing 3 license agreements).

[132] *See* Resp. to AT&T's First Set of Interrog., Ex. 1 at DEP000003-04 (stating that [redacted], and that 148,064 AT&T attachments are covered by the JUA entered in 2000).

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build capacity in its network for CATV and CLEC licensees" and that "CATVs and CLECs are often required to pay for pole replacements" because Duke Progress describes a "typical" pole with communications attachers as a 45-foot pole when a 37.5 foot pole will presumptively hold Duke Progress and 4 communications attachers[133] and Duke Progress's parent company recently informed the Commission that just 0.024% of electric utility poles require replacement each year to increase capacity.[134]

17. The first sentence of Duke Progress's response to paragraph 17 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. With respect to the second sentence of Duke Progress's response to paragraph 17, AT&T admits that it is not required to submit a permit application before making an attachment to Duke Progress's poles, just as Duke Progress is not required to submit a permit application before making an attachment to AT&T's poles.[135] With respect to the third sentence of Duke Progress's response to paragraph 17, AT&T denies that it asserted in "conclusory fashion" that this different permitting arrangement is not a net material competitive advantage because AT&T supported its argument with evidence that AT&T collects and compiles the same information reflected in Duke Progress's permitting form, completes the same work that occurs at each step of Duke Progress's permitting process, and often must wait longer than its competitors to begin the required work, which delays AT&T's

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[133] *See* Answer Ex. C at DEP000299 (Burlison Decl. ¶ 15); 47 C.F.R. §§ 1.1409(c), 1.1410.

[134] Initial Comments of Duke Energy Corp., et. al in Opposition to NCTA's Petition For Expedited Declaratory Ruling at 16-17, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (Sept. 2, 2020); *see also* Reply Ex. D at ATT00415 (Dalton Reply Aff. ¶ 9); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8).

[135] *See* Reply Ex. C at ATT00404-405 (Peters Reply Aff. ¶ 32).

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ability to deploy its facilities.[136] With respect to the fourth and fifth sentences of Duke Progress's response to paragraph 17, AT&T admits the Commission has worked over the past decade to streamline the attachment process and states that the Commission's make-ready rules currently do *not* apply to AT&T, which is an ILEC.[137] With respect to the last three sentences of the first paragraph of Duke Progress's response to paragraph 17, AT&T admits the alleged permitting advantage is reciprocal and admits that AT&T owns about 31,000 poles and Duke Progress owns about 148,000 poles, but denies that the "offsetting effect of reciprocity is precisely inversely proportional to pole ownership," because any alleged advantage related to permitting only applies when each party seeks to attach to the other party's poles and there is no evidence that the parties are deploying their facilities in materially different amounts each year.[138] AT&T also denies the permitting allegations in Duke Progress's response to paragraph 17, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8 and 10, and AT&T hereby incorporates its response to those allegations.

In the first sentence of the second paragraph of Duke Progress's response to paragraph 17, Duke Progress admits that it raised the allegation that AT&T benefits from scheduled (a/k/a "tabulated") make-ready costs, as opposed to work order costs, during the parties' July 2019 and October 2019 meetings, so no response is required. The rest of the first sentence of the second

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[136] Compl Ex. C at ATT00042-44 (Peters Aff. ¶¶ 16-17); Reply Ex. C at ATT00401-405 (Peters Reply Aff. ¶¶ 28-32); Reply Ex. D at ATT00413-15 (Dalton Reply Aff. ¶¶ 5-8); Reply Ex. E at ATT00426-27 (Oakley Reply Aff. ¶¶ 5-7).

[137] *See* 47 C.F.R. § 1.1411(a)(2).

[138] *See, e.g.*, Compl. Exs. 2-6 (2011-2019 Invoices); Reply Ex. C at ATT00401-402 (Peters Reply Aff. ¶ 28); Reply Ex. D at ATT00413 (Dalton Reply Aff. ¶ 5); Reply Ex. E at ATT00426 (Oakley Reply Aff. ¶ 5).

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paragraph of Duke Progress's response to paragraph 17 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second sentence of the second paragraph of Duke Progress's response to paragraph 17 because the JUA states that the scheduled costs set forth in Exhibit B reflect "the cost" for the work, are updated each year based on the Handy Whitman Index to reflect current costs, and, if the parties cannot agree to an update, "the amount to be billed thereafter … shall be the actual cost of the work."[139] The scheduled costs, therefore, cannot be less than—or "significantly less than"—"actual work order costs."[140] With respect to the third, fourth, fifth, and sixth sentences of the second paragraph of Duke Progress's response to paragraph 17, AT&T states that the JUA and Exhibit B speak for themselves and denies the conclusory and unsupported allegation that "Article VII is chock-full of" undisclosed "benefits to AT&T."[141] In fact, Article VII places significant pole ownership responsibilities on AT&T,[142] which confirms that AT&T is competitively *disadvantaged* as compared to AT&T's competitors, which "are not required to own any poles at all."[143]

The seventh, eighth, ninth, tenth, and eleventh sentences of the second paragraph of Duke Progress's response to paragraph 17 contain hypothetical allegations that require no response, but to the extent one is required, AT&T denies that AT&T's cost responsibility would be limited to the amount set forth in Exhibit B because AT&T also incurs costs to perform work itself when

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[139] Compl. Ex. 1 at ATT00096-100 (JUA, Art. VII); *see also* Answer Ex. E at DEP000347 (Metcalfe Decl. ¶ 51).

[140] *See also* Reply Ex. D at ATT00415-16 (Dalton Reply Aff. ¶¶ 9-10); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8).

[141] *See In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

[142] Compl. Ex. 1 at ATT00096-100 (JUA, Art. VII).

[143] Answer ¶ 20.

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it requires a pole replacement to accommodate its facilities.[144] Duke Progress's pole replacement cost allegations compare apples to oranges, as they pair the lowest value in the JUA's pole replacement cost schedule to an unsourced and uncorroborated allegation about Duke Progress's average cost to replace poles of all heights and sizes *and* to transfer facilities to the replacement pole.[145] This significantly inflates Mr. Freeburn's [redacted] cost estimate and makes it impossible to compare to the pole replacement costs in the JUA schedule.[146]

AT&T denies the twelfth and thirteenth sentences of Duke Progress's response to paragraph 17 because Duke Progress admits that it updates the cost schedules regularly.[147] With respect to the fourteenth sentence of Duke Progress's response to paragraph 17, AT&T states that the JUA speaks for itself and notes that Duke Progress failed to quote the provisions of the JUA that define the scheduled costs as "the cost" for the work and permit actual cost billing if the parties cannot agree to "a request for revisions of the pole charges."[148] AT&T denies the fifteenth and sixteenth sentences of Duke Progress's response to paragraph 17, which are absurd and unnecessary allegations that are contradicted by the JUA and AT&T's extensive evidence about the JUA's terms and conditions and the just and reasonable rates that must apply under federal law.

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[144] *See* Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 17); Reply Ex. C at ATT00392 (Peters Reply Aff. ¶ 10).

[145] *See* Answer Ex. A at DEP000256, DEP000260 (Freeburn Decl. ¶¶ 24-25, 35); *see also* Answer Ex. E at DEP000338 (Metcalfe Decl. ¶ 30 n.48) (stating that "equipment transfer costs" are "a significant component" of the [redacted] estimate).

[146] *See* Reply Ex. C at ATT00406 (Peters Reply Aff. ¶¶ 33-34); Reply Ex. D at ATT00415-16 (Dalton Reply Aff. ¶ 10); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8).

[147] *See* Answer ¶ 3.

[148] *See* Compl. Ex. 1 at ATT00096-100 (JUA, Art. VII).

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AT&T denies the last paragraph of Duke Progress's response to paragraph 17 because AT&T explained the type of work that AT&T completes for itself, but Duke Progress may complete at cost for AT&T's competitors.[149] AT&T admits that Duke Progress requires that it perform electric supply space make-ready and pole replacements within energized lines when required to accommodate AT&T's modification or expansion of facilities, but states that the JUA requires that AT&T pay Duke Progress for the cost of the pole replacement.[150] AT&T admits that "[e]xcept as otherwise expressly provided" in the JUA, "each party" rearranges and transfers its own facilities,[151] but denies that this reduces AT&T's costs as compared to its competitors, as AT&T incurs the cost for communications space make-ready (and Duke Progress does not)—and Duke Progress's parent company informed the Commission that "the vast majority of make-ready involves only the rearrangement of communications attachments."[152] AT&T denies that the only "costs that matter are the costs that AT&T is required (or not required) to pay to Duke Progress" (and not the "internal costs incurred by AT&T") because the Commission and the Enforcement Bureau have found otherwise.[153] As the Enforcement Bureau explained, "[w]here [an ILEC] performs a particular service itself and incurs costs comparable to its competitors in performing that service, we agree … that [an electric utility] may not embed in [the ILEC]'s rental rate costs that [the electric utility] does not incur."[154] AT&T also denies the "tabulated

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[149] Compl. ¶ 17; *see also* Compl. Ex. C at ATT00043-44 (Peters Aff. ¶ 17).

[150] *See* Compl. Ex. 1 at ATT00097-98 (JUA, Art. VII.F).

[151] Compl. Ex. 1 at ATT00096 (JUA, Art. VI).

[152] Reply Comments of Duke Energy Corp., et al. at 13, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (July 17, 2017).

[153] *Potomac Edison Order* at 14 (¶ 32); *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

[154] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18); *see also Potomac Edison Order* at 14 (¶ 32).

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cost" and make-ready allegations in Duke Progress's response to paragraph 17, which contain allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 3, 8, 10, 15, and 20, and AT&T hereby incorporates its response to those allegations. The last sentence of Duke Progress's response to paragraph 17 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

18. AT&T denies the first sentence of Duke Progress's response to paragraph 18 because it misrepresents the allegations of paragraph 18, which states that AT&T has *not* defended its location at the bottom of the communications space on a pole.[155] The second sentence of Duke Progress's response to paragraph 18 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. With respect to the third and fourth sentences of Duke Progress's response to paragraph 18, AT&T states that the JUA speaks for itself and does not prevent the attachment of communications facilities below AT&T's facilities. AT&T further notes that the quoted language does not "expressly restrict[ ]" Duke Progress's use of space below AT&T's attachments because it instead permits such attachments when "agreed to by the field representatives and provided all applicable code requirements are met."[156] With respect to the fifth sentence of Duke Progress's response to paragraph 18, AT&T states that the parties' superseded joint use agreement is irrelevant and speaks for itself. AT&T denies the last sentence of the first paragraph of Duke Progress's response to Paragraph 18 because AT&T did not misrepresent anything; it is not "contractual[ly] entitle[d] to the bottom of the communications

[155] *See also* Compl. Ex. C at ATT00045 (Peters Aff. ¶ 20); Reply Ex. C at ATT0000407-408 (Peters Reply Aff. ¶¶ 35-36).

[156] Compl. Ex. 1 at ATT00095 (JUA, Art. III.A).

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space" and it has rebutted Duke Progress's claim that "the bottom of the communications space is a massive contractual benefit" with evidence of the increased costs it imposes on AT&T.[157]

The second paragraph of Duke Progress's response to paragraph 18 misrepresents AT&T's comments and asks the Commission to ignore AT&T's effort to encourage the placement of communications facilities below its attachments if the communications facilities are wireless facilities and is therefore denied. AT&T further denies that this distinction between wireline and wireless facilities is relevant, particularly when wireless facilities "are entitled to the benefits and protection of section 224"[158] and squarely within the Commission's effort to "eliminate[ ] barriers to broadband deployment by streamlining the process for attaching new communications facilities to utility poles and reducing associated costs."[159] AT&T denies the last sentence of Duke Progress's response to paragraph 18, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 10, 12, 15, 22, 24, 25, 31, and 37, and AT&T hereby incorporates its response to those allegations.

19. AT&T denies the first sentence of paragraph 19 because AT&T has not "explain[ed] away the benefits of occupying the lowest position on DEP's poles," but has shown that its location on Duke Progress's poles is a competitive disadvantage.[160] AT&T denies that this is a "specious claim" because AT&T proved that its location on the pole is a competitive

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[157] Compl. Ex. C at ATT00045-46 (Peters Aff. ¶¶ 21-23); Compl. Ex. D at ATT00073-74 (Dippon Aff. ¶ 43); Compl. Ex. 18 at ATT00234-36 (Damage Reports); Reply Ex. C at ATT00407-408 (Peters Reply Aff. ¶¶ 35-36).

[158] *Pole Attachment Order*, 26 FCC Rcd at 5306 (¶ 153).

[159] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, 35 FCC Rcd 7936, 7936 (¶ 1) (2020).

[160] Compl. Ex. C at ATT00045-46 (Peters Aff. ¶¶ 21-23); Compl. Ex. D at ATT00073-74 (Dippon Aff. ¶ 43); Compl. Ex. 18 at ATT00234-36 (Damage Reports); Reply Ex. C at ATT00407-408 (Peters Reply Aff. ¶¶ 35-36).

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disadvantage with testimony and damage claims,[161] causing Duke Progress to admit "there may, indeed, be certain costs and risks attendant to the lowest position on the pole."[162] AT&T denies that its typical location on the pole is the result of the JUA or was something AT&T could seek to change because AT&T's location is the result of the origin of joint use, and must generally continue so that various communications facilities do not crisscross midspan.[163] AT&T denies Duke Progress's unsupported and speculative claim that "it is safe to assume that those costs and risks are outweighed by" unsubstantiated "ease of access" and "ability to sag cable" benefits, which are rebutted by AT&T's testimony.[164] AT&T admits that Duke Progress has not attempted to quantify its alleged "benefit." AT&T denies the rest of Duke Progress's response to paragraph 19, which contains conclusory allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22, 24, 25, 28, 29, 30, 31, and 37, and AT&T hereby incorporates its response to those allegations.

20. AT&T denies the first half of the first sentence of Duke Progress's response to paragraph 20 because it misrepresents the allegations of paragraph 20, which states that AT&T is competitively *disadvantaged* because it must incur the cost to replace poles following an emergency.[165] Duke Progress admits that "when DEP replaces an AT&T pole following an emergency … AT&T pays for these pole replacements," so no response is required. Duke

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[161] *Id.*

[162] Answer ¶ 19.

[163] Compl. Ex. C at ATT00045 (Peters Aff. ¶ 21).

[164] Compl. Ex. C at ATT00045-46 (Peters Aff. ¶¶ 21-23); Reply Ex. C at ATT00407-408 (Peters Reply Aff. ¶¶ 35-36); *see also In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

[165] *See also* Compl. See Ex. C at ATT00044-45 (Peters Aff. ¶¶ 18-19); Compl. Ex. D at ATT00070-71 (Dippon Aff. ¶ 38).

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Progress also admits AT&T's competitors do not incur similar costs because they "are not required to own any poles at all," so no response is required. AT&T denies that it pays "greatly reduced tabulated costs" for the pole replacements, a conclusory allegation that is substantially similar or identical to allegations in Duke Progress's response to paragraphs 3, 8, 10, 15, and 17, and AT&T hereby incorporates its response to those allegations. AT&T denies that there is a "financial benefit" to AT&T, let alone a competitive benefit to AT&T, if Duke Progress replaces AT&T's poles following an emergency because AT&T covers Duke Progress's costs for the pole replacement and also bears its own cost to have "crews, equipment, inventory, dispatchers, engineers and all of the other things necessary to replacing a pole in the middle of the night at a moment's notice"—costs AT&T's competitors need not incur because they do not own poles.[166] AT&T admits the JUA does not require AT&T to own [redacted]% of the poles shared by the parties, but denies that the JUA does not require AT&T to own and share its poles with Duke Progress.[167] As Duke Progress's affiliate Duke Florida previously explained, joint use agreements require "ILECs and electric utilities [to] share the benefits (and burdens) of pole ownership…"[168] AT&T denies the allegation that AT&T pays less because it pays "scheduled costs for this work rather than actual work order costs," an allegation that is substantially similar or identical to allegations in Duke Progress's responses to paragraphs 3, 8, 10, 15, and 17, and AT&T hereby incorporates its response to those allegations. AT&T denies the rest of Duke

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[166] *See* Reply Ex. C at ATT00408 (Peters Reply Aff. ¶ 37); Reply Ex. D at ATT00416-17 (Dalton Reply Aff. ¶¶ 11-12); Reply Ex. E at ATT00428 (Oakley Reply Aff. ¶ 10).

[167] *See, e.g.*, Compl. Ex. 1 at ATT00095 (JUA, Art. III) (requiring AT&T to share "its poles" with Duke Progress).

[168] Reply Comments of Progress Energy Florida n/k/a Duke Energy Florida, et al. at 28-29, *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245 (Oct. 4, 2010).

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Progress's response to paragraph 20, which contains general and conclusory allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22, 24, 25, 28, 29, 30, 31, and 37, and AT&T hereby incorporates its response to those allegations.

21. The first sentence of Duke Progress's response to paragraph 21 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. The rest of the first paragraph of Duke Progress's response to paragraph 21 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies the rest of the first paragraph of Duke Progress's response to paragraph 21, which contains general and conclusory allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 3, 9, 11, 21, 27, and 38, and AT&T hereby incorporates its response to those allegations.

AT&T admits upon information and belief from the positions Duke Progress took during the parties' negotiations that Duke Progress will not voluntarily agree to charge AT&T a new or old telecom rate despite the Commission's regulations and orders and the fact that the new telecom rate is "fully compensatory," which necessitated the filing of AT&T's complaint.[169] AT&T lacks sufficient information to admit or deny Duke Progress's speculative claim that it "would never have agreed to give AT&T the right to remain attached to DEP's poles even in the event of a termination" when the JUA was entered 20 years ago but states that this claim, even if true, is not relevant given the change in applicable law. AT&T denies the rest of the second paragraph of Duke Progress's response to paragraph 21, which contains general and conclusory allegations that are substantially similar or identical to allegations in Duke Progress's response to

[169] *See Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (citations omitted); *see also* Reply Ex. B at ATT00376-380 (Miller Reply Aff. ¶¶ 2-7); Reply Ex. C at ATT00387-389 (Peters Reply Aff. ¶¶ 3-5).

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paragraphs 3, 9, 11, 21, 27, and 38, and AT&T hereby incorporates its response to those allegations.

The third paragraph of Duke Progress's response to paragraph 21 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies that the Commission identified "distinct categories" of existing agreements for purposes of the new telecom rate presumption. Rather, the Commission applied the presumption to all "existing contracts, upon renewal of those agreements" (with "renewal includ[ing] agreements that are automatically renewed, extended, or placed in evergreen status") and stated that "[u]ntil that time, … the 2011 *Pole Attachment Order*'s guidance regarding review of incumbent LEC pole attachment complaints will continue to apply."[170] AT&T also denies Duke Progress's claim that the Commission in 2018 created some "temporal categor[y]" of existing agreements "by implication" that escape the review extended to them in 2011 because the Commission did not and cannot "depart from a prior policy *sub silentio*."[171] With respect to the last sentence of Duke Progress's response to paragraph 21, AT&T admits the preexisting telecom rate is the product of a rate formula that changes from year-to-year based on the pole owner's rate of return and publicly reported pole costs, but denies that Duke Progress has accurately described the preexisting telecom rates or rate formula in its response to paragraph 22 for reasons detailed in Section II.C of AT&T's Reply Legal Analysis, Paragraph 22 of this Reply, and the Reply Affidavit of Daniel P. Rhinehart.

22. The first sentence of Duke Progress's response to paragraph 22 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies that the "pre-

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[170] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 nn.474, 478).

[171] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

existing telecom rate formula validates, rather than undermines, the justness and reasonableness" of the JUA rates because the JUA rates have averaged [redacted] times the properly calculated pre-existing telecom rates, as the following table shows:

Comparison of per-pole rates[172]	2017	2018	2019
Properly calculated pre-existing telecom rate	$10.84	$11.07	$11.88
Rate Duke Progress charged AT&T	[redacted]	[redacted]	[redacted]

AT&T denies that Duke Progress has properly calculated the preexisting rates which, by regulation, should be 1.51 times the new telecom rate, which has averaged about $7.40 per pole.[173] AT&T denies that Duke Progress has rebutted the presumptive inputs for space occupied (1 foot) and average number of attaching entities (5) because Duke Progress has not provided any data, let alone actual verifiable data about the joint use poles, sufficient to rebut the Commission's presumptions, for reasons detailed in Section II.C of AT&T's Reply Legal Analysis and Paragraphs 8, 10, 12, 15, 18, 24, 25, 31, 37 of this Reply.[174]

AT&T denies the fourth through seventh sentences of Duke Progress's response to paragraph 22 (below the table), which contain conclusory allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 10, 12, 15, 18, 24, 25, 31, 37, and AT&T hereby incorporates its response to those allegations. AT&T notes that,

[172] *See* Compl. Ex. A at ATT00009-10, ATT00013-14 (Rhinehart Aff. ¶¶ 17-18 & Ex. R-1); Compl. Ex. B at ATT00028 (Miller Aff. ¶ 8); Reply Ex. A at ATT00349, ATT00368 (Rhinehart Reply Aff. ¶ 5 & Ex. R-5).

[173] *See* Reply Ex. A at ATT00349 (Rhinehart Reply Aff. ¶ 5).

[174] *See also* 47 C.F.R. §§ 1.1409(c), 1.1410; *see also Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19866 (¶ 18) (2002); Reply Ex. A at ATT00353-355 (Rhinehart Reply Aff. ¶¶ 12-14); Reply Ex. F at ATT00444-451 (Dippon Reply Aff. ¶¶ 18-32).

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even under Duke Progress's erroneous rate calculations, Duke Progress still admits it charged AT&T JUA rates higher than its significantly inflated version of the preexisting telecom rate.

The last four sentences of Duke Progress's response to paragraph 22 are denied because they do not respond to the allegations of paragraph 22, but to the extent a response is required, AT&T denies because Duke Progress will not have "paid AT&T a per pole rate that vastly exceeds AT&T's entire annual pole cost" for the 2017 to 2019 rental years if AT&T's complaint is granted because AT&T calculated the proportional new telecom rates that will apply to Duke Progress's use of AT&T's poles for the 2017 to 2019 rental years if AT&T is granted the new telecom rates it seeks.[175] As a result, if AT&T's complaint is granted, Duke Progress will pay a proportional new telecom rate for 10.5 feet of the 13.5 feet of usable space on AT&T's poles,[176] which will cover [redacted] of AT&T's annual pole costs:[177]

North Carolina	2017	2018	2019
Proportional new telecom rate for Duke Progress's use of AT&T North Carolina's poles if AT&T's complaint is granted (per pole)	$10.64	$8.50	$8.95
AT&T North Carolina's annual pole cost for purposes of the new telecom rate formula	[redacted]	[redacted]	[redacted]
New telecom rate for 10.5 feet of space as percentage of AT&T North Carolina's annual pole cost	[redacted]	[redacted]	[redacted]
South Carolina	**2017**	**2018**	**2019**
Proportional new telecom rate for Duke Progress's use of AT&T South Carolina's poles if AT&T's complaint is granted (per pole)	$7.41	$7.01	$5.06
AT&T South Carolina's annual pole cost for purposes of the new telecom rate formula	[redacted]	[redacted]	[redacted]

[175] *See* Compl. Ex. A at ATT00007-8, ATT00017-21 (Rhinehart Aff. ¶¶ 13-15 & Exs. R-3, R-4).

[176] *See* 47 C.F.R. § 1.1410; Compl. Ex. C at ATT00040 (Peters Aff. ¶ 12 n.6).

[177] *See* Compl. Ex. A at ATT00007-8, ATT00017-21 (Rhinehart Aff. ¶¶ 13-15 & Exs. R-3, R-4).

New telecom rate for 10.5 feet of space as percentage of AT&T South Carolina's annual pole cost	[redacted]	[redacted]	[redacted]

B. Even Apart From The 2018 Third Report and Order, AT&T Was Entitled To Just And Reasonable Rates Back To 2011.

23. AT&T denies Duke Progress's response to paragraph 23 because it does not respond to the allegations of paragraph 23, but to the extent a response is required, AT&T admits that it had the right to just and reasonable rates as of July 12, 2011, notes that the provision Duke Progress describes as a "cost sharing obligation" is, in fact, a pole attachment rental rate provision,[178] and denies the rest of Duke Progress's response to paragraph 23 because the JUA rates are unjust and unreasonable for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply. AT&T denies that "AT&T itself viewed the joint use agreement [rates] as just and reasonable until very recently" because AT&T did not, but instead gave Duke Progress an opportunity to voluntarily comply with the Commission's orders and regulations and provided the Enforcement Bureau an opportunity to first resolve other ILEC rate disputes.[179] AT&T denies that AT&T "expressly affirmed the correctness of the rates each year through 2018" or "indicat[ed] its agreement with the rates" because AT&T did *not* affirm that the invoiced rates, rate methodology, or calculations complied with federal law.[180] Instead, AT&T confirmed "the total number of poles" used by the parties and the rates Duke Progress calculated

[178] *See* Compl. Ex. 1 at ATT00102 (JUA, Art. XIII.C) (setting "rental rates").

[179] *See, e.g.*, Reply Ex. B at ATT00380 (Miller Reply Aff. ¶ 8); *see also Dominion Order*, 32 FCC Rcd at 3763 (¶ 28) ("[T]he Commission declined to impose time limits on the filing of pole attachment complaints").

[180] Compl. Ex. 1 at ATT00102 (JUA, Art. XIII); Answer Ex. A at DEP000269-280 (Freeburn Decl., Ex. A-3) (stating "that we now have attachments on the total number of poles as shown below, at the rentals and under the terms and conditions of the AGREEMENT FOR JOINT USE OF POLES").

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under the JUA's rate formula,[181] which is unjust and unreasonable for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply. AT&T also denies Duke Progress's response to paragraph 23, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 9, 23, 26, 28, 29, 32, 33, and 40-42, and AT&T hereby incorporates its response to those allegations. The last sentence of Duke Progress's response to paragraph 23 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

24. The first sentence of Duke Progress's response to paragraph 24 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of Duke Progress's response to paragraph 24, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 12 and 22, and AT&T hereby incorporates its response to those allegations.

25. AT&T denies the conclusory first sentence of Duke Progress's response to paragraph 25 because the JUA disproportionately divides the cost of attaching to Duke Progress's poles between AT&T and Duke Progress because it has required that AT&T pay [redacted]% of Duke Progress's pole cost for use of 1 foot of space, leaving Duke Progress with [redacted]% of its pole cost for use of at least 10.5 feet of space—not accounting for the additional rent Duke Progress collects from third parties, which reduces Duke Progress's cost responsibility to about [redacted]% of its pole costs for use of 3 times the space occupied by all communications

[181] Compl. Ex. 1 at ATT00102 (JUA, Art. XIII); Answer Ex. A at DEP000269-280 (Freeburn Decl., Ex. A-3) (stating "that we now have attachments on the total number of poles as shown below, at the rentals and under the terms and conditions of the AGREEMENT FOR JOINT USE OF POLES").

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attachers on its poles combined.[182] AT&T denies the second through fourth sentences of Duke Progress's response to paragraph 25 because they ignore the proportional rates AT&T has calculated for Duke Progress's use of space on AT&T's poles, which are based on AT&T's pole costs and will ensure the parties each pay "roughly the same proportionate rate given the parties' relative usage of the pole."[183] AT&T denies the remainder of the first paragraph of Duke Progress's response to paragraph 25, which contains unsupported and conclusory allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 10, 14, 20, 26, and 27, and AT&T hereby incorporates its response to those allegations.

With respect to the second paragraph of Duke Progress's response to paragraph 25, AT&T admits that Duke Progress is "'occupying far more space on a pole' than AT&T" when AT&T owns the joint use pole, but denies that this changes when the pole is owned by Duke Progress, an allegation that is rebutted by the Commission's space occupied presumptions[184] Duke Progress's admission that its "typical vertical three-phase construction" requires 8 feet of space for its facilities, not including the 3.33 feet of safety space required by its facilities,[185] and photographs of Duke Progress's poles.[186] AT&T denies Duke Progress's unsupported allegation that "the parties evenly divided those network costs that inured equally to the parties' benefit … while allocating pro rata the portions of the network that did not inure equally to the parties'

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[182] *See, e.g.*, Compl. Ex. D at ATT00066-68 (Dippon Aff. ¶¶ 31-33).

[183] *See Dominion Order*, 32 FCC Rcd at 3760 (¶ 21 n.78) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662)); *see also* Compl. Ex. A at ATT00008-10, ATT00018-23 (Rhinehart Aff. ¶¶ 14, 19 & Ex. R-3 – R-4).

[184] *See, e.g.*, Compl. Ex. C at ATT00040-41 (Peters Aff. ¶¶ 12 n.6).

[185] *See* Answer Ex. C at DEP000298 (Burlison Decl. ¶ 14).

[186] *See, e.g.*, Answer Ex. A at DEP000265 (Freeburn Decl., Ex. A-1).

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benefit" because the JUA sets specific rates without reference to space allocations.[187] AT&T denies the rest of the second paragraph of Duke Progress's response to paragraph 25, which contains unsupported and conclusory allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 10, 12, 15, 18, 22, 24, 31, and 37, and AT&T hereby incorporates its response to those allegations.

The first sentence of the third paragraph of Duke Progress's response to paragraph 25 and footnote 96 contain legal conclusions to which no response is required. To the extent a response is required, AT&T states that the allegations are hypothetical because the JUA does not reserve any particular amount of space for AT&T.[188] AT&T also denies that Duke Progress may lawfully reserve space for AT&T in addition to the space AT&T occupies on Duke Progress's poles.[189] Duke Progress's ongoing refusal to comply with this longstanding Commission precedent is not supported by the language it cites, which "permit[s] an electric utility to reserve space" under specified circumstances related to "the provision of its core utility service."[190] AT&T further denies Duke Progress's claim in footnote 96 that may lawfully charge AT&T for space AT&T does not in fact occupy as part of Duke Progress's "core utility service." The Commission instead set the new telecom rate as the just and reasonable rate because it "is compensatory and is designed so that utilities will not be cross-subsidizing attachers" and vice

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[187] *See* Compl. Ex. 1 at ATT00102 (JUA, Art. XIII.C).

[188] Compl. Ex. 1 at ATT00091-110 (JUA).

[189] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16053 (¶ 1170) (1996) ("Permitting an [I]LEC, for example, to reserve space for local exchange service … would favor the future needs of the [I]LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.").

[190] *See id.* at 16078 (¶ 1169).

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versa.[191] AT&T denies the allegation that the remainder of the allegations in footnote 96 for the reasons detailed in Section Sections II.A.2 and II.A.3 of AT&T's Reply Legal Analysis and Paragraphs 8, 10, 12, 15, 18, 22, 24, 31, and 37 of this Reply.

AT&T denies the second sentence of the third paragraph of Duke Progress's response to paragraph 25 because it is unsupported and contradicted by the evidence.[192] With respect to the third and fourth sentences of the third paragraph of Duke Progress's response to paragraph 25, AT&T states that the JUA, the superseded joint use agreement, and AT&T's complaint speak for themselves. With respect to the fifth and sixth sentences of the third paragraph of Duke Progress's response to paragraph 25, AT&T denies it has not proven it requires space comparable to its competitors,[193] admits that neither party had data proving the space AT&T's physical facilities occupy, on average, across Duke Progress's 148,000+ poles, and states that the Commission adopted the presumption that communications attachers occupy 1 foot of space on a pole to *avoid* the need for costly pole surveys every time rates are set.[194] AT&T denies the last sentence of the third paragraph of Duke Progress's response to paragraph 25, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 10, 12, 15, 18, 22, 24, 31, and 37, and AT&T hereby incorporates its response to those allegations.

AT&T denies the fourth through seventh paragraphs of Duke Progress's response to paragraph 25 (subheading 2) because the Commission's longstanding precedent establishes that

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[191] *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 182).

[192] *See* Compl. Ex. C at ATT00045 (Peters Aff. ¶ 20).

[193] *See, e.g.*, Compl. Ex. C at ATT00046-47 (Peters Aff. ¶ 24); Reply Ex. C at ATT00394-401 (Peters Reply Aff. ¶¶ 14-27).

[194] *See, e.g.*, Reply Ex. C at ATT00398 (Peters Reply Aff. ¶ 21).

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the safety space "is usable and used *by the electric utility*" and that the "communication [safety] space should *not* be attributed to AT&T because … AT&T's attachments do not actually occupy the communications safety space."[195] This is not the appropriate place to reconsider that settled decision.[196] AT&T denies the safety space "serves no purpose in the provision of electric service" because "[i]t is the presence of the potentially hazardous electric lines that makes the safety space necessary"[197] and Duke Progress admits it has placed streetlights within the safety space.[198] AT&T also denies the fourth through seventh paragraphs of Duke Progress's response to paragraph 25 for reasons detailed in Section II.A.2 of AT&T's Reply Legal Analysis and paragraphs 12, 16, and 22 of this Reply.

26. AT&T denies the first two paragraphs of Duke Progress's response to paragraph 26 because the Commission has held that a two-to-one pole ownership advantage is indicative of "market power" and "bargaining leverage"[199] and Duke Progress has a nearly five-to-one pole ownership advantage over AT&T that it has exercised to preserve its unjust and unreasonable

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[195] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) (emphases added); *see also In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 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., Inc. 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").

[196] *See In the Matter of Improving Pub. Safety Commcns in the 800 Mhz Band New 800 Mhz Band Plan for Puerto Rico & the U.S. Virgin Islands*, 26 FCC Rcd 1058, 1063 (¶¶ 12-13) (2011).

[197] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) (citation omitted).

[198] Answer Ex. A at DEP000252-53 (Freeburn Decl. ¶ 18); Answer Ex. C at DEP000297 (Burlison Decl. ¶ 9).

[199] *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 18); *Dominion Order*, 32 FCC Rcd at 3757 (¶ 13); *see also Potomac Edison Order* at 11-12 (¶¶ 25-26) (finding rate relief required where the electric utility has a 4-to-1 pole ownership advantage); *Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206) (estimating that electric utilities "own approximately 65-70 percent of poles").

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rates.[200] AT&T also denies the first two paragraphs for reasons detailed in Section III.B of AT&T's Complaint and Section II.B of AT&T's Reply Legal Analysis.

AT&T denies the third paragraph of Duke Progress's response to paragraph 26 because Duke Progress's allegations about an outdated 1972 document are not supported by the document itself and say nothing about whether the pole attachment rates that Duke Progress charges AT&T today are just, reasonable, or competitively neutral as required by law.[201] AT&T denies the rest of the third paragraph of Duke Progress's response to paragraph 26, which contain allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 9, 23, 28, 29, 32, 33, and 40-42, and AT&T hereby incorporates its response to those allegations. AT&T also denies that AT&T "certified the correctness of … the applicable rates" under federal law or completed a certification "at AT&T's prompting." Rather, AT&T certified "the total number of poles" used by the parties and the rates Duke Progress calculated under the JUA's rate formula,[202] which is unjust and unreasonable for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply.

With respect to the last paragraph of Duke Progress's response to paragraph 26, Duke Progress admits that the rate provision in the joint use agreement "cannot be changed without Duke Progress's agreement," so no response is required. With respect to the second sentence of the last paragraph of Duke Progress's response to paragraph 26, AT&T states that the JUA

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[200] *See* Ex. B at ATT00027 (Miller Aff. ¶¶ 6-7); Ex. 3 at ATT00163 (2019 NC Invoice); Ex. 4 at ATT00167 (2019 SC Invoice); *see also, e.g.*, Compl. Ex. D at ATT00065-69 (Dippon Aff. ¶¶ 29-35).

[201] *See* Reply Ex. F at ATT00469-472 (Dippon Reply Aff. ¶¶ 65-69).

[202] Compl. Ex. 1 at ATT00102 (JUA, Art. XIII); Answer Ex. A at DEP000269-280 (Freeburn Decl., Ex. A-3) (stating "that we now have attachments on the total number of poles as shown below, at the rentals and under the terms and conditions of the AGREEMENT FOR JOINT USE OF POLES").

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speaks for itself. AT&T denies the third sentence because the Commission has held that a pole ownership advantage is indicative of "market power" and "bargaining leverage"[203] and for reasons detailed in Section III.B of AT&T's Complaint and Section II.B of AT&T's Reply Legal Analysis. The last sentence of Duke Progress's response to paragraph 26 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

27. With respect to the first four sentences of Duke Progress's response to paragraph 27, AT&T admits the Commission has authority to terminate the unjust and unreasonable rental provision in the JUA and replace it with a just and reasonable rate[204] and admits that Duke Progress cannot remove AT&T's existing attachments from Duke Progress's poles and AT&T cannot remove Duke Progress's existing attachments from AT&T's poles if either party terminates the JUA.[205] AT&T otherwise denies the first four sentences of Duke Progress's response to paragraph 27, and states that Duke Progress's declaration that AT&T must remove its existing facilities from 148,000+ Duke Progress poles to obtain a different rate (which is, of course, practically impossible)[206] confirms the need for Commission intervention because AT&T genuinely lacks the ability to terminate the JUA rates.[207] AT&T denies the rest of the first paragraph of Duke Progress's response to paragraph 27 because AT&T correctly identified the

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[203] *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 18); *Dominion Order*, 32 FCC Rcd at 3757 (¶ 13); *see also Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206) (estimating that electric utilities "own approximately 65-70 percent of poles").

[204] 47 C.F.R. § 1.1407(a).

[205] Compl. Ex. 1 at ATT00104 (JUA, Art. XVII).

[206] *See FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15) ("But, as 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. C at ATT00394 (Peters Reply Aff. ¶ 13).

[207] *See Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216).

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evergreen provision in the JUA, which the Commission defined as a provision that gives "electric utilities … no right to demand removal of attachments upon termination."[208]

The second paragraph of Duke Progress's response to paragraph 27 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies the rest of the first paragraph of Duke Progress's response to paragraph 27, which contains general and conclusory allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 3, 9, 11, 21, and 38, and AT&T hereby incorporates its response to those allegations.

In the third paragraph of Duke Progress's response to paragraph 27, Duke Progress admits AT&T requested "appropriate rental rates" in a letter dated May 22, 2019 and admits the parties met face-to-face on July 26, 2019 and October 24, 2019, so no response is required. With respect to the rest of the third paragraph of Duke Progress's response to paragraph 27, AT&T admits Duke Progress made a settlement offer on September 10, 2020 after AT&T's complaint was filed, but denies that AT&T's counsel did not respond to Duke Progress's counsel and denies that the offer would result in [redacted] in light of the pole attachment rates required by law.[209] AT&T also denies the allegations of paragraph 27 for reasons detailed in Section III.B of AT&T's Complaint, Section II.B of AT&T's Reply Legal Analysis, and this Reply.

28. The first and fourth sentences of Duke Progress's response to paragraph 28 contain legal conclusions to which no response is required. To the extent a response is required,

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[208] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475); *see also* Compl. Ex. 1 at ATT00104 (JUA, Art. XVII).

[209] *See* Reply Ex. A at ATT00360-361 (Rhinehart Reply Aff. ¶ 24).

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AT&T denies these sentences because AT&T is entitled to a new telecom rate under the 2018 *Third Report and Order* and under the 2011 *Pole Attachment Order* for reasons detailed in Sections III.A-B of AT&T's Complaint, Section II.A-B of AT&T's Reply Legal Analysis, and this Reply. AT&T denies the second, third, and fifth sentences of Duke Progress's response to paragraph 28 and footnote 128, which contain allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 9, 15, 23, 26, 28, 29, 32, 33, and 40-42, and AT&T hereby incorporates its response to those allegations. The last sentence of Duke Progress's response to paragraph 28 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

29. With respect to paragraph 29, Duke Progress admits "that similarly situated attaching entities should pay similar rates" under the standard set in the *Pole Attachment Order*, so no response is required. AT&T denies the rest of Duke Progress's response to paragraph 29, which contains general and conclusory allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 9, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22, 23, 24, 25, 26, 28, 30, 31, 32, 37, and 40-42, and AT&T hereby incorporates its response to those allegations. AT&T denies that the "irreversible" fact that AT&T is an ILEC can mean "AT&T is not, and has never been, similarly situated to DEP's CATV and CLEC licensees" because the Commission instead found in 2011 that ILECs may be—and presumed in 2018 that ILECs *are*—similarly situated to CLECs and cable companies providing telecommunications services on Duke Progress's poles.[210] AT&T also denies Duke Progress's response to paragraph 29 for reasons detailed in Sections III.A-B of AT&T's Complaint, Section II.A-B of AT&T's Reply

[210] *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217); 47 C.F.R. § 1.1413(b).

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Legal Analysis, and this Reply. The last sentence of Duke Progress's response to paragraph 29 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

30. With respect to the first sentence of Duke Progress's response to paragraph 30, Duke Progress "admits that any analysis of competitive neutrality should account for the different rights and responsibilities in joint use agreements and license agreements," so no response is required, but AT&T denies Duke Progress's unsupported and conclusory statement that AT&T is not disadvantaged relative to Duke Progress's license agreements, which is rebutted by Duke Progress's admission "that the joint use agreement … imposes certain *burdens* [on AT&T] that differ from those in a CATV or CLEC license agreement."[211] AT&T denies the second sentence of Duke Progress's response to paragraph 30 because it misrepresents the allegations of paragraph 30, which states that AT&T is disadvantaged *as compared to CLECs and cable companies* (not as compared to Duke Progress) because the JUA requires AT&T to own poles and incur related costs, but Duke Progress's license agreements—as Duke Progress admits—do not require CLECs and cable companies to own poles or incur these same costs. With respect to the third, fourth, and fifth sentences of Duke Progress's response to paragraph 30, AT&T admits that AT&T incurs over [redacted] million in annual pole costs because of the JUA, which its competitors under license agreements with Duke Progress do not incur. AT&T denies that it did not disclose the parties' pole costs in its complaint,[212] denies that a comparison of AT&T's annual pole costs to Duke Progress's annual pole costs is relevant, and states that the relevant comparison for purposes of competitive neutrality are AT&T's undisputed annual pole

[211] Answer ¶ 14 (emphasis added); *see also*, *e.g.*, Compl. Ex. C at ATT00044-48 (Peters Aff. ¶¶ 18-26); Compl. Ex. D at ATT00072, ATT00073-74 (Dippon Aff. ¶¶ 41, 43).

[212] *See* Compl. Ex. A at ATT00013-14, ATT00018-19 (Rhinehart Aff., Exs. R-1, R-3).

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costs, which Duke Progress admits exceed [redacted] million, and lack of pole costs imposed on AT&T's competitors under Duke Progress's license agreements.[213] With respect to the sixth sentence of Duke Progress's response to paragraph 30, AT&T admits "that CLECs and CATVs generally do not own poles at all," but denies that Duke Progress's "network is not constructed on the front end to accommodate CATVs and CLECs," which is an allegation that is substantially similar or identical to allegations in Duke Progress's response to paragraph 16, and AT&T hereby incorporates its response to those allegations. AT&T admits that the JUA does not require AT&T to own [redacted]% of the poles shared by the parties, but denies that the JUA does not require AT&T to own and share its poles with Duke Progress.[214] AT&T denies the ninth sentence of the first paragraph of Duke Progress's response to paragraph 30 because the JUA requires AT&T to share "its poles" with Duke Progress.[215] AT&T also denies the last five sentences of the first paragraph of Duke Progress's response to paragraph 30 because they are incomprehensible. It appears Duke Progress may have sought to create an analogy to its "built-to-suit" network claim, which is denied for reasons detailed in Section III.A.2 of AT&T's Complaint, Section II.A.3 of AT&T's Reply Legal Analysis, and paragraphs 8, 10, 15, 16, 22, and 25 of this Reply. There is typically room on Duke Progress's poles for AT&T and AT&T's

[213] *See* Answer ¶ 30 & n.130.

[214] *See, e.g.*, Compl. Ex. 1 at ATT00095 (JUA, Art. III) (requiring AT&T to share "its poles" with Duke Progress).

[215] *See, e.g.*, Compl. Ex. 1 at ATT00095 (JUA, Art. III) (requiring AT&T to share "its poles" with Duke Progress).

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competitors but if there is no room for AT&T on a pole, AT&T pays for Duke Progress to replace the pole just as its competitors would in similar circumstances.[216]

AT&T denies the second paragraph of Duke Progress's Answer to paragraph 30 because AT&T has not sought to "have it both ways," but has instead properly relied on the fact that AT&T both owns far fewer poles than Duke Progress and far more poles than its competitors. Both facts are relevant under Commission precedent. Where, as here, the ILEC is at a pole ownership disadvantage relative to an electric utility, "market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates."[217] At the same time, because AT&T must own more poles relative to its competitors, the rate that is just and reasonable must "weigh, and account for" this difference that imposes additional costs on AT&T as compared to its competitors.[218] AT&T denies the rest of the second paragraph of Duke Progress's Answer to paragraph 30, which contains allegations that are substantially similar or identical to allegations in Duke Progress's responses to paragraphs 10, 14, 20, 25, 26, and 27, and AT&T hereby incorporates its response to those allegations.

The first sentence of the last paragraph of Duke Progress's response to paragraph 30 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second sentence of the last paragraph of Duke Progress's response to paragraph 30 and footnote 136, which contain allegations that are substantially similar or identical to allegations in Duke Progress's responses to paragraphs 8, 10, 15, and 21, and AT&T hereby incorporates its response

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[216] *See, e.g.*, Compl. Ex. C at ATT00042-43 (Peters Aff. ¶ 16); Reply Ex. C at ATT00402-405 (Peters Reply Aff. ¶¶ 29-32); Reply Ex. D at ATT00416-17 (Dalton Reply Aff. ¶¶ 13-14); Reply Ex. E at ATT00427-28 (Oakley Reply Aff. ¶ 9).

[217] *Pole Attachment Order*, 26 FCC Rcd at 5327 (¶ 199).

[218] *Id.* at 5335 (¶ 216 n.654).

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to those allegations. AT&T denies the third sentence because the terms of Duke Progress's cherry-picked and redacted license agreement, which speak for themselves, cannot override the mandatory statutory right of ongoing pole access enjoyed by AT&T's competitors, but not AT&T.[219] AT&T also denies the second and third sentence for reasons detailed in Section IIIA-B of AT&T's Complaint and Section II.A.3 of AT&T's Reply Legal Analysis.

The next five sentences of Duke Progress's response to paragraph 30 contain legal conclusions and conclusory allegations to which no response is required. To the extent a response is required, AT&T denies these five sentences because the JUA states that Duke Progress may deny AT&T access to a pole,[220] which sets AT&T at a competitive disadvantage as compared to the statutory right of access enjoyed by AT&T's competitors. The last sentence of Duke Progress's response to paragraph 30 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

C. AT&T Should Pay A Properly Calculated New Telecom Rate And Be Refunded Its Overpayments.

31. The first sentence of Duke Progress's response to paragraph 31 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies this sentence because AT&T is entitled to a just and reasonable new telecom rate for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply. AT&T denies the next three sentences of Duke Progress's response to paragraph 31 because Duke Progress did not make an offer at either of the parties' executive-level meetings and did not include "a new pole license agreement (at the Commission's new telecom rate)" in a settlement offer, so there was no

[219] 47 U.S.C. § 224(f).

[220] *See* Compl. Ex. 1 at ATT00094 (JUA, Art. II).

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formal proposal for AT&T to consider or reject.[221] AT&T denies the fifth and sixth sentences of Duke Progress's response to paragraph 31 and the first table because AT&T properly calculated the applicable new telecom rates, and Duke Progress improperly calculated and inflated the new telecom rates, for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and in the supporting Affidavits of Daniel P. Rhinehart. The properly calculated new telecom rates for AT&T's use of Duke Progress's poles for the 2016 through 2019 rental years are $7.16, $7.30, and $7.84 per pole, respectively.[222]

AT&T denies the remaining sentences of Duke Progress's response to paragraph 31 and the second table, which contain allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 7, 8, 12, 22, and 25, and AT&T hereby incorporates its response to those allegations. The last sentence of Duke Progress's response to paragraph 31 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

32. The first sentence of Duke Progress's response to paragraph 32 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. The second and fourth sentences of Duke Progress's response to paragraph 32 contain legal conclusions to which no response is required. To the extent a response is required, AT&T denies these sentences for reasons detailed in AT&T's Complaint, AT&T's Reply Legal Analysis, and this Reply. The third sentence of Duke Progress's response to paragraph 32 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the fifth sentence of Duke Progress's response to paragraph 32, which contain allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 9, 23, 26, 28, 29, 33, and 40-42, and AT&T hereby

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[221] Reply Ex. B at ATT00378 (Miller Reply Aff. ¶ 5 n.10).

[222] *See* Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1); Reply Ex. A at ATT00348, ATT00368 (Rhinehart Reply Aff. ¶ 4 & Ex. R-5).

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incorporates its response to those allegations. The sixth sentence contains a legal conclusion to which no response is required. To the extent a response is required, AT&T denies the sixth sentence because estoppel is not an available defense in a pole attachment complaint[223] and, even if it were available, it would fail because the Commission "decline[d] the invitation … to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge."[224]

With respect to the seventh sentence of Duke Progress's response to paragraph 32, the 2018 *Third Report and Order* speaks for itself and AT&T notes that the Commission declined to create a "*right* to refunds," but affirmed its authority to award refunds when appropriate and has since awarded refunds consistent with the applicable statute of limitations.[225] Indeed, refunds are appropriate when a pole owner charges "unjust and unreasonable" rates in violation of federal law.[226]

AT&T denies the last three sentences of the first paragraph of Duke Progress's response to paragraph 32, which contains conclusory allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraph 13, and AT&T hereby incorporates its

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[223] *AT&T Servs., Inc.*, 35 FCC Rcd at 6414 (¶ 29) ("[Defendant] has cited no authority establishing that a party may assert equitable defenses in a formal complaint proceeding before the Commission."); *Air Touch Cellular v. Pac. Bell*, 16 FCC Rcd 13502, 13508 (¶ 17) (2001) (questioning whether equitable defenses, including waiver and estoppel, are available in formal complaint proceedings); *see also AT&T Servs. Inc. v. Great Lakes Comet, Inc.*, 30 FCC Rcd 2586, 2597 (¶ 36 & n.123) (2015) (same).

[224] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

[225] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.478); 47 C.F.R. § 1.1407(a)(3); *see also Potomac Edison Order* at 24 (¶ 52).

[226] *See, e.g.*, *Dominion Order*, 32 FCC Rcd at 3750 (¶ 1) ("Verizon is entitled to a refund of overpayments").

response to those allegations. AT&T denies footnote 144 because AT&T supported its complaint with economic analysis, including the analysis of Dr. Christian Dippon.[227]

The rest of Duke Progress's response to paragraph 32 (after subheading 2) contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies the remainder of Duke Progress's response to paragraph 32 because the "applicable statute of limitations" is the 3-year statute of limitations that applies to actions involving a North Carolina contract[228] for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, paragraph 12 of this Reply, and the Commission's *Potomac Edison Order*.[229] AT&T also denies the rest of Duke Progress's response to paragraph 32 because the 3-year statute of limitations that applies to North Carolina actions to *rescind* a contract is not "more analogous" to this case because it instead seeks to set the just and reasonable rate for the JUA going forward, and the 2-year statute of limitations of 47 U.S.C. § 415 is not "a closer analogy" because it is not applicable to the Pole Attachment Act or to this case, which does not seek to recover "lawful" charges or to obtain damages from a "carrier"[230] as further detailed in Section II.C of AT&T's Reply Legal Analysis, and paragraph 12 of this Reply.[231]

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[227] Compl. Ex. D at ATT00050-75 (Dippon Aff.); Reply Ex. F at ATT00435-475 (Dippon Reply Aff.).

[228] *See Potomac Edison Order* at 22 (¶ 46) (holding the "applicable statute of limitations" is the "statute of limitations for contract actions" under State law); *see also* N.C. Gen. Stat. § 1-52(1) (applying to "an action upon a contract, obligation or liability arising out of a contract …").

[229] AT&T notes that Duke Progress's allegation that "[t]he Commission has never explained what is meant by the 'applicable statute of limitations' for purposes of rule 1.1407(a)(3)" predated the Commission's *Potomac Edison Order*, which determined that the "applicable statute of limitations" for purposes of 47 C.F.R. 1.1407(a)(3) is the "statute of limitations for contract actions" under State law. *Potomac Edison Order* at 22 (¶ 46).

[230] *See* 47 U.S.C. § 415.

[231] *See also Potomac Edison Order* at 21 (¶¶ 44-45).

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33. The first and last sentences of Duke Progress's response to paragraph 33 are general denials prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of Duke Progress's response to paragraph 33, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraph 8, 9, 22, 23, 26, 28, 29, 31, 32, 33, and 40-42, and AT&T hereby incorporates its response to those allegations.

III. COUNT I – UNJUST AND UNREASONABLE RATES

34. AT&T adopts and incorporates its replies to Duke Progress's responses to paragraphs 1 through 33 as though fully set forth herein.

35. Duke Progress's response to paragraph 35 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies Duke Progress's response to paragraph 35 because Duke Progress's response conflicts with Commission precedent and the plain language of 47 U.S.C. § 224. Duke Progress argues that, even if the Commission has authority to regulate the rates charged ILECs, the Commission "is not 'statutorily *required*' to regulate the parties' relationship." On the contrary, the statute states that "the Commission *shall regulate* the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[232] The Commission therefore held that where an ILEC, like AT&T, has access to utility poles, "they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)."[233] AT&T disagrees with Duke Progress's characterization and interpretation of the law before 2011, but states that it is irrelevant to any issue presented in this complaint proceeding. AT&T denies

[232] 47 U.S.C. § 224(b)(1) (emphasis added).

[233] *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202).

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there is any lawful basis for Duke Progress's forbearance and waiver requests, which are substantially similar or identical to allegations in Duke Progress's response to paragraphs 4 and 10, and AT&T hereby incorporates its response to those allegations. AT&T also denies Duke Progress's forbearance and waiver requests for reasons detailed in Section II.D of AT&T's Reply Legal Analysis and AT&T's denials of Duke Progress's affirmative defenses.

36. The first sentence of Duke Progress's response to paragraph 36 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of Duke Progress's response to paragraph 36, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 12, 26, 31, 37, and 39, and AT&T hereby incorporates its response to those allegations.

37. AT&T denies Duke Progress's response to paragraph 37, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 12, 26, 31, 32, 33, 36, 38, and 39, and AT&T hereby incorporates its response to those allegations. The properly calculated new telecom rates for AT&T's use of Duke Progress's poles for the 2017 through 2019 rental years are $7.16, $7.30, and $7.84 per pole, respectively.[234]

38. AT&T denies Duke Progress's response to paragraph 38, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 3, 9, 11, 21, 22, 24, 32, 33, 37, and 38, and AT&T hereby incorporates its response to those allegations. AT&T also denies that Duke Progress provided any data—let alone reliable and statistically valid survey data sufficient to rebut the presumptive inputs to the Commission's

[234] *See* Compl. Ex. A at ATT00007, ATT00013-14 (Rhinehart Aff. ¶ 11 & Ex. R-1); Reply Ex. A at ATT00348, ATT00368 (Rhinehart Reply Aff. ¶ 4 & Ex. R-5).

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pre-existing telecom rate formula.[235] The properly calculated pre-existing telecom rates for AT&T's use of Duke Progress's poles for the 2017 through 2019 rental years are $10.84, $11.07, and $11.88 per pole, respectively.[236] AT&T further states that the proportional pre-existing telecom rates for Duke Progress's use of AT&T North Carolina's poles for the 2017 through 2019 rental years if the pre-existing telecom rates listed in the prior sentence apply are $16.12, $12.87, and $13.55 per pole, respectively, and $11.22, $10.63, and $7.66, respectively, for use of AT&T South Carolina's poles, but denies that these rates are proportional to the inflated and improperly calculated rates that Duke Progress proposes to apply to AT&T's use of Duke Progress's poles. The last sentence of Duke Progress's response to paragraph 38 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

39. Duke Progress's response to paragraph 39 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies Duke Progress's response to paragraph 39, which contains allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 23, 26, 32, 36, and 37, and AT&T hereby incorporates its response to those allegations.

40-42. Duke Progress's response to paragraphs 40-42 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies Duke Progress's response to paragraphs 40-42, which contain allegations that are substantially similar or identical to allegations in Duke Progress's response to paragraphs 8, 9, 12, 21, 22, 23, 24, 26, 28, 29, 31, 32, 33, 37, and 38, and AT&T hereby incorporates its response to those allegations.

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[235] *See* Reply Ex. A at ATT00353-354 (Rhinehart Reply Aff. ¶ 12-14); Reply Ex. F at ATT00444-451 (Dippon Reply Aff. ¶¶ 18-32).

[236] *See* Compl. Ex. A at ATT00009, ATT00013-14 (Rhinehart Aff. ¶ 17 & Ex. R-1); Reply Ex. A at ATT00349, ATT00368 (Rhinehart Reply Aff. ¶ 5 & Ex. R-5).

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AT&T'S DENIAL OF DUKE PROGRESS'S AFFIRMATIVE DEFENSES

AT&T specifically denies each of Duke Progress's affirmative defenses,[237] which should be summarily rejected because Duke Progress "fails to adequately to explain in its Answer the factual or legal basis for these defenses and their applicability to this dispute, as the Commission's rules require."[238] Duke Progress's affirmative defenses should also be denied because they lack merit on the facts and the law, assert defenses that are not available in a pole attachment complaint proceeding, and improperly seek to relitigate matters that "already fully have been considered and rejected by the Commission" in prior rulemakings.[239] In addition:

1. AT&T denies Duke Progress's first affirmative defense, which asserts that AT&T "is estopped from seeking a refund for periods that precede May 22, 2019," the date that AT&T asked Duke Progress to negotiate a just and reasonable rate. Whether an estoppel defense is available in a pole attachment complaint proceeding is doubtful.[240] But if it were available, it fails. The Commission "decline[d] the invitation … to preclude monetary recovery for any period

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[237] AT&T incorporates its Pole Attachment Complaint, Reply Legal Analysis in Support of Pole Attachment Complaint, this Reply to Duke Progress's Answer, and all Affidavits and Exhibits filed by AT&T in support of each, as if fully set forth in denial of each of Duke Progress's Affirmative Defenses.

[238] *AT&T Servs. v. 123.net*, 35 FCC Rcd 6401, 6414 (¶ 29) (2020) (citing 47 C.F.R. § 1.721(b), (d), (e) and 1.726(b), (c)).

[239] *In the Matter of Improving Pub. Safety Commcns in the 800 Mhz Band New 800 Mhz Band Plan for Puerto Rico & the U.S. Virgin Islands*, 26 FCC Rcd 1058, 1063 (¶¶ 12-13) (2011).

[240] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29) ("[Defendant] has cited no authority establishing that a party may assert equitable defenses in a formal complaint proceeding before the Commission."); *Air Touch Cellular v. Pac. Bell*, 16 FCC Rcd 13502, 13508 (¶ 17) (2001) (questioning whether equitable defenses, including estoppel, laches, and waiver, are available in formal complaint proceedings); *see also AT&T Servs. v. Great Lakes Comet, Inc.*, 30 FCC Rcd 2586, 2597 (¶ 36 & n.123) (2015) (same).

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prior to the time a utility receives actual notice of a disputed charge" because it would "run[ ] counter to the very idea of a statute of limitations."[241]

2. AT&T denies Duke Progress's second affirmative defense, which asserts that AT&T "waived its right to seek a refund for periods that precede May 22, 2019," the date that AT&T asked Duke Progress to negotiate a just and reasonable rate. Whether a waiver defense is available in a pole attachment complaint proceeding is doubtful.[242] But if it were available, it fails. The Commission "decline[d] the invitation … to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge" because it would "run[ ] counter to the very idea of a statute of limitations."[243]

3. AT&T denies Duke Progress's third affirmative defense, which asserts that AT&T's claim is barred by the 3-year statute of limitations for actions to rescind a contract under North Carolina law. The "applicable statute of limitations" does not *bar* a claim for just and reasonable rates or limit the Commission's broad statutory authority to "take such action as it deems appropriate and necessary" to ensure just and reasonable rates,[244] but instead sets the effective date of just and reasonable rates under the Commission's remedies rule.[245] And the "applicable statute of limitations" in this case is the 3-year statute of limitations that applies to

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[241] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

[242] *See AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[243] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

[244] 47 U.S.C. § 224(b)(1); *AEP v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013) ("Under this broad authorization [of 47 U.S.C. § 224(b)(1)], it is hard to see any legal objection to the Commission's selection of any reasonable period for accrual of compensation for overcharges or other violations of the statute or rules.").

[245] 47 C.F.R. § 1.1407(a)(3).

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actions involving a North Carolina contract[246] for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and paragraphs 12 and 32 of this Reply. The 3-year statute of limitations that applies to North Carolina actions to *rescind* a contract is not "more analogous" because this case will leave the JUA in place and set the just and reasonable rate for it as further detailed in Section II.C of AT&T's Reply Legal Analysis, and paragraphs 12 and 32 of this Reply.

4. AT&T denies Duke Progress's fourth affirmative Defense, which asserts that AT&T's claim is barred by the 2-year statute of limitations applicable to actions to recover overcharges under 47 U.S.C. § 415(c). The "applicable statute of limitations" does not *bar* a claim for just and reasonable rates or limit the Commission's broad statutory authority to "take such action as it deems appropriate and necessary" to ensure just and reasonable rates,[247] but instead sets the effective date of just and reasonable rates under the Commission's remedies rule.[248] And the "applicable statute of limitations" in this case is the 3-year statute of limitations that applies to actions involving a North Carolina contract[249] for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and paragraphs 12 and 32 of this Reply. The Commission rejected use of the 2-year statute of limitations of 47 U.S.C. § 415 and found that it is not "more closely analogous" because it is not applicable to the Pole Attachment Act or to this case, which does not seek to recover "lawful" charges or to obtain

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[246] *See Potomac Edison Order* at 22 (¶ 46) (holding the "applicable statute of limitations" is the "statute of limitations for contract actions" under State law); *see also* N.C. Gen. Stat. § 1-52(1) (applying to "an action upon a contract, obligation or liability arising out of a contract …").

[247] 47 U.S.C. § 224(b)(1); *AEP*, 708 F.3d at 190.

[248] 47 C.F.R. § 1.1407(a)(3).

[249] *See* N.C. Gen. Stat. § 1-52(1).

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damages from a "carrier"[250] as further detailed in Section II.C of AT&T's Reply Legal Analysis, and paragraphs 12 and 32 of this Reply.[251]

5. AT&T denies Duke Progress's fifth affirmative defense, which asserts that AT&T's claims for all years prior to 2019 are barred by accord and satisfaction because AT&T paid Duke Progress's invoices in full and agreed that the invoiced rates complied with the JUA's rate formula. Whether an accord and satisfaction defense is available in a pole attachment complaint proceeding is doubtful.[252] But if it were available, it fails. AT&T is statutorily entitled to "just and reasonable" rates for use of Duke Progress's poles; AT&T's payment of rates charged by Duke Progress that were in violation of federal law "is of no consequence."[253] Any other standard "would subvert the supremacy of federal law over contracts[254] and inappropriately reward Duke Progress for failing and refusing to comply with the law.

6. AT&T denies Duke Progress's sixth affirmative defense, which asserts that AT&T's claims for all years prior to 2019 are barred "because AT&T acquiesced, consented to,

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[250] *See* 47 U.S.C. § 415.

[251] *See also Potomac Edison Order* at 21 (¶¶ 44-45).

[252] *See AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[253] *AT&T Servs. Inc.*, 30 FCC Rcd at 2597 (¶ 36) ("[T]he doctrines of waiver, estoppel, laches, and ratification do not preclude AT&T from challenging [the] rates .... AT&T is entitled to receive Defendants' services at rates no higher than what the Commission has determined to be just and reasonable. That AT&T ordered and paid for Defendants' services for a period of time, therefore, is of no consequence."); *see also S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002) (The FCC must ensure "just and reasonable" rates even if "the attacher has agreed, for one reason or another, to pay a rate above the statutory maximum or otherwise relinquish a valuable right to which it is entitled under the Pole Attachments Act and the Commission's rules.").

[254] *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50) (internal quotation and alteration omitted); *see also Pole Attachment Order NPRM*, 25 FCC Rcd at 11908 (¶ 105) ("The Commission would not be fulfilling [its statutory] duty if it were to substitute the requirements of contract law for the dictates of section 224.").

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and ratified the rates billed for those years." Whether acquiescence, consent, or ratification defenses are available in a pole attachment complaint proceeding is doubtful.[255] But if it were available, it fails. AT&T is statutorily entitled to "just and reasonable" rates for use of Duke Progress's poles; that AT&T paid rates charged by Duke Progress that were in violation of federal law "is of no consequence."[256] Any other standard "would subvert the supremacy of federal law over contracts"[257] and inappropriately reward Duke Progress for failing and refusing to comply with the law.

7. AT&T denies Duke Progress's seventh affirmative defense, which asserts that AT&T's claims for all years prior to 2019 are barred "because AT&T waived any right to contest the rates billed for those years" when AT&T paid Duke Progress's invoices in full and agreed that the invoiced rates complied with the JUA's rate formula. Whether a waiver defense is available in a pole attachment complaint proceeding is doubtful.[258] But if it were available, it fails. AT&T is statutorily entitled to "just and reasonable" rates for use of Duke Progress's poles; AT&T's payment of rates charged by Duke Progress that were in violation of federal law "is of no consequence."[259] Any other standard "would subvert the supremacy of federal law over

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[255] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[256] *AT&T Servs. Inc.*, 30 FCC Rcd at 2597 (¶ 36); *see also S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002).

[257] *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50) (internal quotation and alteration omitted); *see also Pole Attachment Order NPRM*, 25 FCC Rcd at 11908 (¶ 105).

[258] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[259] *AT&T Servs. Inc.*, 30 FCC Rcd at 2597 (¶ 36); *see also S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002).

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contracts"[260] and inappropriately reward Duke Progress for failing and refusing to comply with the law.

8. AT&T denies Duke Progress's eighth affirmative defense, which asserts that AT&T "received and continues to enjoy numerous valuable benefits and competitive advantages under the joint use agreement" such that "it would be inequitable for the Commission to grant any of the relief sought in AT&T's complaint because it would unjustly enrich AT&T." Whether an unjust enrichment defense is available in a pole attachment complaint proceeding is doubtful.[261] But if it were available, it fails. "The Commission made clear in the *Pole Attachment Order* that applying Section 224(b)(1) to [I]LEC attachments will not result in unreasonably low rates."[262] Instead, the new telecom "rate is just, reasonable, and fully compensatory."[263] Moreover, AT&T does not enjoy net material competitive benefits under the JUA and has instead been competitively disadvantaged by the JUA, including the JUA's pole attachment rates that are over [redacted] times the new telecom rates, for reasons detailed in AT&T's Complaint, Reply Legal Analysis, and this Reply.

9. AT&T denies Duke Progress's ninth affirmative defense, which asserts that granting the relief sought in AT&T's complaint "will render the joint use agreement

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[260] *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50) (internal quotation and alteration omitted); *see also Pole Attachment Order NPRM*, 25 FCC Rcd at 11908 (¶ 105).

[261] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[262] *FPL 2015 Order*, 30 FCC Rcd at 1146 (¶ 19).

[263] *Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137); *id.* at 531 (¶ 182) ("The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers.... The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate."); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987); *City of Portland v. United States*, 969 F.3d 1020, 1053 (9th Cir. 2020); *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002).

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unconscionable and therefore unenforceable." Whether an unconscionability defense is available in a pole attachment complaint proceeding is doubtful.[264] But if it were available, it fails. "The Commission made clear in the *Pole Attachment Order* that applying Section 224(b)(1) to [I]LEC attachments will not result in unreasonably low rates."[265] Instead, the new telecom "rate is just, reasonable, and fully compensatory."[266]

10. AT&T denies Duke Progress's tenth affirmative defense, which asserts that AT&T's claim "fails to state a claim upon which relief can be granted" under 47 C.F.R. § 1.1413(b) because the JUA "was not 'entered into or renewed' after the effective date of the rule." The new telecom rate presumption codified at 47 C.F.R. § 1.1413(b) applies to "new and newly-renewed joint use agreements," including agreements "that are automatically renewed, extended, or placed in evergreen status" after the rule's effective date.[267] The JUA has "*continue[d]* in force until terminated" upon one year's written notice.[268] "Continue" and "extend" are synonyms, meaning that the JUA has "automatically … extended" after the effective date of the new rule.[269] The new telecom rate presumption applies for reasons detailed in Section III.A.1 of AT&T's Complaint, Section II.A.1 of AT&T's Reply Legal Analysis, and this Reply.

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[264] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[265] *FPL 2015 Order*, 30 FCC Rcd at 1146 (¶ 19).

[266] *Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137); *id.* at 531 (¶ 182); *see also Fla. Power Corp.*, 480 U.S. at 254; *City of Portland*, 969 F.3d at 1053; *Ala. Power Co.*, 311 F.3d at 1370-71.

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

[268] Compl. Ex. 1 at ATT00104 (JUA, Art. XVII).

[269] *Potomac Edison Order* at 6-7 (¶ 15).

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11. AT&T denies Duke Progress's eleventh affirmative defense, which asserts that "[t]he Commission should forbear from exercising jurisdiction in this case because the facts and circumstances that gave rise to the Commission's assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles are not present in this case."[270] The Enforcement Bureau recently rejected this defense.[271] It should do so again here. The "facts that gave rise to the Commission's assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles"[272] *are* present in this case because "AT&T is, in fact, in an inferior bargaining position and … the JUA rate is neither just nor reasonable."[273] Duke Progress also has not filed a proper forbearance request and the Commission cannot forbear from applying its rules only to one ILEC's attachments on one electric utility's poles.[274] Forbearance is also precluded by statute because enforcement of AT&T's right to just and reasonable rates *is* (1) "necessary to ensure that the … regulations … in connection with … telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory," (2) "necessary for the protection of consumers," and (3) "consistent with the public interest."[275]

12. AT&T denies Duke Progress's twelfth affirmative defense, which asserts that the Commission should waive the applicability of its rules as they apply to ILECs under 47 C.F.R.

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[270] Answer, Affirmative Defense 11.

[271] *FPL 2020 Order*, 35 FCC Rcd at 5331-32 (¶ 19).

[272] Answer, Affirmative Defense 11.

[273] *See FPL 2020 Order*, 35 FCC Rcd at 5332 (¶ 19); *see also* Reply Legal Analysis § II.A-B.

[274] *See* 47 C.F.R. §§ 1.53-1.59; *see also FPL 2020 Order*, 35 FCC Rcd at 5332 (¶ 19 n.83).

[275] *See* 47 U.S.C. § 160(a); *FPL 2020 Order*, 35 FCC Rcd at 5331-32 (¶ 19 & n.83); *see also Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) (finding "just and reasonable" rates for ILECs "will promote broadband deployment and serve the public interest [because] greater rate parity between [ILECs] and their telecommunications competitors can energize and further accelerate broadband deployment").

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§ 1.3. Duke Progress's request is facially invalid as it has not demonstrated "good cause" or "plead with particularity the facts and circumstances which warrant such action."[276] Nor could Duke Progress meet the applicable standard because "a party seeking waiver of a rule's requirements must demonstrate that 'special circumstances warrant a deviation from the general rule' and 'such deviation will serve the public interest.'"[277] "In order to demonstrate the required special circumstances, [the party seeking waiver] must show that the application of the … rule would be inequitable, unduly burdensome or contrary to the public interest or that no reasonable alternative existed which would have allowed it to comply with the rule."[278] Duke Progress has not and cannot meet that standard. A "just and reasonable" rate for AT&T's use of Duke Progress's pole cannot be "inequitable."[279] Collection of a "fully compensatory" new telecom rate cannot be "unduly burdensome."[280] And application of the Commission's rules to ensure just and reasonable rates *will "serve the public interest* [because] greater rate parity between [ILECs] and their telecommunications competitors can energize and further accelerate broadband deployment."[281]

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[276] 47 C.F.R. § 1.3; *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

[277] *See In the Matter of Results Broad. Rhinelander, Inc. Pet. for Waiver of Final Payment Deadline for Winning Bids in Auction 94*, 34 FCC Rcd 8520, 8522 (¶ 7) (2019) (citing case law interpreting 47 C.F.R. § 1.3).

[278] *Id.*

[279] *See id.*; *see also FPL 2015 Order*, 30 FCC Rcd at 1146 (¶ 18) ("'Just and reasonable' and 'arbitrary and capricious' are mutually exclusive concepts.").

[280] *See Rhinelander*, 34 FCC Rcd at 8522 (¶ 7); *see also Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (quoting National Broadband Plan at 110).

[281] *See id.*; *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *see also, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5241 (¶ 1) ("Th[is] Order is designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation."). For this same reason, Duke Progress cannot show that no reasonable

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13. AT&T denies Duke Progress's thirteenth affirmative defense, which asserts that "[t]he rule upon which AT&T's complaint is premised is unlawful, ultra vires, arbitrary, capricious and unreasonable." The U.S. Courts of Appeals for the D.C. Circuit and Ninth Circuit disagreed.[282]

14. AT&T denies Duke Progress's fourteenth affirmative defense, which asserts that the doctrine of laches bars some or all of AT&T's claims. Whether a laches defense is available in a pole attachment complaint proceeding is doubtful.[283] But if it were available, it fails. The doctrine of "laches … do[es] not preclude AT&T from challenging [the] rates,"[284] particularly when "the Commission declined to impose time limits on the filing of pole attachment complaints."[285]

15. AT&T denies Duke Progress's fifteenth affirmative defense, which asserts that the "applicable statute of limitations bars some or all of AT&T's claims." The "applicable statute of limitations" does not *bar* a claim for just and reasonable rates or limit the Commission's broad statutory authority to "take such action as it deems appropriate and necessary" to ensure just and reasonable rates,[286] but instead sets the effective date of just and

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alternative existed which would have allowed it to comply with the "just and reasonable" rate requirement.

[282] *See Potomac Edison Order* at 6, 23 (¶¶ 14 n.43, 50); *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 19); *see also City of Portland*, 969 F.3d at 1052-53; *Am. Elec. Power Serv. Corp.*, 708 F.3d 183.

[283] *AT&T Servs.*, 35 FCC Rcd at 6414 (¶ 29); *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36 & n.123); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

[284] *AT&T Servs.*, 30 FCC Rcd at 2597 (¶ 36).

[285] *Dominion Order*, 32 FCC Rcd at 3763 (¶ 28).

[286] 47 U.S.C. § 224(b)(1); *AEP*, 708 F.3d at 190.

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reasonable rates under the Commission's remedies rule.[287] And AT&T has sought relief consistent with the "applicable statute of limitations," which is the 3-year statute of limitations that applies to actions involving a North Carolina contract,[288] for reasons detailed in Section III.C of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and paragraphs 12 and 32 of this Reply.[289]

16. AT&T denies Duke Progress's sixteenth affirmative defense, which purports to "reserve[ ] the right to assert other affirmative defenses as pleadings and discovery in this case progress." Whether this is an affirmative defense is doubtful.[290] But if it is, it fails. Under the Commission's rules, "[t]he answer shall advise the complainant and the Commission fully and completely of the nature of any defense ...."[291]

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[287] 47 C.F.R. § 1.1407(a)(3).

[288] *See* N.C. Gen. Stat. § 1-52(1).

[289] *See also Potomac Edison Order* at 22 (¶ 46).

[290] *See* Black's Law Dictionary (11th ed. 2019) (an "affirmative Defense" is an "assertion of facts and arguments that, if true, will DEPeat the plaintiff's ... claim, even if all the allegations in the complaint are true.").

[291] 47 C.F.R. § 1.726(b).

Respectfully submitted,

By: _____
Robert Vitanza
Gary Phillips
David Lawson
AT&T SERVICES, INC.
1120 20th Street NW, Suite 1000
Washington, DC 20036
(214) 757-3357

Attorneys for BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina

Christopher S. Huther
Claire J. Evans
Frank Scaduto
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevans@wiley.law
fscaduto@wiley.law

Dated: December 18, 2020

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RULE 1.721(M) VERIFICATION

I, Robert Vitanza, as signatory to this submission, hereby verify that I have read this Reply to Duke Energy Progress, LLC's Answer 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

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2020, I caused a copy of the foregoing AT&T's Reply to Duke Energy Progress, LLC's Answer to be served on the following (service method indicated):

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9050 Junction Drive
Annapolis Junction, MD 20701
(confidential version of Reply by hand delivery; public version of Reply by ECFS)

Eric B. Langley
Robin F. Bromberg
Robert R. Zalanka
Langley & Bromberg LLC
2700 U.S. Highway 280
Suite 240E
Birmingham, AL 35223
(confidential and public versions of Reply by email)

Rosemary H. McEnery
Michael Engel
Lisa Boehley
Lisa B. Griffin
Lisa J. Saks
Federal Communications Commission
Market Disputes Resolution Division
Enforcement Bureau
(confidential and public versions of Reply by email)

Kimberly D. Bose, Secretary
Nathaniel J. Davis, Sr., Deputy Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426
(public version of Reply by overnight delivery)

North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699
(public version of Reply by overnight delivery)

Public Service Commission of South Carolina
101 Executive Center Drive
Suite 100
Columbia, SC 29210
(public version of Reply by overnight delivery)

Frank Scaduto