

**Before the
Federal Communications Commission
Washington, DC 20554**

BELLSOUTH
TELECOMMUNICATIONS, LLC
d/b/a AT&T ALABAMA,

Complainant,

v.

ALABAMA POWER COMPANY,

Defendant.

Proceeding No. 19-____
Bureau ID No. EB-19-MD-____

POLE ATTACHMENT COMPLAINT

**BELLSOUTH TELECOMMUNICATIONS,
LLC d/b/a AT&T ALABAMA**

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* Certain information in this Pole Attachment Complaint and its supporting Affidavits and Exhibits has been designated confidential pursuant to 47 C.F.R. § 1.731. The designated information is marked with a text box in the confidential version of these pleadings and is redacted in the public version.

I. SUMMARY

This Complaint asks the Commission to apply its recently-adopted new telecom rate presumption to force a reduction in egregiously high pole attachment rates. Since the July 12, 2011 effective date of the Commission’s *Pole Attachment Order*, Complainant BellSouth Telecommunications, LLC d/b/a AT&T Alabama (“AT&T”) has been “entitled to pole attachment rates, terms and conditions that are just and reasonable,” meaning that AT&T should pay “the same rate as [a] comparable provider” when it attaches to an electric utility’s poles pursuant to comparable terms and conditions.¹ This makes sense—AT&T competes with the competitive local exchange carriers (“CLECs”) and cable companies that pay the Commission’s new telecom and cable rates; provides telephone, video, broadband, and other advanced services from facilities that occupy a similar amount of space on utility poles as these competitors; and is protected by the same right under 47 U.S.C. § 224 to “just and reasonable” rates.

Alabama Power Company (“Alabama Power”) refuses to charge AT&T the lawful just and reasonable new telecom rate. Most recently, it charged AT&T [REDACTED] per pole for 2017 rent, over [REDACTED] times the \$8.35 per-pole rate produced by the Commission’s new telecom rate formula. This rate is estimated because Alabama Power denied AT&T’s repeated requests for the rates Alabama Power charges AT&T’s competitors, for calculations supporting those rates, and for a complete set of license agreements showing the terms and conditions associated with those rates.

Alabama Power denied AT&T’s requests for information for reasons at odds with the Commission’s 2011 *Pole Attachment Order* and last year’s *Third Report and Order*,² first

¹ *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, 5331, 5336 (¶¶ 209, 217) (2011) (“*Pole Attachment Order*”).

² *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (“*Third Report and Order*”).

claiming that the rates it charges AT&T's competitors are not relevant because AT&T is an incumbent local exchange carrier ("ILEC"). Alabama Power then stated that it does not need to prove that the contract rate is reasonable. But Alabama Power is wrong. The Commission's new telecom rate presumption applies here, as the parties' Joint Use Agreement ("Agreement" or "JUA") is a newly renewed or extended agreement. And under the Commission's new presumption, AT&T is entitled to the new telecom rate—in this case, \$8.35 per pole—unless Alabama Power can prove that a higher rate is justified because the JUA provides AT&T net material benefits that advantage AT&T over its competitors.

Alabama Power has not tried to prove that AT&T has any such benefits. Instead, Alabama Power just claims that AT&T receives certain "obvious" benefits under the JUA. But AT&T's experience and a review of the two cherry-picked license agreements Alabama Power did provide (presumably, its best-case-scenario agreements) show that the alleged benefits do not exist at all, much less justify charging AT&T a more than [REDACTED] per-pole annual rental premium.

Even if Alabama Power could rebut the presumption, AT&T is still entitled to relief from Alabama Power's unjust and unreasonable rates. The Commission set the pre-existing telecom rate, which AT&T estimates at \$12.66 per pole for the 2017 rental year, as the maximum rate a utility can charge an ILEC when the utility can rebut the presumption. Yet, Alabama Power charges AT&T *nearly* [REDACTED] *times* that rate.

But Alabama Power has not, and cannot, prove a rate higher than the new telecom rate is justified. With AT&T facilities attached to over 630,000 Alabama Power poles, Alabama Power's overcharges have a more than [REDACTED] million annual impact. The Commission should enforce its presumption to eliminate this rate disparity and provide the competitively neutral rates that the Commission found essential to its competition and broadband deployment goals.

II. PARTIES AND JURISDICTION

1. Complainant AT&T is an ILEC that provides telecommunications and other services in areas of Alabama. It is a Georgia limited liability company with a principal place of business at 675 West Peachtree Street NW, Suite 4500, Atlanta, GA 30308. AT&T may be reached through undersigned counsel at (214) 757-3357.

2. Defendant Alabama Power, the second-largest electric utility of Southern Company,³ owns and controls poles in Alabama that are used, in whole or in part, for wire communications. Alabama Power is not owned by a railroad, a person who is cooperatively organized, or a person owned by the Federal Government or a State. It is an Alabama company with a principal place of business at 600 North 18th Street, Birmingham, Alabama 35203.

3. AT&T and Alabama Power are parties to a 1978 Agreement with a rate provision that was amended in 1994.⁴ Alabama Power and AT&T share an estimated 809,164 utility poles, with Alabama Power owning about 630,143 of the joint use poles (77.9%) and AT&T owning about 179,021 of the joint use poles (22.1%).⁵

4. The Commission has jurisdiction over this pole attachment complaint pursuant to 47 U.S.C. § 224(b), which states that it “shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall ... hear and resolve complaints concerning such rates, terms, and conditions.”⁶

³ See How We Operate, *available at* <https://www.alabamapower.com/our-company/how-we-operate/background.html> (last visited Apr. 17, 2019).

⁴ See Ex. 1 at ATT00102-119 (JUA).

⁵ Ex. 5 at ATT00199 (Invoice dated Nov. 13, 2018) (“2018 Invoice”).

⁶ 47 U.S.C. § 224(b)(1). This dispute is about the meaning and application of this statutory “just and reasonable” rate requirement. While the JUA contains an arbitration clause, it is limited to disputes about “the intent of the Agreement” and “differences which are covered by [its] terms” and so is inapplicable here. See Ex. 1 at ATT00109 (JUA, Art. XVIII).

5. The State of Alabama has not certified to the Commission that it regulates the rates, terms, and conditions for pole attachments and so has not reverse-preempted the Commission's jurisdiction pursuant to 47 U.S.C. § 224(c).

6. A separate action has not been filed with the Commission, any court, or other government agency based on the same claim or same set of facts, in whole or in part, and AT&T does not seek prospective relief that is identical to the relief proposed or at issue in a notice-and-comment rulemaking proceeding that is currently before the Commission.

7. Prior to the filing of this complaint, AT&T notified Alabama Power in writing of the allegations that form the basis of this complaint and invited a response within a reasonable time period. AT&T also, in good faith, engaged in two face-to-face executive-level meetings and numerous other discussions with Alabama Power concerning the possibility of settlement.⁷

III. ALABAMA POWER HAS LONG CHARGED AT&T UNJUST AND UNREASONABLE POLE ATTACHMENT RENTAL RATES.

8. As of mid-2011, AT&T was entitled to a “competitively neutral” pole attachment rate—meaning the new telecom rate—because it attaches to Alabama Power's poles on terms and conditions that are materially comparable to those of “a telecommunications carrier or a cable operator.”⁸ But Alabama Power continues to charge AT&T “pole attachment rates significantly higher than the [new telecom] rates charged to similarly situated telecommunications attachers.”⁹

⁷ See also Section III.B, below.

⁸ *Pole Attachment Order*, 26 FCC Rcd at 5333-38 (¶¶ 214-220).

⁹ See *Third Report and Order*, 33 FCC Rcd at 7767 (¶ 123) (quotation marks omitted).

9. In 2018, the Commission adopted its new telecom rate presumption to rectify reports of such persistent overcharges, finding that, for “new and newly-renewed pole attachment agreements,” ILECs are presumptively comparable to their competitors and entitled to the new telecom rate.¹⁰ In discussions with AT&T, Alabama Power has offered no valid basis to rebut that presumption, only a series of makeweight arguments about claimed advantages that do not in fact exist. Accordingly, the Commission should order Alabama Power to reduce the pole attachment rate it charges AT&T to the competitively-neutral new telecom rental rate established by law nearly eight years ago.

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

10. The Commission’s new telecom rate presumption is the most recent step in the Commission’s longstanding effort to ensure that “similarly situated attachers ... pay similar pole attachment rates for comparable access.”¹¹ With or without the presumption, AT&T is entitled to rate relief in this case. But the presumption applies, and it entitles AT&T to the new telecom rate because Alabama Power cannot prove that its far higher rental rates are justified by any net material advantages provided to AT&T under the JUA.

1. The New Telecom Rate Presumption Applies, But Alabama Power Charges Rates Far Higher.

11. AT&T is presumptively entitled to the new telecom rate because the JUA is a “newly-renewed” agreement as defined by the *Third Report and Order*. In that *Order*, the Commission applied its new telecom rate presumption to all “new and newly-renewed joint use agreements,” and defined “newly-renewed agreements” to include those “that are automatically

¹⁰ *Id.* at 7769 (¶ 126).

¹¹ *Id.* at 7768 (¶ 123).

renewed, *extended*, or placed in evergreen status.”¹² The JUA’s initial term expired on June 1, 1988, and it states that it “*shall continue* thereafter until terminated ... by either party giving to the other party one (1) year’s notice in writing....”¹³ Continue and extend are synonyms: “Continue” means “[t]o carry further in time, space or development: *extend*”¹⁴ and “extend” means “to lengthen, prolong; *to continue* ...”¹⁵ Consequently, the JUA has automatically extended after the effective date of the *Third Report and Order*, and the Commission’s newly adopted rate presumption applies.¹⁶

12. Under the presumption, AT&T should be charged a properly calculated new telecom “rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2).”¹⁷ Using publicly available data, AT&T estimates that the properly calculated new telecom rate for use of Alabama Power’s poles has been around \$8 per pole since the effective date of the 2011 *Pole Attachment*

¹² *Id.* at 7770 (¶ 127 & n.475) (emphasis added).

¹³ Ex. 1 at ATT00108 (JUA, Art. XV) (emphasis added). The license agreements Alabama Power produced contain a similar provision, stating that “[u]pon completion of the initial term ... this Agreement *shall continue* in effect until terminated by either party” See Ex. 2 at ATT00142 (CLEC License ¶ 35) (emphasis added).

¹⁴ “Continue,” *Webster’s II New College Dictionary* 244 (2001) (emphasis added); see also “Continue,” *Oxford English Dictionary* (3d ed. online) (“To remain in existence or in its present condition”); *Ex parte Pierce*, 50 So. 3d 447, 457 (Ala. Civ. App. 2010) (“To maintain without interruption a condition, course, or action”).

¹⁵ “Extend,” *Oxford English Dictionary* (3d ed online); see also “Extend,” *Webster’s II New College Dictionary* 396 (2001) (“To stretch or reach”); “Extend,” *Merriam-Webster’s Collegiate Dictionary* 411 (1996) (“To stretch out in distance, space, or time”).

¹⁶ The JUA automatically extends, and so falls within the Commission’s definition of a “newly renewed” agreement. It also automatically “renews” because its terms “repeat so as to reaffirm” or “begin again” absent termination by a party. See “Renew,” *Webster’s II New College Dictionary* 938 (2001); “Renew,” *Merriam-Webster’s Collegiate Dictionary* 990 (10th ed. 1996).

¹⁷ 47 C.F.R. § 1.1413(b).

Order. Alabama Power has instead charged AT&T rates in excess of [REDACTED] per pole since 2011, and those rates have increased to the point where they are now approaching [REDACTED] per pole.¹⁸

| | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|---------------------------------------|------------|------------|------------|------------|------------|------------|------------|
| Contract rate paid by AT&T (per pole) | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| New telecom rate (per pole) | \$8.10 | \$7.80 | \$7.66 | \$7.84 | \$7.53 | \$7.58 | \$8.35 |

AT&T has thus consistently paid Alabama Power contract rates that are more than [REDACTED] *times* the new telecom rates to which it is entitled.¹⁹ In fact, AT&T has paid Alabama Power contract rates that are *nearly* [REDACTED] the average \$26.12 per-pole rate that, in part, led the Commission to adopt the new telecom rate presumption in order to accelerate rate relief to ILECs.²⁰ Alabama Power's rates are not merely unjust and unreasonable, but egregiously so.

2. Alabama Power Cannot Rebut The Presumption, So AT&T Is Entitled To The New Telecom Rate.

13. The new telecom rate presumption is rebuttable, but Alabama Power cannot meet its burden here. Alabama Power would need "clear and convincing evidence that [AT&T] receives net benefits under its pole attachment agreement with [Alabama Power] that materially advantage [AT&T] over other telecommunications attachers."²¹ The Commission has set ground rules for this analysis: when comparing a joint use agreement and a license agreement, the electric utility must weigh and account for all of the different rights *and responsibilities* placed

¹⁸ See Ex. A at ATT00007 (Aff. of D. Rhinehart, Apr. 16, 2019 ("Rhinehart Aff.") ¶ 13); Ex. B at ATT00044-45 (Aff. of D. Miller, Apr. 16, 2019 ("Miller Aff.") ¶ 8).

¹⁹ Ex. A at ATT00008 (Rhinehart Aff. ¶ 14).

²⁰ *Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125).

²¹ *Id.* at 7768 (¶ 123); *see also* 47 C.F.R. § 1.1413(b).

on the ILEC as compared to its competitors.²² The electric utility must also establish more than a mere difference in how an attacher's costs are incurred or work is performed, since an ILEC and its competitor bear comparable costs even if the ILEC performs a service itself whereas its competitor pays the electric utility to perform the service at cost.²³ The electric utility must also factor in the unique and substantial cost to ILECs of joint use agreement terms that are reciprocal—meaning that the ILEC must provide the same term to the electric utility for use of the ILEC's poles.²⁴ Such reciprocal terms are absent from license agreements since they, by definition, provide only for the attacher's use of the electric utility's poles.²⁵ Reciprocal joint use agreement terms, therefore, cannot be “net benefits” that justify charging an ILEC a rate higher than the new telecom rate.²⁶

14. Alabama Power has not produced and cannot produce evidence of net benefits that give AT&T a material advantage under the Commission's strict standard. In rejecting

²² *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654) (“A failure to weigh, and account for, the different rights and responsibilities in joint use agreement could lead to marketplace distortions.”); *see also* Ex. D at ATT00083-84 (Aff. of C. Dippon, Apr. 16, 2019 (“Dippon Aff.”) ¶ 34).

²³ *Verizon Va., LLC and Verizon S., Inc. v. Va. Electric and Power Co.*, 32 FCC Rcd 3750, 3759 (¶ 18) (EB 2017) (“*Verizon Va.*”) (“Where Verizon performs a particular service itself and incurs costs comparable to its competitors in performing that service, ... Dominion may not ‘embed in Verizon’s rental rate costs that Dominion does not incur.’”); *see also* Ex. D at ATT00083-84 (Dippon Aff. ¶ 34).

²⁴ *Verizon Va.*, 32 FCC Rcd at 3760 (¶ 21) (“By identifying as alleged ‘benefits’ to Verizon services that Verizon is likewise required to extend to Dominion under the Joint Use Agreements, Dominion has failed to show that Verizon receives a disproportionate benefit”); *see also* Ex. D at ATT00084-85 (Dippon Aff. ¶ 35).

²⁵ *See* Ex. C at ATT0064-65 (Aff. of M. Peters, Apr. 16, 2019 (“Peters Aff.”) ¶ 8).

²⁶ *See Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123) (requiring utility to prove that the ILEC “receives *net benefits* under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers”) (emphasis added); *see also* Ex. C at ATT00064-65 (Peters Aff. ¶ 8); Ex. D at ATT00084-85 (Dippon Aff. ¶ 35).

AT&T's request for a rate reduction, Alabama Power sent AT&T two redacted license agreements which, Alabama Power claims, show that AT&T has eight "obvious and significant benefits" under the JUA.²⁷ But even if those cherry-picked agreements somehow depicted the terms available to "a *typical* competitor or an *average* of [AT&T's] competitors,"²⁸ which they likely do not, they still would not support Alabama Power's assertion that AT&T enjoys material advantages that justify rental rates ■ times the rates that apply to its competitors. The eight so-called "benefits" advanced by Alabama Power are not benefits at all.²⁹ And, they certainly do not justify an annually recurring ■ per pole rental rate disparity.

15. *First*, Alabama Power claims that AT&T avoided make-ready costs decades ago because Alabama Power installed 40-foot poles to accommodate AT&T instead of shorter poles "sufficient only to meet [Alabama Power's] own service needs."³⁰ This argument is specious. As of 1966, nearly half of Alabama Power's poles that were jointly used by AT&T were 35 feet.³¹ Obviously, this would not be the case if joint use poles had to be 40 feet to accommodate AT&T in the first instance. Indeed, the JUA recognizes that shorter poles can accommodate both parties' facilities by allowing for the installation of "35-foot or shorter joint use poles."³²

²⁷ Ex. 13 at ATT00260 (Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (July 19, 2018)) ("Alabama Power July 19, 2018 Letter").

²⁸ See *Verizon Va.*, 32 FCC Rcd at 3759 (¶ 20) (emphasis added).

²⁹ Ex. 13 at ATT00260-261 (Alabama Power July 19, 2018 Letter); see Ex. B at ATT00047, -51 (Miller Aff. ¶¶ 14, 22); Ex. C at ATT00064, -66 (Peters Aff. ¶¶ 7, 11); Ex. D at ATT00083, -87 (Dippon Aff. ¶¶ 33, 41).

³⁰ Ex. 13 at ATT00260-261 (Alabama Power July 19, 2018 Letter).

³¹ Ex. 6 at ATT00203 (Letter Agreement (Dec. 30, 1966), A.1 & A.2) (estimating that 44% of Alabama Power's joint use poles were 35-foot poles).

³² Ex. 1 at ATT00107 (JUA, Art. VII(D)); see also Ex. B at ATT00047-48 (Miller Aff. ¶ 15); Ex. C at ATT00065-66 (Peters Aff. ¶ 10).

16. To the extent that Alabama Power chose over time to install taller poles, it did so to accommodate third parties, not AT&T. In Reply Comments filed at the FCC, Alabama Power conceded that “joint use agreements have always contemplated use by parties *other than* the electric utility and the telephone company.”³³ As a result, pole height has never been uniquely caused by AT&T, nor has it uniquely advantaged AT&T.³⁴ In fact, in recent years AT&T has paid Alabama Power substantial sums for make-ready in order to create sufficient space for AT&T’s facilities on Alabama Power’s poles given the attachments of third parties.³⁵ In any event, regardless of why Alabama Power installed taller poles many years ago, pole height does not justify the extraordinarily high rental rates Alabama Power charges AT&T now, or provide a basis for extending them into the future.

17. *Second*, Alabama Power claims that AT&T is advantaged because AT&T pays scheduled (*i.e.*, estimated) instead of actual make-ready costs.³⁶ But the license agreements that Alabama Power produced demonstrate that Alabama Power also charges AT&T’s competitors estimated make-ready costs—it estimates the “work order cost” for a project and does not true-up that estimate based on the actual cost incurred.³⁷ But, regardless of whether AT&T’s

³³ Reply Comments of Alabama Power, et al. at 11, *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 (Apr. 22, 2008) (emphasis added).

³⁴ Ex. C at ATT00065-66 (Peters Aff. ¶ 10).

³⁵ Ex. B at ATT00048 (Miller Aff. ¶ 16).

³⁶ Ex. 13 at ATT00260 (Alabama Power July 19, 2018 Letter).

³⁷ Ex. 2 at ATT00127 (CLEC License ¶ 5); *see also* Initial Comments of Southern Company et al. at 42, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (June 15, 2017) (explaining “work order cost approach”).

competitors pay estimated or actual costs, Alabama Power has failed to show that such costs are higher than the “actual” costs paid by AT&T.³⁸

18. *Third*, Alabama Power claims that AT&T is advantaged by the JUA’s allocation of 2.5 feet of space to AT&T, with an option to occupy more space, because AT&T’s competitors allegedly “are only allowed to occupy 1 foot of space.”³⁹ This claim also cannot withstand scrutiny. The JUA does not dedicate 2.5 feet of space to AT&T’s exclusive use, instead deeming joint use poles satisfactory regardless of whether 2.5 feet of space is reserved for AT&T.⁴⁰ And, in AT&T’s experience, Alabama Power has not reserved that much space for AT&T, instead renting out part of the space to AT&T’s competitors and collecting additional rent from them for space also paid for by AT&T.⁴¹ This advantages only Alabama Power, not AT&T. Moreover, AT&T does not want, require, or occupy 2.5 feet of space or more on Alabama Power poles.⁴² Instead, AT&T occupies space on the pole comparable to its competitors, which are presumed to occupy the 1 foot of pole space that Alabama Power

³⁸ In addition, the make-ready terms of the JUA are better for Alabama Power than for AT&T. Under the JUA, AT&T—and not Alabama Power—is required to pay premiums for certain pole replacement and removal work. *See* Ex. 1 at ATT00114 (JUA, App’x A, p.4).

³⁹ Ex. 13 at ATT00260 (Alabama Power July 19, 2018 Letter). Although Alabama Power states that cable and CLEC attachers are only allowed 1 foot of space, the license agreements it produced contain no such restriction. *See* Ex. 2 at ATT00120-158 (CLEC License), Ex. 3 at ATT00159-194 (Cable License).

⁴⁰ Ex. 1 at ATT00106 (JUA, Art. III(3)) (“... any existing joint use pole, or any pole hereafter placed in joint use, shall be deemed satisfactory to both parties and adequate for their requirements *whether or not* the space allocations made herein have been observed.”) (emphasis added); *see also id.* at ATT00107 (JUA, Art. VII(D)) (joint use poles may be “poles [that] would *not* provide the standard space allocation referred to in this agreement”) (emphasis added).

⁴¹ Ex. B at ATT00048-49 (Miller Aff. ¶ 17); Ex. C at ATT00065-66 (Peters Aff. ¶ 10).

⁴² Ex. B at ATT00048-49 (Miller Aff. ¶ 17); Ex. C at ATT00065-66 (Peters Aff. ¶ 10).

concedes they are provided.⁴³ But unlike AT&T’s competitors, which are charged only for the space that they occupy, AT&T is charged for allocated space that it does not occupy *and* for additional “safety space” that is used only by Alabama Power.⁴⁴

19. *Fourth*, Alabama Power claims that AT&T is advantaged because it pays per-pole rates when Alabama Power charges licensees “on a per attachment—not a per pole—basis.”⁴⁵ Alabama Power is wrong. A per-pole rate is not a benefit provided by the JUA or by Alabama Power, but is instead a right provided to all attachers by the FCC’s pole attachment rate formula, which “determine[s] the maximum just and reasonable rate *per pole*.”⁴⁶ If, indeed, Alabama Power wrongly charges AT&T’s competitors per-attachment rates, that is not a valid basis on which to claim AT&T is advantaged. Doing so would allow Alabama Power to profit from two wrongs—first by collecting attachment rates from AT&T’s competitors that are

⁴³ Ex. B at ATT00048-49 (Miller Aff. ¶ 17); Ex. C at ATT00065-66 (Peters Aff. ¶ 10); Ex. 13 at ATT00260 (Alabama Power July 19, 2018 Letter); 47 C.F.R. § 1.1410.

⁴⁴ See Ex. 1 at ATT00119 (JUA, App’x B, Ex. 2) (dividing cost of 40 inches of safety space between AT&T and Alabama Power); *Amendment of Commission’s Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, 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”); see also Ex. D at ATT00081 (Dippon Aff. ¶ 28).

⁴⁵ Ex. 13 at ATT00260 (Alabama Power July 19, 2018 Letter).

⁴⁶ See *Consolidated Partial Order*, 16 FCC Rcd at 12122 (¶ 31) (emphasis added). If a communications attacher has multiple attachments on a utility’s poles, such that its facilities occupy, on average, more than 1 foot of space, the pole owner may adjust the “space occupied” input of the new telecom rate formula to produce a slightly higher rate. See 47 C.F.R. § 1.1406(d)(2). The pole owner cannot lawfully multiply the rental rate for 1 foot of space by the number of feet of space used, as doing so would assign the attacher more unusable space than the statute allows. See 47 U.S.C. § 224(e)(2) (requiring that unusable space be *equally* divided among “attaching *entities*,” not attachments) (emphasis added).

contrary to the FCC’s rate formula *and* then by using those “per-attachment” rates to justify excessive “per-pole” rates from AT&T.⁴⁷

20. *Fifth*, Alabama Power claims that AT&T is competitively advantaged because it “is reserved the lowest section of usable space on the pole,” which Alabama Power claims is “easier to access.”⁴⁸ In fact, AT&T’s typical position as the lowest on the pole is simply because the ILEC was the only consistent attacher in the communications space when joint use originated, and it must continue today to ensure that the facilities of various communications providers do not crisscross midspan.⁴⁹ It is not an advantage to AT&T.⁵⁰ When a pole leans (*e.g.*, from weather damage, normal wear and tear, improperly engineered or constructed competitor facilities), the lowest facilities on the pole (typically, those of AT&T) can become low-hanging without notice and vulnerable to being struck by large vehicles.⁵¹ As the lowest attacher, AT&T also is most likely to receive a request to temporarily raise its facilities to accommodate an oversized vehicle or a load that exceeds standard vertical clearance.⁵² In addition, AT&T’s facilities are more susceptible to damage by workers ascending a pole to work

⁴⁷ Ex. D at ATT00087 (Dippon Aff. ¶ 40).

⁴⁸ Ex. 13 at ATT00260 (Alabama Power July 19, 2018 Letter).

⁴⁹ Ex. B at ATT00049 (Miller Aff. ¶ 18).

⁵⁰ *Id* at ATT00049-50 (Miller Aff. ¶¶ 18-19); Ex. C at ATT00065-66 (Peters Aff. ¶ 10).

⁵¹ Ex. B at ATT00049-50 (Miller Aff. ¶ 19); *see also Reply Comments of AT&T Services, Inc.*, WC Docket No. 17-84 at 3 (filed Feb. 16, 2018) (“AT&T has experienced a number of incidences where sagging cables from overlashing [of competitor facilities] without proper engineering caused trucks to unknowingly snag cables, felling poles on roads and sidewalks, endangering the public from pole impact and energized electric lines, and creating avoidable service outages. For example, in Akron, Ohio, a truck caught AT&T cables that had been in place for years without incident when poorly engineered overlashing caused those cables to sag over a roadway, breaking three utility poles....”).

⁵² Ex. B at ATT00049-50 (Miller Aff. ¶ 19).

on facilities above AT&T's.⁵³ Also increasing costs, the lowest attacher is usually the last to transfer its facilities to a replacement pole, and is often required to make multiple trips to a pole because the attachers located higher on the pole delayed transferring their facilities as scheduled.⁵⁴ These added risks and costs far outweigh any perceived (but nonexistent) “ease of access” advantage to being lowest on the pole. So, even apart from all of the significant *disadvantages* that come with being the lowest attacher, no credible argument can be made that AT&T has unique *advantages* that warrant dramatically different rates from its competitors.⁵⁵

21. *Sixth*, Alabama Power argues that AT&T is advantaged because it pays for inspections at the time of attachment differently than its competitors.⁵⁶ The competitors pay Alabama Power to complete the work, whereas AT&T incurs the cost to perform the work itself.⁵⁷ The Enforcement Bureau rejected a prior attempt to characterize such a difference as a benefit, holding that if an ILEC “performs a particular service itself and incurs costs comparable to its competitors in performing that service,” the electric utility may not increase the ILEC’s rental rate based on “costs that [the utility] does not incur.”⁵⁸ This is particularly so here, where the JUA’s inspection provisions, which apply once at the time of attachment, are reciprocal. As

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at ATT00049-50 (Miller Aff. ¶¶ 18-19); Ex. C at ATT00065-66 (Peters Aff. ¶ 10).

⁵⁶ Ex. 13 at ATT00260 (Alabama Power July 19, 2018 Letter).

⁵⁷ Ex. B at ATT00050 (Miller Aff. ¶ 20). It is not clear that Alabama Power in fact charges AT&T’s competitors for post-installation inspections because they are discretionary under its license agreements. *See* Ex. 2 at ATT00127 (CLEC License § 3(d)).

⁵⁸ *Verizon Va.*, 32 FCC Rcd at 3759 (¶ 18); *id.* (n.67) (“Dominion may not justify charging higher rates to Verizon based on costs that only Verizon incurs[]. To charge a higher rate on this basis would effectively double charge Verizon”); *see also* Ex. D at ATT00083-84 (Dippon Aff. ¶ 34).

such, they do not provide AT&T a net benefit over its competitors, let alone one that recurs annually for every pole to which AT&T is attached and pays rent.⁵⁹

22. *Seventh*, Alabama Power claims that AT&T has a “more favorable” liability sharing provision than the indemnification provision in its license agreements, even though they both assign liability based on fault.⁶⁰ But even if there were some difference between the indemnification obligations, the indemnification term in the JUA is reciprocal, and thus, is not a net benefit that supports charging AT&T a higher rate.⁶¹

23. *Finally*, Alabama Power claims that AT&T is advantaged because the JUA does not require that AT&T obtain insurance or provide Alabama Power a security bond.⁶² These provisions as well are reciprocal. Neither AT&T nor Alabama Power is required by the Agreement to purchase insurance or provide each other with a security bond, and so AT&T does not receive a net benefit that justifies a higher rate.⁶³

24. Because Alabama Power has not met and cannot meet its burden to rebut the presumption that AT&T is entitled to the new telecom rate,⁶⁴ the new telecom rate should be promptly set as the just and reasonable rate for AT&T’s use of Alabama Power’s poles.

25. Even if Alabama Power could rebut the new telecom rate presumption, which it cannot, it still could not charge the rates it has demanded from AT&T. In the 2018 *Third Report*

⁵⁹ Ex. C at ATT00064-65 (Peters Aff. ¶¶ 8-9); Ex. D at ATT00084-85, 86-87 (Dippon Aff. ¶¶ 35, 39).

⁶⁰ Ex. 13 at ATT00260-61 (Alabama Power July 19, 2018 Letter); *see also* Ex. 1 at ATT00108 (JUA, Art. XII(1)); Ex. 2 at ATT00137 (CLEC License § 26(a)).

⁶¹ Ex. C at ATT00064-65 (Peters Aff. ¶ 8); Ex. D at ATT00084-85 (Dippon Aff. ¶ 35).

⁶² Ex. 13 at ATT00261 (Alabama Power July 19, 2018 Letter).

⁶³ Ex. C at ATT00064-65 (Peters Aff. ¶ 8); Ex. D at ATT00084-85 (Dippon Aff. ¶ 35).

⁶⁴ *See* 47 C.F.R. § 1.1413(b).

and Order, the Commission set the pre-existing telecom rate as the *maximum* “just and reasonable” rate if a utility can rebut the new telecom rate presumption with clear and convincing evidence.⁶⁵ The Commission created this “hard cap” to eliminate uncertainty arising from the 2011 *Pole Attachment Order*, which looked to the pre-existing telecom rate as a “reference point” when an agreement provides an ILEC a net material advantage over its competitors.⁶⁶

26. It is self-evident from the below table that the near [REDACTED] pole attachment rates charged by Alabama Power are not close to “just and reasonable” even if Alabama Power could rebut the presumption and charge a rate as high as the pre-existing telecom rate:⁶⁷

| | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|---------------------------------------|------------|------------|------------|------------|------------|------------|------------|
| Contract rate paid by AT&T (per pole) | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Pre-existing telecom rate (per pole) | \$12.28 | \$11.82 | \$11.61 | \$11.88 | \$11.41 | \$11.49 | \$12.66 |

There is thus no set of circumstances under which the rates charged by Alabama Power are lawful, as they have consistently been more than [REDACTED] times the pre-existing telecom rate.⁶⁸ The Commission should apply its new presumption and eliminate these extraordinary overcharges.

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

27. The Commission’s *Third Report and Order* simplifies this case by presuming that the new telecom rate is the “just and reasonable” rate absent clear and convincing evidence from Alabama Power to the contrary. But even without that rate presumption, AT&T is entitled to a

⁶⁵ *Third Report and Order*, 33 FCC Rcd at 7769-71 (¶¶ 126-29).

⁶⁶ *Id.* at 7771 (¶ 129); *see also Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

⁶⁷ *See* Ex. A at ATT00010 (Rhinehart Aff. ¶ 19); Ex. B at ATT00044-45 (Miller Aff. ¶ 8).

⁶⁸ Ex. A at ATT00010 (Rhinehart Aff. ¶ 20); *see also* Ex. D at ATT00078 (Dippon Aff. ¶ 21).

“just and reasonable” new telecom rate and has been since the July 12, 2011 effective date of the *Pole Attachment Order*. Alabama Power’s exceptionally high rental rates have all the characteristics that the Commission found justify rate relief as of mid-2011. They are: unjust and unreasonable; the direct result of unequal bargaining power; locked in by an evergreen provision in the JUA; and not justified by any net material benefits that advantage AT&T over its competitors.⁶⁹

28. *First*, the contract rates are not just and reasonable. The 2011 rate paid by AT&T was more than [REDACTED] times the new telecom rate applicable to its competitors and more than [REDACTED] the pre-existing telecom rate, and yet over the last seven years, the disparity has grown even larger.⁷⁰ Most recently, AT&T paid over [REDACTED] per pole more than the new telecom rate, and over [REDACTED] per pole more than the pre-existing telecom rate—amounts that will continue to increase without the Commission’s assistance.⁷¹

29. The unreasonableness of the contract rates is also evident when viewed as a percentage of pole costs. The Commission expected that ILECs and electric utilities would each

⁶⁹ See *Pole Attachment Order*, 26 FCC Rcd at 5333-37 (¶¶ 214-18); see also Ex. D at ATT00077-87 (Dippon Aff. ¶¶ 20-41).

⁷⁰ See Ex. A at ATT00008, -10 (Rhinehart Aff. ¶¶ 14, 20).

⁷¹ *Id.*; Ex. B at ATT00044-45 (Miller Aff. ¶ 8). AT&T, meanwhile, reduced the rates it charges CLECs and cable companies attached to its poles to reflect the Commission’s new telecom rate methodology—thereby reducing its rental revenue during the same years that Alabama Power increased AT&T’s rates. See *Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125) (noting concern that survey data showed ILEC rental revenue from CLECs and cable companies decreased since 2008, but ILEC rental payments to electric utilities increased). The Enforcement Bureau previously asked ILECs to disclose the rates they charge CLECs and cable companies. See *Verizon Fla. LLC v. Fla. Power and Light Co.*, Memorandum Opinion and Order, 30 FCC Rcd 1140, 1150 (¶ 25 n.84) (EB 2015) (“*Verizon Fla.*”). For the 2012 through 2018 rental years, AT&T charged new telecom and cable rates that ranged from [REDACTED] per pole, assuming 1 foot of space occupied. See Ex. A at ATT00002-03 (Rhinehart Aff. ¶ 2).

pay “roughly the same proportionate rate given the parties’ relative usage of the pole ‘such as the same rate per foot of occupied space.’”⁷² Instead, the JUA disproportionately divides the entire pole cost between AT&T and Alabama Power. In particular, AT&T is required to pay Alabama Power 43.1% of the annual pole cost,⁷³ which is more than 35 percentage points higher than the 7.4% of annual pole costs that the Supreme Court and the Commission determined were fully compensatory to a pole owner for 1 foot of pole space.⁷⁴ At the same time, Alabama Power [REDACTED] is allocated 3.2 times more space than AT&T (8 feet vs. 2.5 feet).⁷⁵ Making matters worse, Alabama Power uses more space than it is allocated under the JUA, including over three feet of safety space that is “usable and used by the electric utility”—but is half paid for by AT&T under the JUA’s rate provision.⁷⁶ AT&T, in contrast, uses less space than allocated by the JUA, which lets Alabama Power double- and triple-recover by collecting additional rent from third parties also attached in the space allocated to AT&T.⁷⁷

⁷² See *Verizon Va.*, 32 FCC Rcd at 3760 (¶ 21 n.78) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662)).

⁷³ Ex. 1 at ATT00119 (JUA, App’x B, Ex. 2).

⁷⁴ *FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987); *Pole Attachment Order*, 26 FCC Rcd at 5297 (¶ 131 n.399) (“Under the cable formula, each attacher, other than the pole owner, pays about 7.4% of the annual cost of a pole.”), 5324 (¶ 191) (“Courts have upheld the existing cable rate, finding it to be a fully compensatory rate.”); see also Ex. D at ATT00082 (Dippon Aff. ¶ 30).

⁷⁵ *Id.* at ATT00079 (Dippon Aff. ¶ 24).

⁷⁶ See Ex. 1 at ATT00119 (JUA, App’x B, Ex. 2) (showing Alabama Power is not allocated 40 inches of safety space); *Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51) (holding “the 40-inch safety space ... is usable and used by the electric utility”); see also Ex. B at ATT00048-49 (Miller Aff. ¶ 17); Ex. D at ATT00081 (Dippon Aff. ¶ 28).

⁷⁷ See Ex. B at ATT00048-49 (Miller Aff. ¶ 17). [REDACTED]

30. *Second*, Alabama Power’s substantial pole ownership advantage “continuously impacted [AT&T’s] ability to negotiate a just and reasonable rate over time.”⁷⁸ The FCC has previously found that an electric utility’s relatively high rates coupled with its “nearly two-to-one pole ownership advantage” supported an inference of bargaining leverage, which justified rate relief for the ILEC.⁷⁹ In this case, Alabama Power’s pole ownership advantage at the time that Appendix B was adopted was even greater, over two-to-one (68% vs. 32%).⁸⁰ This relative disparity in pole ownership has enabled Alabama Power to require AT&T to pay unlawful pole attachment rates.⁸¹

31. *Third*, AT&T “genuinely lacks the ability to terminate” the contract rates and obtain new “just and reasonable” rates through negotiations.⁸² The JUA includes an “evergreen” provision that renders the rates effectively inescapable—even if AT&T were to terminate the JUA, it would have to continue paying the contract rates.⁸³ AT&T thus asked Alabama Power to

[REDACTED] See Ex. D at ATT00080-81 (Dippon Aff. ¶ 26). In contrast, if Alabama Power collected new telecom rates from all four attachers, Alabama Power would be responsible for a far more proportional 70.4% of the pole cost for use of 77.8% of the space. *Id.* at ATT00081 (Dippon Aff. ¶ 27).

⁷⁸ *Verizon Va.*, 32 FCC Rcd at 3757 (¶ 13 n.53); see also *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216); Ex. D at ATT00078-81 (Dippon Aff. ¶¶ 22-27).

⁷⁹ *Verizon Va.*, 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”).

⁸⁰ See Ex. 1 at ATT00116 (JUA, App’x B). The disparity has since widened. According to its most recent invoice, Alabama Power owns 77.9% of the utility poles that it shares with AT&T. See Ex. B at ATT00044 (Miller Aff. ¶ 7); Ex. 5 at ATT00199 (2018 Invoice).

⁸¹ Ex. D at ATT00078-81 (Dippon Aff. ¶¶ 22-27).

⁸² See *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216).

⁸³ See *Verizon Fla.*, 30 FCC Rcd at 1150 (¶ 25) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216)) (finding that evergreen clause is evidence that the ILEC “genuinely lacks the ability to terminate an existing agreement”); see also Ex. 1 at ATT00108-109 (JUA, Art. XV) (stating that, after termination, all existing “attachments shall continue thereafter to be

renegotiate a “just and reasonable” rate as required by law.⁸⁴ Despite more than a year of effort and two face-to-face meetings between executives, Alabama Power continued to leverage its pole ownership advantage to deny AT&T the just and reasonable rate to which it is entitled.⁸⁵

32. Alabama Power essentially denied the applicability of the Commission’s 2011 *Pole Attachment Order* and 2018 *Third Report and Order* to the parties’ discussions. It has still not disclosed the specific new telecom rates it charges AT&T’s competitors, or the inputs it uses to calculate them,⁸⁶ claiming that “AT&T is an incumbent local exchange carrier, not a CLEC or CATV. The rates charged to CLECs and CATVs are not applicable to AT&T.”⁸⁷ Alabama Power also refused to provide any information—other than two cherry-picked license agreements—to support its claim that AT&T should continue paying a rate that is [REDACTED] multiples of the rates charged others, stating that “it is not Alabama Power’s burden to prove the reasonableness” of its rates.⁸⁸

33. AT&T nonetheless tried to negotiate a just and reasonable rate. Its first face-to-face meeting was at Alabama Power headquarters on June 1, 2018.⁸⁹ Alabama Power’s

maintained, pursuant to and in accordance with the terms of this Agreement, which Agreement shall, so long as such attachments are continued, remain in full force and effect...”).

⁸⁴ Ex. 7 at ATT00207-208 (Letter from K. Hitchcock, AT&T, to D. Bynum, Alabama Power (Mar. 7, 2018)) (“AT&T Mar. 7, 2018 Letter”).

⁸⁵ See Ex. B at ATT00045-47 (Miller Aff. ¶¶ 10-13).

⁸⁶ See Ex. A at ATT00003 (Rhinehart Aff. ¶ 4).

⁸⁷ Ex. 10 at ATT00214 (Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (May 10, 2018)) (“Alabama Power May 10, 2018 Letter”).

⁸⁸ Ex. 13 at ATT00260 (Alabama Power July 19, 2018 Letter). Although Alabama Power claimed that the license agreements it provided support the rates it charges, they actually show that AT&T should be charged the new telecom rate. See Section III.A.2, above; see also Ex. C at ATT00064-66 (Peters Aff. ¶¶ 6-11).

⁸⁹ Ex. A at ATT00003 (Rhinehart Aff. ¶ 4).

executives had “the necessary authority to discuss pole attachment rental rates” at the meeting, but began a pattern of delay that has continued to date.⁹⁰ First, after agreeing to provide a rate offer in two weeks,⁹¹ Alabama Power informed AT&T that more time was needed to develop “an entirely different operating relationship.”⁹² Alabama Power then assured AT&T multiple times that it was working on a rate proposal, but 2018 ended without any offer.⁹³

34. In January 2019, AT&T reached out to Alabama Power to inquire about and seek the promised rate proposal, which led to a second executive-level meeting at Alabama Power’s headquarters on February 22, 2019.⁹⁴ The day before the meeting, Alabama Power informed AT&T that it still would “not be able to provide any offering [sic] at the meeting tomorrow.”⁹⁵ Alabama Power tried to blame AT&T for the delay, claiming that Alabama Power required confirmation of AT&T’s net bare pole cost (a number that it is not relevant to calculating a rate for use of Alabama Power’s poles).⁹⁶ In fact, Alabama Power had the information necessary to

⁹⁰ Ex. 10 at ATT00214 (Alabama Power May 10, 2018 Letter); Ex. B at ATT00045-47 (Miller Aff. ¶¶ 10-13).

⁹¹ Ex. A at ATT00003 (Rhinehart Aff. ¶ 4).

⁹² Ex. 11 at ATT00217 (Email from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (June 15, 2018)).

⁹³ Ex. 13 at ATT00261 (Alabama Power July 19, 2018 Letter); Ex. 15 at ATT00268-69 (Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (Sept. 11, 2018)); Ex. B at ATT00045-46 (Miller Aff. ¶ 10).

⁹⁴ *Id.* at ATT00046-47 (Miller Aff. ¶¶ 11-12).

⁹⁵ Ex. 17 at ATT00275 (Email from P. Boyd, Alabama Power, to D. Miller, AT&T (Feb. 21, 2019)) (“Alabama Power Feb. 21, 2019 Email”).

⁹⁶ *Id.*

calculate AT&T's net bare pole cost, as the calculation is based on publicly available data and distribution pole counts that AT&T sends Alabama Power each year.⁹⁷

35. At the February 2019 meeting, AT&T confirmed for Alabama Power its 2017 net bare pole cost and again asked for an offer.⁹⁸ Instead, Alabama Power rejected out of hand the possibility that it would be able to offer a rate that approximated the rates charged AT&T's competitors.⁹⁹ Subsequent discussions between the parties failed to resolve the dispute and confirmed that AT&T "genuinely lacks the ability to terminate" the existing rates and "obtain a new arrangement" through private negotiations.¹⁰⁰

36. Finally, AT&T has been entitled to a new telecom rate since the 2011 effective date of the *Pole Attachment Order* for the same reason that it is entitled to a new telecom rate under the Commission's newly enacted presumption: AT&T does not enjoy any net material benefits under the JUA that advantage AT&T over its competitors, let alone benefits that justify a rental rate that is more than [REDACTED] per pole higher than the new telecom rate.¹⁰¹

37. The 2011 *Pole Attachment Order* first adopted the standard that an ILEC should pay "*the same rate*" as its CLEC and cable competitors if its joint use agreement "does not provide a material advantage to [the ILEC] relative to cable operators or telecommunications

⁹⁷ See, e.g., Ex. 18 at ATT00282 (Email from D. Miller, AT&T, to P. Boyd, Alabama Power (Feb. 25, 2019)) ("AT&T Feb. 25, 2019 Email"); see also Ex. B at ATT00046 (Miller Aff. ¶ 11).

⁹⁸ Ex. A at ATT00003-04 (Rhinehart Aff. ¶ 4); Ex. B at ATT00046-47 (Miller Aff. ¶ 12).

⁹⁹ *Id.* at ATT00046-47 (Miller Aff. ¶ 12).

¹⁰⁰ *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216); see also Ex. B at ATT00047 (Miller Aff. ¶ 13).

¹⁰¹ See *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217); *Verizon Fla.*, 30 FCC Rcd at 1142 (¶ 7); see also Section III.A.2, above; Ex. B at ATT00047, -51 (Miller Aff. ¶¶ 14, 22); Ex. C at ATT00064, -66 (Peters Aff. ¶¶ 7, 11); Ex. D at ATT00083, -87 (Dippon Aff. ¶¶ 33, 41).

carriers.”¹⁰² And here, as detailed above, Alabama Power has not identified anything that gives AT&T a net material advantage over its competitors because AT&T has no such advantage.¹⁰³ Since the 2011 *Pole Attachment Order* took effect, then, AT&T should have been paying the “the same rate as the comparable provider, *i.e.*, the New Telecom Rate.”¹⁰⁴

38. Not only has Alabama Power failed to identify any net material advantage that AT&T enjoys over its competitors, it also has ignored those aspects of the JUA that *disadvantage* AT&T as compared to its competitors.¹⁰⁵ But any analysis of “competitive neutrality” must “account for ... the[se] different rights *and responsibilities*.”¹⁰⁶ It therefore must account for the fact that AT&T must provide Alabama Power each and every alleged “benefit” that Alabama Power claims to provide to AT&T.¹⁰⁷ No similar mandate is required of AT&T’s competitors.¹⁰⁸

39. It is also relevant that the JUA, “in contrast to cable or telecommunications carrier pole lease agreements—reflect[s] a decades-old contractual responsibility [for AT&T] to share in infrastructure costs” and requires AT&T to “still own many poles today.”¹⁰⁹ This is a costly distinction between AT&T and its competitors, as they need not incur any of the same pole

¹⁰² *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217) (emphasis added).

¹⁰³ See Section III.A.2, above; see also Ex. B at ATT00047, -51 (Miller Aff. ¶¶ 14, 22); Ex. C at ATT00064, -66 (Peters Aff. ¶¶ 7, 11); Ex. D at ATT00083, -87 (Dippon Aff. ¶¶ 33, 41).

¹⁰⁴ See *Verizon Fla.*, 30 FCC Rcd at 1142 (¶ 7) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217)) (internal quotation mark omitted).

¹⁰⁵ Ex. C at ATT00064-66 (Peters Aff. ¶¶ 8, 10); Ex. D at ATT00083-84 (Dippon Aff. ¶ 34).

¹⁰⁶ *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654) (emphasis added).

¹⁰⁷ Ex. C at ATT00064-65 (Peters Aff. ¶ 8); Ex. D at ATT00084-85 (Dippon Aff. ¶ 35).

¹⁰⁸ Ex. C at ATT00064-65 (Peters Aff. ¶ 8); Ex. D at ATT00084-85 (Dippon Aff. ¶ 35).

¹⁰⁹ *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654).

ownership, maintenance, and disposal costs under the license agreements that Alabama Power provided.¹¹⁰ And, as Alabama Power’s parent company informed the FCC, the “costs of owning and maintaining pole infrastructure are substantial and growing.”¹¹¹ When they are appropriately weighed against the non-existent “advantages” that Alabama Power has alleged, it is apparent that the JUA does not provide AT&T a net material advantage relative to its CLEC and cable competitors.¹¹² AT&T should pay a rate no higher than the new telecom rate dating back to 2012.¹¹³

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

40. Because Alabama Power can identify no material advantages that AT&T enjoys over its competitors, AT&T should be charged a properly calculated new telecom “rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2).”¹¹⁴ The best data available to AT&T shows that the applicable new telecom rates for AT&T’s use of Alabama Power’s poles during the 2011 through 2017 rental years are \$8.10, \$7.80, \$7.66, \$7.84, \$7.53, \$7.58, and \$8.35 per pole, respectively.¹¹⁵ These rates were calculated using Alabama Power’s FERC Form 1 data, Alabama Power’s most recent state-authorized rate of return, and the Commission’s presumptive

¹¹⁰ Ex. B at ATT00050 (Miller Aff. ¶ 21); Ex. D at ATT00083-84 (Dippon Aff. ¶ 34).

¹¹¹ See Comments of Southern Company, et al. at 19, *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 (Mar. 7, 2008).

¹¹² Ex. B at ATT00047, -51 (Miller Aff. ¶¶ 14, 22); Ex. C at ATT00064, -66 (Peters Aff. ¶¶ 7, 11); Ex. D at ATT00083, -87 (Dippon Aff. ¶¶ 33, 41).

¹¹³ See *Verizon Fla.*, 30 FCC Rcd at 1142 (¶ 7) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217)) (internal quotation mark omitted).

¹¹⁴ 47 C.F.R. § 1.1413(b); see also *Verizon Va.*, 32 FCC Rcd at 3759-61 (¶¶ 20-22) (requiring electric utility to justify its rates).

¹¹⁵ Ex. A at ATT00007 (Rhinehart Aff. ¶ 13).

inputs for pole height (37.5 feet), unusable space (24 feet), space occupied by AT&T (1 foot), average number of attaching entities in an urbanized area (5), and electric company appurtenance factor (15%).¹¹⁶

41. AT&T does not have complete insight into Alabama Power’s new telecom rates because Alabama Power refused AT&T’s repeated requests for the rates and their supporting calculations.¹¹⁷ However, the information that Alabama Power provided indicates that Alabama Power improperly inflates its new telecom rates.¹¹⁸ At a minimum, Alabama Power applies a “modification” to the Commission’s formula that increases Alabama Power’s pole costs by including “one-half of [Alabama Power’s] investment in overhead grounds (booked in FERC Account 365).”¹¹⁹ The Commission expressly rejected this approach, stating that “[w]e decline to add portions of Account[] 365” to the pole cost calculation.¹²⁰ As a result, Alabama Power cannot (although it appears it does) include “grounding installations recorded in accounts other than Account 364” in its rate calculation.¹²¹

42. The Commission should find that the “just and reasonable” rate is a properly calculated per-pole new telecom rate and thereby set the precedent for Alabama Power to

¹¹⁶ *Id.* at ATT00005-07 (Rhinehart Aff. ¶¶ 7-12).

¹¹⁷ *See, e.g.*, Ex. 7 at ATT00207 (AT&T Mar. 7, 2018 Letter); Ex. 9 at ATT00212 (AT&T Apr. 13, 2018 Letter); Ex. 16 at ATT00271-72 (Email from D. Miller, AT&T, to P. Boyd, Alabama Power (Feb. 8, 2019)) (each requesting Alabama Power’s new telecom rate calculations). *But see* Ex. 17 at ATT00275 (Alabama Power Feb. 21, 2019 Email) (confirming that Alabama Power uses the Commission’s presumptive inputs to calculate rates for AT&T’s competitors).

¹¹⁸ Ex. 2 at ATT00148 (CLEC License, Ex. A).

¹¹⁹ *Id.*

¹²⁰ *In re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6475 (¶ 38) (2000).

¹²¹ *Id.*

properly calculate rates for all of its attachers. The Commission should also order Alabama Power to refund the [REDACTED] millions of dollars that AT&T has paid in excess of the just and reasonable rate, “plus interest, consistent with the applicable statute of limitations.”¹²² Through the 2017 rental year (the most recent rental year invoiced in full), AT&T has overpaid Alabama Power by more than [REDACTED] million during the applicable 6-year statute of limitations period.¹²³

43. The Commission should require Alabama Power to refund these amounts, which were collected in violation of federal law. The refund will be consistent with the Commission’s intention that “monetary recovery in a pole attachment action extend as far back in time as the applicable statute of limitations allows.”¹²⁴ Any other result “discourages pre-complaint negotiations between the parties,” “fails to make injured attachers whole, and is inconsistent with the way that claims for monetary recovery are generally treated under the law.”¹²⁵ And here, AT&T should be made as whole as possible. It has been paying Alabama Power unjust and unreasonable rates for longer than the applicable statute of limitations period—and its effort to obtain new rates was met with delay from Alabama Power. By awarding refunds, the Commission can discourage similar conduct, encourage prompt negotiations, and confirm for the industry that it will enforce the ILEC rate reforms that were “designed to promote competition

¹²² 47 C.F.R. § 1.1407(a)(3). In the *Verizon Virginia* decision, the Enforcement Bureau cited a 5-year Virginia statute of limitations that applied to actions involving a contract. *See Verizon Va.*, 32 FCC Rcd at 3764 (¶ 28 n.104) (citing Va. Code § 8.01-246(2)). The comparable statute of limitations in Alabama is six years. *See Ala. Code* § 6-2-34.

¹²³ Ex. A at ATT00009 (Rhinehart Aff. ¶ 17) (calculating a net rental overpayment of [REDACTED] for the 2012 – 2017 rental years); Ex. B at ATT00044-45 (Miller Aff. ¶ 8).

¹²⁴ *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

¹²⁵ *Id.* at 5289 (¶ 110).

and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation.”¹²⁶

IV. COUNT I – UNJUST AND UNREASONABLE RATES

44. AT&T incorporates paragraphs 1 through 43 as if fully set forth herein.

45. The Commission is statutorily required to ensure that the pole attachment rates that Alabama Power charges AT&T are just and reasonable.¹²⁷

46. The rates that Alabama Power charges AT&T under the JUA are, and have long been, unjust and unreasonable in violation of 47 U.S.C. § 224.

47. The just and reasonable rate for AT&T’s attachments to Alabama Power’s poles is the new telecom rate under the new telecom rate presumption adopted in the 2018 *Third Report and Order* and the principle of competitive neutrality adopted in the 2011 *Pole Attachment Order*.¹²⁸ The following table includes the new telecom rates, calculated using the best data available to AT&T, for AT&T’s use of Alabama Power’s poles, and the proportional new telecom rates that would apply to Alabama Power’s use of AT&T’s poles:¹²⁹

| | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|--|---------|---------|---------|---------|---------|---------|
| New telecom rate for AT&T’s use of Alabama Power’s poles (per pole) | \$7.80 | \$7.66 | \$7.84 | \$7.53 | \$7.58 | \$8.35 |
| Proportional new telecom rate for Alabama Power’s use of AT&T’s poles (per pole) | \$26.65 | \$18.17 | \$16.69 | \$12.31 | \$14.84 | \$13.31 |

¹²⁶ *Id.* at 5241 (¶ 1).

¹²⁷ 47 U.S.C. § 224(b)(1).

¹²⁸ *See Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

¹²⁹ Ex. A at ATT00008-09 (Rhinehart Aff. ¶ 16).

Because Alabama Power denied AT&T these just and reasonable rates, AT&T has already overpaid Alabama Power by more than [REDACTED] million in net pole attachment rentals during the relevant refund period.¹³⁰

48. Alternatively, even if Alabama Power could show that the JUA provides AT&T a net material advantage over its competitors, the just and reasonable rate for AT&T's use of Alabama Power's poles is not higher than the rate calculated using the FCC's pre-existing telecom formula.¹³¹ The following table includes the pre-existing telecom rates, calculated using the best data available to AT&T, for AT&T's use of Alabama Power's poles, and the proportional pre-existing telecom rates that would apply to Alabama Power's use of AT&T's poles:¹³²

| | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|---|---------|---------|---------|---------|---------|---------|
| Pre-existing telecom rate for AT&T's use of Alabama Power's poles (per pole) | \$11.82 | \$11.61 | \$11.88 | \$11.41 | \$11.49 | \$12.66 |
| Proportional pre-existing telecom rate for Alabama Power's use of AT&T's poles (per pole) | \$40.37 | \$27.53 | \$25.29 | \$18.65 | \$22.48 | \$20.17 |

Under these alternative circumstances, AT&T has already overpaid Alabama Power by more than [REDACTED] million in net pole attachment rentals during the relevant refund period.¹³³

¹³⁰ *Id.* at ATT00009 (Rhinehart Aff. ¶ 17) (calculating overpayment for 2012 – 2017 rental years of [REDACTED] using proportional new telecom rental rates for AT&T and Alabama Power); Ex. B at ATT00044-45 (Miller Aff. ¶ 8).

¹³¹ *See Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

¹³² Ex. A at ATT00011 (Rhinehart Aff. ¶ 21).

¹³³ *Id.* (Rhinehart Aff. ¶ 22) (calculating overpayment for 2012 – 2017 rental years of [REDACTED] using proportional pre-existing telecom rental rates for AT&T and Alabama Power); Ex. B at ATT00044-45 (Miller Aff. ¶ 8).

V. REQUEST FOR RELIEF

49. AT&T respectfully requests that the Commission find that Alabama Power charged and continues to charge AT&T unjust and unreasonable rates in violation of federal law.

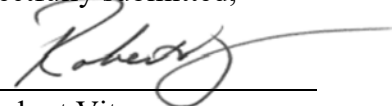
50. AT&T respectfully requests that the Commission set the just and reasonable rate, effective as of the 2012 rental year, as the rate that is properly calculated in accordance with the new telecom rate formula.

51. Alternatively, if the Commission concludes that Alabama Power has met its burden to prove by clear and convincing evidence that the JUA provides AT&T a net material advantage over its competitors, AT&T respectfully requests that the Commission set the just and reasonable rate, effective as of the 2012 rental year, at a rate that is no higher than the rate that is properly calculated in accordance with the pre-existing telecom rate formula.

52. AT&T respectfully requests that the Commission order Alabama Power to refund all amounts paid in excess of a just and reasonable rate beginning with the 2012 rental year and grant AT&T such other relief as the Commission deems just, reasonable, and proper.

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chuther@wileyrein.com
cevens@wileyrein.com

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

Dated: April 22, 2019

*Attorneys for BellSouth Telecommunications,
LLC d/b/a AT&T Alabama*

INFORMATION DESIGNATION

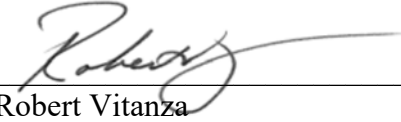
1. The AT&T employees and former employees with relevant information about this rental rate dispute are identified in this Pole Attachment Complaint and its supporting Affidavits and Exhibits.

2. The Joint Use Agreement and correspondence exchanged by the parties during the rental rate negotiations are attached as Exhibits to this Pole Attachment Complaint. Also attached are Affidavits from AT&T employees involved in the rate negotiations, calculations of the rental rates that result from the Commission's new and pre-existing telecom rate formulas, and calculations of the amounts that Alabama Power has collected in violation of 47 U.S.C. § 224(b).

3. Should Alabama Power seek to rebut the new telecom rate presumption, additional information will become relevant. AT&T previously sought to obtain some of this information from Alabama Power, such as the rates that Alabama Power charges CLECs and cable companies, the supporting calculations, a complete set of unredacted license agreements, and the support and quantification of the value associated with any competitive "benefit" that Alabama Power believes would justify its extraordinarily high rental rates. AT&T seeks such information in interrogatories being served contemporaneously with this Pole Attachment Complaint. AT&T reserves the right to rely on information that is not appended to this Pole Attachment Complaint if it is provided by Alabama Power or becomes relevant.

RULE 1.721(M) VERIFICATION

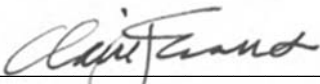
I, Robert Vitanza, as signatory to this submission, hereby verify that I have read this Pole Attachment Complaint and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, 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

DECLARATION OF PAYMENT

I, Claire J. Evans, counsel for Complainant BellSouth Telecommunications LLC d/b/a AT&T Alabama (“AT&T”), hereby declare, under penalty of perjury, that AT&T paid the \$295 filing fee electronically using the Commission’s electronic filing and payment system “Fee Filer” (www.fcc.gov/feefiler) on April 15, 2019, as required by Section 1.1106 of the Commission’s Rules, 47 C.F.R. § 1.1106. AT&T’s 10-digit FCC Registration Number is 0020882668.



Claire J. Evans

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2019, I caused a copy of the foregoing Complaint, Affidavits, and Exhibits in support thereof, to be served on the following (service method indicated):


Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554
(confidential version of Complaint,
Affidavits, and Exhibits by hand delivery;
public version of Complaint, Affidavits,
and Exhibits by ECFS)

Alabama Power Company
600 North 18th Street
Birmingham, AL 35203
(confidential and public versions of
Complaint, Affidavits, and Exhibits by hand
delivery)

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

Eric B. Langley, Esq.
Langley & Bromberg LLC
2700 U.S. Highway 280
Suite 240E
Birmingham, AL 35223
(courtesy copy of public version of Complaint
by email at eric@langleybromberg.com)

Walter L. Thomas, Jr., Secretary
Alabama Public Service Commission
100 North Union Street
RSA Union Building
Room 850
Montgomery, AL 36104
(public version of Complaint, Affidavits,
and Exhibits by overnight delivery)



Claire J. Evans

**Before the
Federal Communications Commission
Washington, DC 20554**

BELLSOUTH
TELECOMMUNICATIONS, LLC
d/b/a AT&T ALABAMA,

Complainant,

v.

ALABAMA POWER COMPANY,

Defendant.

Proceeding No. 19-____
Bureau ID No. EB-19-MD-____

Affidavits

- A. Affidavit of Daniel P. Rhinehart (April 16, 2019)
- B. Affidavit of Dianne W. Miller (April 16, 2019)
- C. Affidavit of Mark Peters (April 16, 2019)
- D. Affidavit of Christian M. Dippon, Ph.D. (April 16, 2019)

Exhibits

- 1. Joint Use Agreement Between Alabama Power Company (“Alabama Power”) and South Central Bell Telephone Company (“AT&T”), dated June 1, 1978, as amended.
- 2. Alabama Power CLEC Pole License Agreement, effective March 7, 2018.
- 3. Alabama Power Cable Pole License Agreement, effective May 24, 2017.
- 4. Final Invoice from Alabama Power for 2017 Rental Year.
- 5. Preliminary Invoice from Alabama Power for 2018 Rental Year.
- 6. Letter Agreement between Alabama Power and AT&T (December 30, 1966).
- 7. Letter from K. Hitchcock, AT&T, to David Bynum, Alabama Power (March 7, 2018).
- 8. Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (April 4, 2018).
- 9. Letter from K. Hitchcock, AT&T, to S. Morgan, Alabama Power (April 13, 2018).

PUBLIC VERSION

10. Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (May 10, 2018).
11. Email from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (June 15, 2018).
12. Letter from K. Hitchcock, AT&T, to S. Morgan, Alabama Power (June 26, 2018).
13. Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (July 19, 2018)
(without attachments, which appear separately as Exhibits 2 and 3).
14. Letter from K. Hitchcock, AT&T, to S. Morgan, Alabama Power (August 16, 2018).
15. Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (September 11, 2018).
16. Email from D. Miller, AT&T, to P. Boyd, Alabama Power (February 8, 2019).
17. Email from P. Boyd, Alabama Power, to D. Miller, AT&T (February 21, 2019).
18. Email from D. Miller, AT&T, to P. Boyd, Alabama Power (February 25, 2019).
19. Email from P. Boyd, Alabama Power, to D. Miller, Alabama Power (February 27, 2019).
20. Email from S. Morgan, Alabama Power, to D. Miller, AT&T (March 15, 2019) (without attachment).
21. Email from S. Morgan, Alabama Power, to D. Miller, AT&T (March 22, 2019) (without attachment).
22. Email from D. Miller, AT&T, to P. Boyd, Alabama Power (March 28, 2019) (without attachment).

Exhibit A

Defendant.

Proceeding No. 19-____
Bureau ID No. EB-19-MD-____

STATE OF TEXAS)
) ss.
COUNTY OF WILLIAMSON)

2. My job title is Director – Regulatory. My current responsibilities include supporting various AT&T entities in the areas of cost analysis, rate development, and universal services. In this role, I direct the development of the AT&T operating companies’ pole attachment and conduit occupancy rates pursuant to Federal Communications Commission (“FCC”) and state formulas, including the calculation of the rental rates that AT&T charges

cable and CLEC attachers in Alabama. These new telecom and cable rates in Alabama ranged from [REDACTED] to [REDACTED] per pole during the 2012 through 2018 rental years, assuming 1 foot of space occupied. In my role, I also review and evaluate the propriety of pole attachment rates paid by AT&T. I have also testified in a number of federal and state cases regarding the reasonableness of a variety of rates and charges during the more than 35 years that I have worked in the telecommunications industry. I received a BS – Education with high distinction from the University of Nevada – Reno, where I majored in math, and an MBA with honors from St. Mary's College in Moraga, California.

3. As a result of my experience, I am familiar with the manner in which rates are calculated under the new and pre-existing telecom pole attachment rate formulas adopted by the FCC. I have relied on the best data available to AT&T when making the rate calculations described in this Affidavit. I reserve the right to supplement or revise this Affidavit as additional data becomes available.

4. I also have personal knowledge of AT&T's negotiations with Alabama Power for a just and reasonable pole attachment rate. I attended a face-to-face meeting on June 1, 2018 with executives from Alabama Power, including Sherri Morgan, Joint Use Team Leader, Pam Boyd, Power Delivery Technical Services General Manager, and Bobby Hawthorne, Distribution Engineering Services Manager, at Alabama Power's headquarters in Birmingham, Alabama, along with Kyle Hitchcock, who was Associate Director of AT&T's National Joint Utility Team at that time. Alabama Power's executives stated at the meeting that the FCC's rate formulas do not apply to AT&T, but they agreed to provide a rate proposal within two weeks. AT&T repeatedly sought the rate proposal from Alabama Power throughout 2018. When AT&T had still not received an offer from Alabama Power in early 2019, AT&T requested and I attended a

second face-to-face meeting with Alabama Power’s executives on February 22, 2019. At that meeting, Alabama Power executives again took the position that they did not have to share with AT&T the pole attachment rates that they charge cable and CLEC attachers. Nevertheless, in response to a request from Alabama Power and although unnecessary for Alabama Power to calculate a rental rate for AT&T’s use of Alabama Power’s poles, I confirmed for Alabama Power the 2017 annual cost per bare pole used by AT&T to calculate new telecom rates for AT&T’s cable and CLEC attachers.

A. New Telecom Rates For AT&T’s Use Of Alabama Power’s Poles

5. I calculated the per-pole rental rates that result from the FCC’s new telecom rate formula for AT&T’s use of Alabama Power’s poles during the 2011 through 2017 rental years. My calculations are attached as Exhibit R-1. I began with the 2011 rental year because it includes the July 12, 2011 effective date of the FCC’s *Pole Attachment Order*.¹ I ended with the 2017 rental year because it is the most recent rental year invoiced in full by Alabama Power.² Alabama Power issues AT&T two rental invoices each year—a preliminary invoice for estimated rent based on the prior year’s rental rates, and a final invoice calculated using year-end cost data for the rental year, which typically does not become available until spring of the following year. AT&T has received and paid the preliminary invoice for the 2018 rental year, but has not received a final invoice because year-end 2018 data does not become available until Spring 2019. I am willing to provide calculations for additional rental years, including the 2018 rental year, when the relevant data becomes available.

¹ *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*”).

² See Compl. Ex. 5 at ATT00199 (Invoice dated Nov. 13, 2018).

6. The attached calculations use the FCC's new telecom rate formula, which has two basic components: (1) a space factor that reflects the percentage of usable and unusable pole space assigned to the attacher and (2) an annual pole cost, as shown in the following graphic:³

$$\begin{array}{c}
 \text{Rate} = \qquad \qquad \text{Space Factor} \qquad \qquad \times \qquad \qquad \text{Annual Pole Cost} \\
 \qquad \qquad \qquad \Downarrow \qquad \qquad \qquad \qquad \qquad \qquad \qquad \Downarrow \\
 \text{Rate} = \left[\frac{\left(\frac{\text{Space Occupied}}{\text{Pole Height}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right] \times \frac{\text{Net Cost of Bare Pole}}{\text{Pole}} \times \frac{\text{Carrying Charge Rate}}{\text{Rate}} \times \frac{\text{No. of Attachers}}{\text{Cost Allocator}}
 \end{array}$$

7. The space factor is calculated using presumptive inputs of 1 foot for space occupied by a communications attacher, 24 feet for unusable space, 37.5 feet for pole height, and 5 for the average number of attaching entities in an urbanized area (or 3 for non-urbanized areas) unless a pole owner rebuts these presumptive values with actual data.⁴ Alabama Power confirmed at our February 22, 2019 executive-level meeting that Alabama Power uses the presumptive inputs when it calculates the rates it charges its CLEC and cable attachers. This is consistent with the two license agreements that Alabama Power provided to AT&T that include presumptive values when describing the space factor calculation.⁵ The use of the presumptive values is appropriate because I am not aware of actual data that could rebut the presumptions.

8. I calculated a space factor of 11.20% for AT&T's use of Alabama Power's poles using the presumptive inputs.⁶ The use of the urbanized area presumption of 5 attaching entities

³ See 47 C.F.R. § 1.1406(d)(2)(i).

⁴ See 47 C.F.R. §§ 1.1409(c), 1.1410.

⁵ See Compl. Ex. 2 at ATT00150 (CLEC License at Ex. A-2); Ex. 3 at ATT00188 (Cable License at Ex. A-2).

⁶ 47 C.F.R. §§ 1.1409(c), 1.1410.

is appropriate because the parties' overlapping service areas includes Birmingham, Huntsville, Mobile, Montgomery, and Tuscaloosa, Alabama.⁷ Each of these is an urbanized area with a population greater than 50,000, and under FCC rules, "[i]f any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities."⁸

9. My calculation of the 11.20% space factor follows:

$$\text{Space Factor} = \frac{1 \text{ foot} + \left[\frac{2}{3} \times \frac{24 \text{ feet}}{5 \text{ Attaching Entities}} \right]}{37.5 \text{ feet}} = 11.20\%$$

10. The second component of the new telecom formula—the annual pole cost—has three subparts: (1) net cost of a bare pole, (2) carrying charge rate, and (3) a cost allocator that reflects the average number of attachers used in the space factor calculation.⁹ The first subpart—the net cost of a bare pole—is calculated as follows:

$$\frac{\text{Net Cost of Bare Pole}}{\text{Bare Pole}} = \frac{\text{Net Pole Investment}}{\text{Number of Poles}} \times \frac{\text{Appurtenance Factor}}{\text{Factor}}$$

Net pole investment is calculated by reducing the gross investment assigned to FERC Form 1 Account 364 (for Poles, Towers & Fixtures), by the depreciation and deferred tax reserves assigned or allocated to this account.¹⁰ The appurtenance factor eliminates investment in non-

⁷ 47 C.F.R. § 1.1409(c); *see also* Compl. Ex. B at ATT00044 (Aff. of D. Miller, Apr. 16, 2019, ¶ 5); QuickFacts, U.S. Census Bureau, *available at* <https://www.census.gov/quickfacts>.

⁸ 47 C.F.R. § 1.1409(c).

⁹ 47 C.F.R. § 1.1406(d)(2)(i).

¹⁰ *Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Order on Reconsideration, 16 FCC Rcd 12103, 12122-123 (¶ 32), 12161 (¶ 121), 12176 (App'x E-2) (2001) ("2001 Consolidated Order").

pole appurtenances from the pole costs used to calculate rates and is presumptively 15% for poles owned by investor-owned utilities.¹¹

11. The second subpart—the carrying charge rate—is the sum of 5 components: an administrative element, maintenance element, depreciation element, taxes element, and rate of return.¹² The first four components (administrative, maintenance, depreciation, and taxes) are calculated using data in Alabama Power’s FERC Form 1. The fifth component (rate of return) is Alabama Power’s “weighted average cost of capital, both debt and equity.”¹³ My calculation of Alabama Power’s rate of return for the 2011 through 2017 rental years is attached as Exhibit R-2 and is based entirely on information provided in Alabama Power’s FERC Form 1 filings.

12. The third subpart—the cost allocator—is 0.66 in this case under FCC rules because the presumptive input of 5 attaching entities applies.¹⁴

13. The following table shows the per-pole new telecom rates that apply to AT&T’s use of Alabama Power’s poles during the 2011 through 2017 rental years using these inputs:

| Rate | | = | Space Factor | x | Annual Pole Cost | | | | |
|-------------|-----------------------------|---|--------------|---|-----------------------|---|----------------------|---|----------------|
| Rental Year | New Telecom Rate (per pole) | = | Space Factor | x | Net Cost of Bare Pole | x | Carrying Charge Rate | x | Cost Allocator |
| 2011 | \$8.10 | | 11.20% | | | | | | 0.66 |
| 2012 | \$7.80 | | 11.20% | | | | | | 0.66 |
| 2013 | \$7.66 | | 11.20% | | | | | | 0.66 |
| 2014 | \$7.84 | | 11.20% | | | | | | 0.66 |
| 2015 | \$7.53 | | 11.20% | | | | | | 0.66 |
| 2016 | \$7.58 | | 11.20% | | | | | | 0.66 |
| 2017 | \$8.35 | | 11.20% | | | | | | 0.66 |

¹¹ *Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, Report and Order, 2 FCC Rcd 4387 ¶ 19 (1987).

¹² *2001 Consolidated Order*, 16 FCC Rcd at 12156 (¶ 110) & 12176 (App’x E-2).

¹³ *See Matter of Multimedia Cablevision, Inc.*, 11 FCC Rcd 11202, 11215 (¶ 36) (1996).

¹⁴ 47 C.F.R. § 1.1406(d)(2)(i).

14. AT&T paid Alabama Power pole attachment rates for the 2011 through 2017 rental years that were more than [REDACTED] times these new telecom rates:

| Rental Year | New Telecom Rate (per pole) | Contract Rate Paid by AT&T (per pole) | Contract Rate compared to New Telecom Rate |
|-------------|-----------------------------|---------------------------------------|--|
| 2011 | \$8.10 | [REDACTED] | [REDACTED] times |
| 2012 | \$7.80 | [REDACTED] | [REDACTED] times |
| 2013 | \$7.66 | [REDACTED] | [REDACTED] times |
| 2014 | \$7.84 | [REDACTED] | [REDACTED] times |
| 2015 | \$7.53 | [REDACTED] | [REDACTED] times |
| 2016 | \$7.58 | [REDACTED] | [REDACTED] times |
| 2017 | \$8.35 | [REDACTED] | [REDACTED] times |

B. AT&T's Overpayments As Compared To New Telecom Rates

15. I calculated AT&T's overpayments beginning with the July 12, 2011 effective date of the *Pole Attachment Order* by comparing the net rental amount that AT&T has paid Alabama Power to the net rental amount that AT&T would have paid if both companies paid proportional new telecom rates. My overpayment calculation for the 2011 through 2017 rental years is attached as Exhibit R-3.

16. My calculation uses proportional new telecom rates for Alabama Power's use of AT&T's poles. My calculations of these proportional rates are attached as Exhibit R-4. I used the same new telecom rate formula described above, *see* Section A, but calculated (1) a space factor that accounts for Alabama Power's greater use of space on the pole, and (2) annual pole costs based on AT&T-specific data, such as the publicly reported AT&T cost data that AT&T used to calculate rates for other attachers during the rental year and the 5% appurtenance factor that presumptively applies when calculating rates for ILEC-owned poles.¹⁵ The following table includes the proportional new telecom rates that I calculated:

¹⁵ *See Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, CC Docket No. 86-212, Report and Order, 2 FCC Rcd 4387, 4390 (¶ 19) (1987).

| | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|--|---------|---------|---------|---------|---------|---------|---------|
| New telecom rate for AT&T's use of Alabama Power's poles (per pole) | \$8.10 | \$7.80 | \$7.66 | \$7.84 | \$7.53 | \$7.58 | \$8.35 |
| Proportional new telecom rate for Alabama Power's use of AT&T's poles (per pole) | \$17.44 | \$26.65 | \$18.17 | \$16.69 | \$12.31 | \$14.84 | \$13.31 |

17. My calculations show that AT&T overpaid Alabama Power by more than [REDACTED] million in net pole rent for the 2012 through 2017 rental years using proportional new telecom rates:

| Rental Year | AT&T's Net Rent Payment to Alabama Power | - | Net Rent at Proportional New Telecom Rates | = | AT&T's Overpayment |
|---|--|---|--|---|--------------------|
| 2012 | [REDACTED] | | \$(258,614) | | [REDACTED] |
| 2013 | [REDACTED] | | \$1,178,492 | | [REDACTED] |
| 2014 | [REDACTED] | | \$1,612,348 | | [REDACTED] |
| 2015 | [REDACTED] | | \$2,275,773 | | [REDACTED] |
| 2016 | [REDACTED] | | \$1,946,823 | | [REDACTED] |
| 2017 | [REDACTED] | | \$2,777,657 | | [REDACTED] |
| Total 6-Year Overpayment (2012-2017) | | | | | [REDACTED] |

AT&T also overpaid Alabama Power by more than [REDACTED] million for the portion of the 2011 rental year following the July 12, 2011 effective date of the *Pole Attachment Order*. I am not yet able to determine the extent of AT&T's overpayment for the 2018 rental year because Alabama Power has not yet issued a final 2018 rental invoice.

C. AT&T Has Also Paid Far More Than The Pre-Existing Telecom Rate

18. I also calculated rental rates using the FCC's pre-existing telecom rate formula, meaning the telecom rate formula in effect prior to the 2011 *Pole Attachment Order*. I calculated these rates because the FCC set pre-existing telecom rates as a "hard cap" under the 2018 *Third Report and Order*, and as a "reference point" under the 2011 *Pole Attachment Order*, on the rental rate that may be charged an ILEC that has net benefits under a joint use agreement that

materially advantage the ILEC over its competitors.¹⁶ My pre-existing telecom rate calculations are included in Exhibit R-1.

19. The pre-existing telecom rate formula differs from the new telecom rate formula in that it does not include a cost allocator in the annual pole cost calculation to account for the number of attaching entities on the pole. The formula is in all other respects the same. The following table shows my calculation of the per-pole pre-existing telecom rates that apply to AT&T's use of Alabama Power's poles during the 2011 through 2017 rental years:

| Rental Year | Pre-Existing Telecom Rate (per pole) | = | Space Factor | x | Net Cost of Bare Pole | x | Carrying Charge Rate |
|--------------------|---|----------|---------------------|----------|------------------------------|----------|-----------------------------|
| 2011 | \$12.28 | | 11.20% | | | | |
| 2012 | \$11.82 | | 11.20% | | | | |
| 2013 | \$11.61 | | 11.20% | | | | |
| 2014 | \$11.88 | | 11.20% | | | | |
| 2015 | \$11.41 | | 11.20% | | | | |
| 2016 | \$11.49 | | 11.20% | | | | |
| 2017 | \$12.66 | | 11.20% | | | | |

20. AT&T consistently paid Alabama Power pole attachment rates for the 2011 through 2017 rental years that were more than [REDACTED] times these pre-existing telecom rates:

| Rental Year | Pre-Existing Telecom Rate (per pole) | Contract Rate Paid by AT&T (per pole) | Contract Rate Compared to Pre-Existing Telecom Rate |
|--------------------|---|--|--|
| 2011 | \$12.28 | [REDACTED] | [REDACTED] times |
| 2012 | \$11.82 | [REDACTED] | [REDACTED] times |
| 2013 | \$11.61 | [REDACTED] | [REDACTED] times |
| 2014 | \$11.88 | [REDACTED] | [REDACTED] times |
| 2015 | \$11.41 | [REDACTED] | [REDACTED] times |
| 2016 | \$11.49 | [REDACTED] | [REDACTED] times |
| 2017 | \$12.66 | [REDACTED] | [REDACTED] times |

¹⁶ *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7771 (¶ 129) (2018); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

21. AT&T's annual net rental payments to Alabama Power have also far exceeded the net rent that AT&T would have paid if both companies paid proportional pre-existing telecom rates, as shown in Exhibit R-3. My calculations use proportional pre-existing telecom rates for Alabama Power's use of AT&T's poles, which are included in Exhibit R-4. The following table includes the proportional pre-existing telecom rates that I calculated:

| | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|---|---------|---------|---------|---------|---------|---------|---------|
| Pre-existing telecom rate for AT&T's use of Alabama Power's poles (per pole) | \$12.28 | \$11.82 | \$11.61 | \$11.88 | \$11.41 | \$11.49 | \$12.66 |
| Proportional pre-existing telecom rate for Alabama Power's use of AT&T's poles (per pole) | \$26.42 | \$40.37 | \$27.53 | \$25.29 | \$18.65 | \$22.48 | \$20.17 |

22. My calculations show that AT&T overpaid Alabama Power by more than [REDACTED] million in net pole rent for the 2012 through 2017 rental years using proportional pre-existing telecom rates:

| Rental Year | AT&T's Net Rent Payment to Alabama Power | - | Net Rent at Proportional Pre-Existing Telecom Rates | = | AT&T's Overpayment |
|---|--|---|---|---|--------------------|
| 2012 | [REDACTED] | | \$(389,350) | | [REDACTED] |
| 2013 | [REDACTED] | | \$1,787,855 | | [REDACTED] |
| 2014 | [REDACTED] | | \$2,443,281 | | [REDACTED] |
| 2015 | [REDACTED] | | \$3,448,939 | | [REDACTED] |
| 2016 | [REDACTED] | | \$2,953,683 | | [REDACTED] |
| 2017 | [REDACTED] | | \$4,213,203 | | [REDACTED] |
| Total 6-Year Overpayment (2012-2017) | | | | | [REDACTED] |

AT&T also overpaid Alabama Power by more than [REDACTED] million as compared to the pre-existing telecom rates for the portion of the 2011 rental year following the July 12, 2011 effective date of the *Pole Attachment Order*. I am not yet able to determine the extent of AT&T's overpayment for the 2018 rental year because Alabama Power has not yet issued a final 2018 rental invoice.



Daniel P. Rhinehart

Sworn to before me on
this 16th day of April, 2019



Notary Public

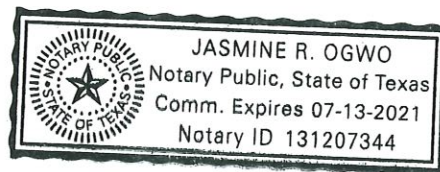


Exhibit R-1

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Exhibit R-2

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Exhibit R-3

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Exhibit R-4

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Confidential

Exhibit B

Defendant.

Proceeding No. 19-____
Bureau ID No. EB-19-MD-____

STATE OF HAWAII)
) ss.
COUNTY OF HONOLULU)

2. My job title is Director – Construction & Engineering, with responsibility for the National Joint Utility Team. In this role, I support various AT&T-affiliated incumbent local exchange carriers (“ILECs”) across 21 states in the negotiation and implementation of joint use

agreements with investor-owned, municipal, and cooperative utilities. I also interact with operational and field teams, assist with joint use issues impacting the wireline network, and negotiate the rates, terms, and conditions of joint use. I am familiar with AT&T's Joint Use Agreement with Alabama Power and I participated in AT&T's executive-level negotiations with Alabama Power to obtain a just and reasonable pole attachment rate.

3. I have 45 years of experience in the telecommunications industry. I was hired by Southern Bell Telephone and Telegraph Company in 1973 in an administrative role supporting plant operations. I remained with the Company through its merger with South Central Bell Telephone Company to become BellSouth Telecommunications Inc., which later became BellSouth Telecommunications, LLC. I obtained a BA in Business Economics *magna cum laude* from Wofford College while working as a dispatching manager for field technicians. I have since served in a variety of managerial and executive capacities involving network operations, DSL deployment, and joint use. Among other positions, I served as a Supervisor in the Construction Management Center in the late 1980s, where I was responsible for pole transfers and coordinating repairs of broken poles and lines. In the 1990s, I was a Construction Manager and participated in joint utility meetings on issues related to permitting, rights-of-way, road relocations, and deployment to new areas. In the early 2000s, I was a Director with responsibility for all joint use agreements across a 9-state southeastern region. Over the years, I have had a variety of other jobs involving wireline deployment and coordination with utilities on issues related to shared infrastructure.

4. Throughout my career, I have reviewed over a hundred joint use agreements. I have also become familiar with the operational practices and procedures surrounding the joint use of utility poles, including poles in AT&T's overlapping service area with Alabama Power.

A. AT&T's Effort To Obtain Just And Reasonable Rates From Alabama Power

5. BellSouth Telecommunications, LLC is a Georgia limited liability company d/b/a AT&T Alabama with a principal place of business at 675 West Peachtree Street NW, Suite 4500, Atlanta, GA 30308. AT&T Alabama ("AT&T") is an ILEC that provides telecommunications and other services in areas of Alabama. AT&T's overlapping service territory with Alabama Power includes, but is not limited to, Birmingham, Huntsville, Mobile, Montgomery, and Tuscaloosa, Alabama.

6. AT&T became party to a Joint Use Agreement entered into by Alabama Power and South Central Bell Telephone Company in 1978, and amended from time to time thereafter (the "JUA"). A true and correct copy of the JUA is attached to the Complaint as Exhibit 1. Alabama Power charges AT&T for pole attachment rent calculated using a rental rate formula in Appendix B to the JUA, which took effect in 1994. According to Appendix B, Alabama Power then owned 357,026 (68%), and AT&T owned 168,705 (32%), of 525,731 utility poles jointly used by the parties.

7. Alabama Power issues AT&T two pole attachment rental invoices each year—a preliminary invoice for estimated rent based on the prior year's rental rates and a final invoice calculated once the rental year's cost data becomes available. True and correct copies of the final invoice for the 2017 rental year and the preliminary invoice for the 2018 rental year are attached to the Complaint as Exhibits 4 and 5, respectively. The 2018 invoice estimates that Alabama Power owns 630,143 (77.9%), and AT&T owns 179,021 (22.1%), of 809,164 utility poles jointly used by the parties.

8. The rental rate formula in Appendix B to the JUA assigns to AT&T an exceptionally high 43.1% of the parties' annual pole costs and does not account for the presence

of or rent received by any third parties on the jointly used poles. Since 2011, Alabama Power has charged, and AT&T has paid, pole attachment rent calculated as follows:

| Rental Year | AT&T's Rent to APCO | | - | APCO's Rent to AT&T | | = | Net Rent | | |
|-------------|--|---|------------|---------------------|--|---|------------|---|-----------------------|
| | Per-Pole Rate for AT&T's Use of APCO's Poles | x | APCO Poles | - | Per-Pole Rate for APCO's Use of AT&T's Poles | x | AT&T Poles | = | Net Rent Paid by AT&T |
| 2011 | | | 534,848 | | | | 168,489 | | |
| 2012 | | | 547,524 | | | | 169,955 | | |
| 2013 | | | 560,500 | | | | 171,433 | | |
| 2014 | | | 573,784 | | | | 172,925 | | |
| 2015 | | | 587,383 | | | | 174,429 | | |
| 2016 | | | 601,303 | | | | 175,947 | | |
| 2017 | | | 615,554 | | | | 177,477 | | |

AT&T has also paid Alabama Power's preliminary invoice for the 2018 rental year, which used the 2017 rental rates with increased pole counts to estimate [REDACTED] in net rent.

9. The rental rates paid by AT&T are extremely high when compared to the rates that AT&T calculated, based on the best data available to it, using the FCC's new and pre-existing telecom rate formulas.¹ Operating in a highly competitive market, AT&T has tried to eliminate this significant rate disparity through negotiations with Alabama Power. True and correct copies from AT&T's records of the written communications between the parties regarding AT&T's effort to obtain a just and reasonable rate are attached to the Complaint as Exhibits 7 to 22.

10. I assumed responsibility for the rate negotiations initiated by my predecessor, Kyle Hitchcock, when I became Director – Construction & Engineering with responsibility for the National Joint Utility Team in November 2018. Upon my review of the prior

¹ See Compl. Ex. A (Affidavit of Daniel P. Rhinehart (Apr. 16, 2019)) ("Rhinehart Aff.").

correspondence, it became clear to me that Alabama Power had been using its unequal ownership of almost 78% of the joint use poles to delay and deny rate relief to AT&T. Over five months earlier, at a June 1, 2018 executive-level meeting, Alabama Power had promised a rate offer within two weeks. In July 2018 and September 2018, Alabama Power stated that it was still working on that offer, yet, AT&T received no offer.

11. AT&T still had not received an offer from Alabama Power by the end of 2018, so I telephoned Pam Boyd, Power Delivery Technical Services General Manager at Alabama Power, in January 2019 to inquire about and ask for the promised rate offer. Ms. Boyd and I agreed to have a second executive-level meeting at Alabama Power's headquarters in Birmingham, Alabama on February 22, 2019. It was my understanding from our discussions that Alabama Power would provide AT&T a rate offer before or at the executive-level meeting. Consequently, I was surprised and disappointed when Ms. Boyd emailed me the day before the meeting to let me know that Alabama Power would not provide an offer at the meeting. She stated in her email that Alabama Power could not provide an offer because it required information from AT&T about its 2017 pole costs, even though I had previously provided her some of the information needed to calculate AT&T's 2017 pole cost and the rest is publicly available. Moreover, AT&T's pole costs are not used to calculate rental rates for AT&T's use of Alabama Power's poles, so this did not explain Alabama Power's claimed inability to make a rate offer to AT&T.

12. We nevertheless proceeded with the executive-level meeting. I attended for AT&T, along with Daniel Rhinehart, Director – Regulatory, Dorian Denburg, Assistant Vice President – Senior Legal Counsel, and Christopher Huther, outside counsel; Mark Peters, Area Manager – Regulatory Relations, participated by telephone. Alabama Power was represented by

Ms. Boyd, Sherri Morgan – Joint Use Team Leader, Shane Powell – Distribution Manager, Teresa Minor – Risk Services Director, and Eric Langley, outside counsel. We asked Alabama Power for a rate offer, but it did not provide one at the meeting and expressed an unwillingness to make an offer that approximated the new telecom rate that it charges AT&T’s competitors.

13. Ms. Boyd and I continued to correspond by email following the February 22, 2019 meeting and, on March 22, 2019—more than a year into negotiations—Alabama Power provided a confidential rate proposal. On March 28, 2019, I sent Ms. Boyd a confidential counteroffer from AT&T. On April 3, 2019, Ms. Boyd called to inform me that Alabama Power rejected AT&T’s counteroffer and was not providing a counteroffer.

B. Alabama Power Has Not Justified The Rates It Charges AT&T

14. At the executive-level meeting and in correspondence between the parties, Alabama Power has taken the position that the rental rates it charges AT&T are reasonable because the JUA provides AT&T “obvious and significant benefits” that advantage AT&T over its competitors.² I have considered Alabama Power’s claims and have reviewed the two redacted license agreements that Alabama provided. I disagree with Alabama Power’s claim that AT&T receives material benefits operationally that advantage AT&T over its competitors, let alone net material benefits that justify the extremely high rates that Alabama Power charges.

15. Alabama Power’s claim that Alabama Power installed 40-foot poles decades ago to accommodate AT&T instead of shorter poles “sufficient only to meet [Alabama Power’s] own service needs,”³ is inconsistent with a document from 1966, located in AT&T’s files and attached to the Complaint as Exhibit 6. This document shows that 35-foot poles were then

² See Compl. Ex. 13 at ATT00260.

³ *Id.*

sufficient to hold the attachments of AT&T and Alabama Power. Indeed, in certain circumstances, a 35-foot pole can accommodate the facilities of Alabama Power and AT&T, as well as other communications companies.⁴ Many newer Alabama Power poles are taller 40-foot poles, which have more room to accommodate other attachers, but it is my understanding that Alabama Power still owns 35-foot poles to which AT&T is attached today.

16. I also disagree with Alabama Power's claim that AT&T has uniquely avoided make-ready costs because of the height of Alabama Power's poles. AT&T has paid Alabama Power substantial sums for make-ready in recent years in order to create sufficient space for AT&T's facilities on Alabama Power's poles given the attachments of third parties. AT&T (and Alabama Power) pay make-ready costs based on the cost schedule in Appendix A of the JUA. The cost schedule was most recently revised in February 2010. I am not aware of any request from Alabama Power to update the cost schedule since that time.

17. I also disagree with Alabama Power's claim that AT&T receives a competitive benefit because the JUA allocates 2.5 feet of space to AT&T, with an option to occupy more space if available. This space allocation is not something that AT&T wants, uses, or requires. AT&T installs light-weight copper and fiber optic cables that are comparable in size to the facilities of AT&T's competitors and do not occupy 2.5 feet of space or more across Alabama Power's poles. The space allocation is also not a benefit to AT&T because Alabama Power has not reserved 2.5 feet of space for AT&T's exclusive use across all of its poles. Attached as

⁴ The ability of shorter poles to accommodate several attachers is also reflected in the default presumptions for the FCC's rate formulas, which assume that a 37.5-foot pole has 24 feet of unusable space and can accommodate 5 attaching entities. *See* 47 C.F.R. §§ 1.1409(c), 1.1410. These presumptions are consistent with the fact that, with 6 feet of unusable space below ground and 18 feet of unusable space above ground, 4 communications attachers can attach 1 foot apart in the communications space located 18-21 feet above ground and there will still be 10.5 feet on the pole for the power company.

Exhibit M-1 are recent photographs of poles owned by Alabama Power that were taken by AT&T Construction & Engineering managers. Each of these photographs shows attachments by third parties within the 2.5 feet of space that Alabama Power claims to reserve for AT&T's exclusive use. This is commonplace throughout the joint use network. AT&T, in contrast, cannot and does not allow communications attachers to place facilities in the space allocated to Alabama Power on AT&T's poles due to the nature of Alabama Power's facilities, and must preserve the safety space between Alabama Power's facilities and any communications attachments under the National Electric Safety Code ("NESC").

18. The fact that AT&T's facilities are typically the lowest on Alabama Power's poles is also not an advantage as Alabama Power claims. It is a disadvantage that is the result of standard construction practices from the early days of joint use when AT&T was the only consistent communications attacher on utility poles. This practice must continue for efficient network management, as it lets all companies quickly identify the ownership of facilities on a pole and prevents facilities from crisscrossing mid-span.

19. AT&T's location on the pole has increased AT&T's costs. When a pole leans, which may be the result of weather damage, normal wear and tear, or improperly engineered or constructed facilities of other attachers, AT&T's facilities can become low-hanging without notice to AT&T and vulnerable to being struck by large vehicles. AT&T is also the communications attacher that is the most likely to receive a request to temporarily raise its facilities to accommodate an oversized vehicle or load that exceeds standard vertical clearance. Its facilities are more susceptible to damage, as an attachment may become loose or a cable may be punctured by climbers as a worker ascends a pole to work on facilities above AT&T's. AT&T is also more likely to incur higher transfer costs because the lowest communications

attacher is usually the last to transfer its facilities to a replacement pole. This means that AT&T is frequently required to make a second trip to a pole location because another attacher did not complete its transfer as scheduled.

20. I also disagree with Alabama Power's claim that AT&T is advantaged because it does not pay Alabama Power to review the pole pre-installation to determine whether make-ready is required or post-installation to determine whether the attachment was made in compliance with specifications. Before and after AT&T attaches to a pole owned by Alabama Power, AT&T completes these same reviews at its own cost. Before making an attachment, AT&T's employee checks the pole to identify requirements for the project, which could range from a simple transfer to a more complex pole replacement. AT&T's Engineering group typically then performs a visual inspection of the pole prior to performing work on the pole, and anyone performing aerial work on the pole is required to perform a more comprehensive inspection before and after the work is completed.

21. Indeed, as a pole owner, AT&T incurs significant costs to ensure the safety and reliability not just of its own facilities but also of the utility poles it shares with Alabama Power. AT&T's Construction & Engineering employees are trained in the wind loading and safety standards of Alabama Power and the NESC, as well as AT&T's own safety, reliability, and quality standards. AT&T's technicians report problems with facilities or poles they encounter in the field, which creates a work ticket for their repair. AT&T also has responsibility for replacing its poles when they pose a safety hazard, for disposing of poles that are replaced or no longer required, and for relocating its poles to accommodate a road widening and other projects. Each of these functions imposes costs on AT&T that are not imposed on non-pole owners, such as AT&T's CLEC and cable competitors.

22. For all these reasons, it is my opinion that Alabama Power has not identified any net operational benefit that gives AT&T a material advantage over its cable and CLEC competitors that could justify AT&T's payment of a higher rental rate for use of Alabama Power's poles.

Dianne W. Miller
Dianne W. Miller

Sworn to before me on
this 16th day of April, 2019

Notary Public

Doc. Date: 4/16/2019 # Pages 10
Notary Name: Elena T. Santos First Circuit
Doc. Description: Affidavit of Dianne W. Miller in support of
file with the court
Notary Signature: [Signature] Date: 4/16/19



Exhibit M-1



APCO Tag: 5-260335

CATV: 21'3"

AT&T: 20'1"

CATV drop: 19' 11"

Date Taken: March 8, 2019



[REDACTED]

[REDACTED]

APCO Tag: 5-110127

CATV: 22'3"

AT&T: 20'9"

Date Taken: March 8, 2019



APCO Tag: 5-106519

CATV: 21'1"

AT&T: 19'10"

Date Taken: March 8, 2019



APCO Tag: 5-061065

CATV: 21'

AT&T cable: 20'

AT&T drop: 19'2"

Date Taken: March 7, 2019



[REDACTED]

[REDACTED]

APCO Tag: 5-126870

Street Light Bracket: 21'7"

Street Light Loop: 21'3"

CATV: 20'3"

AT&T drops: 19'5"

AT&T cable: 19'2"

Date Taken: March 8, 2019



APCO Tag: 5-126876

CATV: 21'10"

AT&T drops: 21'

AT&T cable: 20'9"

Date Taken: March 8, 2019