Wiley Rein LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

REDACTED

Christopher S. Huther
202.719.7197
chuther@wileyrein.com

January 31, 2014

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Verizon Florida LLC v. Florida Power and Light Company*, Pole Attachment Complaint

REQUEST FOR CONFIDENTIAL TREATMENT

Dear Ms. Dortch:

Enclosed for filing is a confidential and public copy of the Pole Attachment Complaint of Verizon Florida LLC ("Verizon") against Florida Power and Light Company ("FPL"), along with Exhibits and Affidavits of Steven R. Lindsay and Mark S. Calnon Ph.D. in support thereof. Verizon has marked each page of the confidential version with the legend "CONFIDENTIAL INFORMATION – NOT SUBJECT TO PUBLIC INSPECTION," and has marked each page of the public version with the legend "REDACTED – FOR PUBLIC INSPECTION."

Pursuant to Section 0.459(a) of the Commission's rules, 47 C.F.R. § 0.459(a), Verizon requests confidential treatment of the information that has been marked as confidential in the Pole Attachment Complaint, Exhibits, and Affidavits. Verizon has an obligation to maintain the information as confidential under federal law. This information, accordingly, is entitled to confidential, non-public treatment under the Freedom of Information Act ("FOIA") and the related provisions of the Commission's rules. *See* 5 U.S.C. § 522; 47 C.F.R. §§ 0.0457, 0.0459.

Also enclosed is a copy of Remittance Advice Form 159 showing that the $260 filing fee has been paid by credit card. *See* Agency Tracking ID PGC2458272; Authorization Number 292179.

Thank you for your attention to this matter.

Sincerely,

Christopher S. Huther
Counsel for Verizon Florida LLC

REDACTED - FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, DC 20554

VERIZON FLORIDA LLC, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	)	File No.

POLE ATTACHMENT COMPLAINT

VERIZON FLORIDA LLC

By Counsel:

William H. Johnson
Katharine R. Saunders
VERIZON
1320 N. Courthouse Rd.
9th Floor
Arlington, VA 22201

Christopher S. Huther
Claire J. Evans
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006

Michael E. Glover
Of Counsel

Date: January 31, 2014

TABLE OF CONTENTS

POLE ATTACHMENT COMPLAINT 1

I. JURISDICTION AND PARTIES 4

II. FACTS AND ARGUMENT 7

A. The Rates That FPL Seeks From Verizon Are Not Just And Reasonable. 7

B. Given Verizon's Inferior Bargaining Position, FPL Has Flatly Refused To Even Negotiate To Set A Reasonable Pole Attachment Rate. 9

1. FPL Owns – And Has Always Owned – The Vast Majority Of Jointly-Used Poles. 9

2. Verizon Was Unable To Obtain A Just And Reasonable Rate Through Private Negotiations. 10

3. [redacted] 12

4. FPL Responded To Verizon's Efforts To Negotiate A Just And Reasonable Rate With A Breach Of Contract Lawsuit. 14

C. The *Pole Attachment Order* Provides Verizon A Remedy For This Precise Situation. 16

2. Verizon Is Entitled To Attach At The New Telecommunications Rate Because It Is Comparably Situated To FPL's Other Attachers. 17

3. Verizon Is Entitled To The New Telecommunications Rate For Both Existing And New Attachments To FPL's Poles. 19

4. Even If Verizon Were Not Comparably Situated To FPL's Other Attachers, It Would Be Entitled To Attach At The Pre-Existing Telecommunications Rate. 22

III. COUNT I – UNJUST AND UNREASONABLE POLE ATTACHMENT RATES 22

IV. RELIEF REQUESTED 23

V. CERTIFICATE OF SERVICE 25

Before the
Federal Communications Commission
Washington, DC 20554

VERIZON FLORIDA LLC, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	)	File No.

POLE ATTACHMENT COMPLAINT

Although Verizon Florida LLC ("Verizon") terminated its nearly 40-year-old Joint Use Agreement with Florida Power & Light Company ("FPL") more than 18 months ago, FPL takes the position that the Agreement allows it to charge Verizon in perpetuity a pole attachment rate for Verizon's existing attachments that is nearly four times higher than it charges comparable attachers, and that it can refuse to renegotiate that rate. At the same time, FPL collects and retains substantial rent from Verizon's competitors, such as competitive local exchange carriers, wireless providers, and cable companies, which attach in the space allocated to Verizon under the Agreement without crediting Verizon or otherwise reducing the attachment fees charged to Verizon.

Contrary to FPL's position, it is not entitled to preserve in amber and profit forever from the exorbitant rates that it was able to extract from one of Verizon's predecessor companies during the very different competitive circumstances of the mid-1970s. Instead, the Commission has now made clear that incumbent local exchange carriers ("ILECs") are entitled to just and reasonable pole attachment rates just as their competitors are, and that ensuring such rates

encourages broadband deployment and prevents distortions to competition. FPL's actions are improper under the FCC's 2011 *Pole Attachment Order*.[1]

In 1975, FPL entered into the Joint Use Agreement with one of Verizon's predecessors, a regional telephone company known as the General Telephone Company of Florida, which offered telephone service to certain still-developing areas of Florida. Even at that time, FPL owned approximately 90% of the poles covered by the Agreement. With the power of its greater position, FPL was able to include in the Agreement an escalating pole rental rate. For 2012, FPL calculates the Verizon rate under the Agreement to be $36.23. At the same time, under the FCC's pre-*Order* telecommunications formula, the highest "upper bound" on any telecom rate was, at most, $12.91. [redacted] Given the dramatically changed competitive landscape since 1975, that significant rate disparity puts Verizon at a competitive disadvantage and is untenable.

Verizon tried to redress the exorbitant rate term in the Agreement at various intervals over the years, including in numerous executive level discussions. In multiple discussions with

[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] [redacted]

FPL, Verizon invoked its right under the Agreement to renegotiate the rate, yet FPL refused to negotiate in good faith and continued to insist that the high rate would apply in perpetuity to all existing attachments. [redacted] But rather than negotiate over a reasonable rate, FPL filed suit in Florida state court claiming a right to the high rate – multiples higher than that charged to other attachers – under the contract. FPL has since argued successfully to that court that Verizon failed to exhaust its administrative remedies by filing a Pole Attachment Complaint with this Commission and so cannot seek relief from the unfair and unreasonable rate provision in the pending litigation.[3]

In short, FPL has been unwilling to engage in good faith negotiation of a rate within the bounds the Commission has provided, but has conceded in pleadings filed in state court that this Commission has jurisdiction to decide whether Verizon is entitled to any rate relief from FPL for its so-called "existing" attachments. FPL would read the *Order* to force Verizon to remove every one of its attachments and then apply for a new attachment in order to receive the benefit of the *Order* – a nonsensical position that if adopted would result in pointless disruption to the

[3] *See* Ex. 21 (Order on Motion to Dismiss Counterclaim, *Florida Power & Light Co. v. Verizon Florida, LLC*, Case No. 13-14808 (Fla. 11th Cir. Ct. Jan. 23, 2014)) ("*FPL v. Verizon*"). This Order, entered by the Court to dismiss Verizon's Counterclaim that sought a declaration that the rates FPL charged under the contract were unjust and unreasonable, flowed from the various claims made by FPL in the litigation that "an FCC complaint is Verizon's sole legitimate avenue for redress, if it believes the contract rate is unfair and unreasonable. . . ." Ex. 20 at 8 (FPL's Reply in Support of its Mot. to Dismiss Verizon Florida LLC's Counterclaim, *FPL v. Verizon* (Jan. 17, 2014); *see also Ex.* 13 at 8-9 (FPL's Opp. to Amended Mot. to Dismiss (Aug. 13, 2013) ("If Verizon decides to invoke the FCC's expertise at some future time under the Pole Attachment Order, this Court's interpretation of the *meaning* of the Joint Use Agreement would have no bearing upon the FCC's review of the *reasonableness* of the rates set by the parties in that agreement.") (emphasis in original).

network and existing service. The Commission should help avert such an event, by establishing that the rate FPL is charging Verizon is unjust and unreasonable, and that Verizon is entitled to pay a reasonable and comparable rate under 47 U.S.C. § 224(b) for all of its attachments to FPL's poles. Verizon will then charge FPL the same proportionate rate for its attachments to Verizon's poles.

I. JURISDICTION AND PARTIES

1. The Commission has jurisdiction over this action under the provisions of the Communications Act of 1934, as amended (the "Act"), including, but not limited to, Section 224 thereof. *See* 47 U.S.C. § 224; *Pole Attachment Order*, 26 FCC Rcd at 5327-28 (¶¶ 202-03). Verizon brings this complaint subject to Section 224 and Sections 1.1401-1.1424 of the Rules of the Federal Communications Commission.

2. Verizon is a Florida limited liability company with a principal place of business at 610 Zack Street, 4th Floor, Tampa, Florida 33602. Verizon is an ILEC that provides telecommunications and other services in sections of Hillsborough, Pinellas, Manatee, Sarasota, Polk, and Pasco Counties in Florida. One of Verizon's predecessors was the General Telephone Company of Florida, which was an independent telephone company that relied primarily on utility poles owned by electric companies to provide service to these relatively small and then-developing geographic areas within Florida. Ex. A ¶ 2 (Affidavit of Steven R. Lindsay (Jan. 31, 2014) ("Lindsay Aff.")).

3. FPL is a Florida corporation with a principal place of business at 700 Universe Boulevard, Juno Beach, Florida 33408. FPL is an electric utility that owns and controls facilities used to distribute electricity and that serves retail customers in Florida. *See* NextEra Energy, Annual Report 2012 at 1, 5 (Mar. 21, 2013), *available at* www.investor.nexteraenergy.com (last visited Jan. 31, 2014). FPL is, therefore, a "utility" within the meaning of Section 224(a)(1) of

the Pole Attachment Act. FPL is not owned by any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

4. FPL is the largest electric utility in the state of Florida. It is a wholly-owned subsidiary of NextEra Energy, Inc., which is one of the largest electric power companies in North America, providing retail and wholesale electric services to nearly five million customers in twenty-six States and four Canadian Provinces. NextEra Energy, Annual Report 2012 at 4.

5. The State of Florida, including its political subdivisions, agencies and instrumentalities, has not certified to the Commission that it regulates the rates, terms and conditions for pole attachments in the manner established by Section 224, which would preempt the jurisdiction of the Commission over pole attachments in Florida. *See Pole Attachment Order*, 26 FCC Rcd at 5371 (App. C).

6. FPL and Verizon were parties to a Joint Use Agreement entered by FPL and General Telephone Company of Florida, on January 1, 1975. Ex. 1 (Joint Use Agreement). The rate provision in the Joint Use Agreement was most recently amended in a Supplemental Agreement entered by FPL and General Telephone Company of Florida on March 29, 1978. Ex. 2 (Supplemental Agreement).[4]

7. The parties' Joint Use Agreement, as amended, terminated on June 9, 2012. The Agreement contains a so-called "evergreen" provision. That provision contemplates that the rates reflected in the Agreement will continue to apply to pre-existing attachments in the event the Agreement is terminated until the parties agree upon a new rate. That provision does not

[4] The parties also entered a Confidential Letter Agreement in 2007 to address costs related to pole replacements and relocations that were to occur in conjunction with a storm hardening plan that FPL had developed. Ex. 3. The Confidential Letter Agreement did not amend the rate provision in the parties' Joint Use Agreement, as amended, so is not directly implicated by the claims in this Complaint.

apply to any new attachments following termination, and there is no agreement between Verizon and FPL for joint use of new poles.

8. FPL continues to own or control large numbers of poles used or designated, in whole or in part, for wire communication. Verizon currently has attachments on approximately 67,000 distribution poles that FPL owns or controls. *See* Ex. 10 (Invoice from Florida Power & Light Company to Verizon Florida LLC (Apr. 15, 2013) ("2012 Invoice")).

9. As contemplated by the Agreement, Verizon has, in good faith, requested on numerous occasions that the parties renegotiate the pole attachment rate to make it consistent with the Commission's rules and with the rates charged to comparable attachers.[5] Verizon engaged in executive-level discussions with FPL in an attempt to resolve this pole attachment dispute. Prior to filing this Complaint, Verizon mailed a certified letter to FPL outlining the allegations that form the basis of this Complaint, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute. Exs. A ¶ 12 (Lindsay Aff.); 5 (Letter from S. Lindsay, Staff Consultant, Verizon Network Engineering, to T. Kennedy, Principal Regulatory Affairs Analyst, FPL (Dec. 9, 2011)). Executive-level discussions were held on January 27, 2012, but failed to resolve the dispute. Ex. A ¶ 12 (Lindsay Aff.). [redacted]

[5] *See* Ex. 1 at Art. XI, Section 11.1 (Joint Use Agreement) ("Article X of this Agreement covering Rental and Procedures for Payment shall remain in effect for a minimum term on [sic] one (1) year. At any time thereafter, the adjustment rate shall be subject to renegotiation at the request of either party.").

II. FACTS AND ARGUMENT

A. The Rates That FPL Seeks From Verizon Are Not Just And Reasonable.

10. The Commission has ruled that ILECs, such as Verizon, are entitled to a just and reasonable attachment rate that is based on the Commission's new formula for telecommunications carriers. As the Commission explained, "[u]nder any new agreements, to the extent that the incumbent LEC demonstrates that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators, we believe it will be appropriate to use the rate of the comparable attacher as the 'just and reasonable' rate for purposes of section 224(b)." *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217) (emphasis added).

11. FPL should have charged competitors comparably situated to Verizon (for reasons detailed in section II.C.1 below and incorporated here by reference), a rate of $8.52 for the 2011 and 2012 calendar years. Ex. B ¶ 10 (Calnon Aff.).[6] This rate results from the Commission's new formula for telecommunications carriers. *Id.*.

12. In 2011 and 2012, FPL instead invoiced Verizon annual per pole attachment rates of $35.465 and $36.225, respectively. Exs. 6 (Invoice from Florida Power & Light Company to Verizon Florida LLC (Feb. 28, 2012) ("2011 Invoice"),10 (2012 Invoice).

13. FPL has thus sought from Verizon rates for 2011 and 2012 that are four times the just and reasonable rate to which Verizon is entitled under Section 224(b) because Verizon is comparably situated to its competitors. *See Pole Attachment Order*, 26 FCC Rcd at 5336

6 [redacted]

(¶ 217); *see also* Ex. B ¶ 12 (Calnon Aff.). FPL's invoiced rates are also nearly three times the $12.91 rate produced by the prior telecommunications formula that the Commission has held should serve as an "upper bound" on just and reasonable rates charged to an ILEC. *Id.* at 5336-37 (¶¶ 218); Ex. B ¶¶ 10, 12 (Calnon Aff.).

14. FPL's invoiced rates also allow FPL to collect from Verizon one-half of FPL's average annual cost of joint use poles, when Verizon is allocated less than half of the useable space on the pole – and in fact occupies significantly less space than it is allocated.[7] Moreover, FPL collects and retains rent from third parties that attach in the space allocated to, but not used by, Verizon on the joint use poles, thereby increasing its overcompensation and covering costs that it should pay for its own use of the poles. Exs. A ¶ 9 (Lindsay Aff.), B ¶ 14 (Calnon Aff.). FPL provides Verizon with no credit or reduction in rate, but instead double-dips in a manner that allows it to recover a disproportionate share of its pole costs from Verizon.

15. Further, these rates and their annual escalations are unjust and unreasonable because FPL seeks to enforce them in perpetuity. According to FPL, all poles to which Verizon attached prior to the June 9, 2012 termination of the parties' Joint Use Agreement are locked into the rental rate provision contained in the Agreement going forward.[8] Ignoring its obligation to

[7] *See* Exs. 2 at § 1 (Supplemental Agreement) (defining the rental rate as "one half of the average annual cost of joint use poles for the next preceding year as determined by the party owning the majority of the jointly used poles"), 1 at § 1.1.7 (Joint Use Agreement) (allocating 4 feet of space to Verizon and 6 feet of space to FPL), A ¶ 9 (Lindsay Aff.) (representing that Verizon generally uses, at most, 1.25 feet of space on a joint use pole).

[8] [redacted]

renegotiate the rental rates in good faith,[9] FPL insists that the rate provision has an evergreen effect that prevents it from ever being amended following termination of the Agreement. FPL's approach contradicts the Commission's rules, which limit FPL to a just and reasonable rate comparable to the much lower rate applicable to comparable attachers.

B. Given Verizon's Inferior Bargaining Position, FPL Has Flatly Refused To Even Negotiate To Set A Reasonable Pole Attachment Rate.

16. In the *Pole Attachment Order*, the Commission found that the record showed that a pole ownership disparity between an ILEC and an electric utility could leave the ILEC "in an inferior bargaining position" and mean that "market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates, terms and conditions for incumbent LECs pole attachments." 22 FCC Rcd at 5327 (¶ 199). Therefore, the Commission explained that "in evaluating incumbent LEC pole attachment complaints, the Commission will consider the incumbent LEC's evidence that it is in an inferior bargaining position to the utility against which it has filed the complaint." *Id.* at 5334 (¶ 215).

1. FPL Owns – And Has Always Owned – The Vast Majority Of Jointly-Used Poles.

17. According to FPL's most recent invoice, FPL owns 90 percent (or about 67,000) of the approximately 74,000 distribution poles jointly used by the parties, whereas Verizon owns just 10 percent (or about 7,000) of the joint use poles. Ex. 10 (2012 Invoice). FPL also owns about 1,400 transmission poles to which Verizon is attached. *Id.*

18. [redacted]

[9] *See* Ex. 1 at Art. XI, Section 11.1 (Joint Use Agreement).

19. As a result of this disparity, Verizon currently has inferior bargaining power in the sense that the Commission used that term, and Verizon's predecessor likewise had inferior bargaining power when it entered and amended the Joint Use Agreement over 30 years ago. Indeed, the pole ownership disparity in this case – which is roughly 90 percent to 10 percent in FPL's favor – is significantly greater than that noted in the *Pole Ownership Order*: "[t]oday, incumbent LECs as a whole appear to own approximately 25-30 percent of poles and electric utilities appear to own approximately 65-70 percent of poles," meaning that "incumbent LECs may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases." 26 FCC Rcd at 5329 (¶ 206).

20. The disparity in this case matches the hypothetical provided by the Commission to illustrate the effect of a pole ownership disparity on negotiations: "As a hypothetical illustration, if the electric company owned 90% of poles in an area and the incumbent LEC owned 10%, and if the best outside alternative for each party was deploying the remaining needed poles (and having the legal right to do so), the electric utility would face the cost of deploying 10% of poles, while the incumbent LEC would face the cost of deploying 90% of poles. As a result, the incumbent LEC would have less bargaining power than the electric utility." 26 FCC Rcd at 5329 (¶ 206 n.618).

2. Verizon Was Unable To Obtain A Just And Reasonable Rate Through Private Negotiations.

21. Following the effective date of the *Pole Attachment Order*, Verizon requested that FPL commence negotiations for a new joint use agreement, or a new amendment to the rate provision in the parties' then-existing Agreement. This request was consistent with the contractual language of the Agreement, which contemplated that either party could request to

renegotiate rates over time, as warranted by changed circumstances.[10] Verizon emphasized that it sought a rate comparable to the rate that FPL charges its comparable competitors. To that end, Verizon requested a copy of FPL's standard license agreement for competitive local exchange and cable companies, along with information detailing any deviations from the standard license terms among FPL's licensees. Ex. 4 (Letter from S. Lindsay, Staff Consultant, Verizon Network Engineering, to T. Kennedy, Principal Regulatory Affairs Analyst, FPL (June 27, 2011)).

22. Verizon met with FPL on numerous occasions in 2011 to try to negotiate a new agreement and a new rental rate. FPL consistently denied that the *Order* provided Verizon any right to rate relief with respect to the facilities attached to FPL's poles before the July 12, 2011, effective date of the *Order*. FPL refused to negotiate in good faith to reach a just and reasonable rate. Ex. A ¶ 11 (Lindsay Aff.).

23. On December 9, 2011, Verizon requested "that executives from each company meet as soon as possible in person to attempt in good faith to resolve these issues, including reaching agreement on a just and reasonable pole attachment rate for both companies." Ex. 5 at 2 (Letter from S. Lindsay, Staff Consultant, Verizon Network Engineering, to T. Kennedy, Principal Regulatory Affairs Analyst, FPL (Dec. 9, 2011)). Verizon also provided formal notice of termination of the Joint Use Agreement, as amended, that would become effective six months later, on June 9, 2012. Verizon emphasized that it "remain[ed] willing to enter into a new agreement if the rate issue is resolved." *Id.*

24. Consistent with its contractual right to renegotiate the rate, Verizon continued to try to negotiate a new agreement with FPL in an executive-level meeting that was held on January 27, 2012, and as well as in informal negotiations. On several occasions, Verizon offered

[10] *See* Ex. 1 at Art. XI, Section 11.1 (Joint Use Agreement).

to enter an attachment agreement that contains comparable rates, terms and conditions to those that FPL has agreed to with comparable attachers that compete with Verizon. FPL refused to negotiate in good faith, maintaining it was entitled under the Agreement and the FCC *Order* to the same going forward rental rate for its existing attachments to FPL's poles. Ex. A ¶ 13 (Lindsay Aff.).

25. In early 2012, FPL invoiced Verizon for its 2011 attachments to FPL's distribution poles at a $35.465 per pole rate. Ex. 6 (2011 Invoice).

26. On or about July 23, 2012, Verizon submitted a payment to FPL that reflected (1) the invoiced rate for January through June 2011 attachments that preceded the effective date of the *Pole Attachment Order*, and (2) a just and reasonable rental rate of $8.52 per pole for July through December 2011 attachments that were entitled to rate relief under the *Order*. The $8.52 rate was calculated by Verizon using the Commission's new telecommunications rate formula and the best data then available. Ex. A ¶ 18 (Lindsay Aff.).

27. On June 9, 2012, the Joint Use Agreement terminated without a new agreement in place for the joint use of new poles. *Id.* ¶ 13.

3. [redacted]

28. [redacted]

29. [redacted]

30. [redacted]

31. [redacted]

32. FPL continued to invoice at an unjust and unreasonable rate during negotiations. On or about April 15, 2013, FPL invoiced Verizon for its 2012 attachments to FPL's distribution poles at a $36.225 per pole rate. The invoice also included charges for 2008 through 2011 pole rent associated with adjusted pole counts from a joint field check. Ex. 10 (2012 Invoice).

33. On or about June 13, 2013, Verizon submitted a payment to FPL. Consistent with its prior payment, Verizon paid FPL at the full invoiced rate for attachments attributable to the 2008 through June 2011 period, and at a just and reasonable $8.52 rental rate for attachments

attributable to the July 2011 through December 2012 period that followed the effective date of the FCC's *Pole Attachment Order*. Ex. A ¶ 19 (Lindsay Aff.).

4. FPL Responded To Verizon's Efforts To Negotiate A Just And Reasonable Rate With A Breach Of Contract Lawsuit.

34. Negotiations came to an abrupt stop in April 2013 when FPL filed a Complaint against Verizon in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County. With the lawsuit, FPL seeks to compel Verizon to pay the rates it invoiced under the terminated Joint Use Agreement. Ex. 11 (Complaint, FPL v. Verizon (Apr. 23, 2013)).[11]

35. Verizon asked the Court to dismiss or stay the litigation pursuant to the primary jurisdiction doctrine until the Commission had an opportunity to resolve the parties' rate dispute.[12] FPL opposed the Motion, asserting that its Complaint presents nothing but "a straightforward contract case" that asks the Court "to enforce the existing rate in the Joint Use Agreement." Ex. 13 at 6-7 (Opp. to Am. Mot. to Dismiss, *FPL v. Verizon* (Aug. 13, 2013)).

[redacted]

FPL also asserted to the Court that Verizon had "provided no explanation for its failure to take

---

[11] The Complaint includes five counts – three counts alleging breach of the Joint Use Agreement related to Verizon's adjusted payments on the 2011 and 2012 invoices, and two alternative counts for quantum meruit and unjust enrichment in the event that the rate provision in the Joint Use Agreement was not enforceable following the Agreement's termination on June 9, 2012. FPL has since voluntarily withdrawn the counts for quantum meruit and unjust enrichment, Ex. 14 (Notice of Voluntary Dismissal of Counts IV and V of Complaint, *FPL v. Verizon* (Sept. 25, 2013), and for breach of contract related to retroactive rentals that resulted from the joint field check, Ex. 15 (Order Denying Motion to Dismiss or Transfer Venue, *FPL v. Verizon* (Sept. 26, 2013)). Two counts thus remain – one alleging breach of contract based on Verizon's payment of the 2011 invoice, and one alleging breach of contract based on Verizon's payment of the 2012 invoice. Ex. 11 at 4-6, 7-8 (Complaint, *FPL v. Verizon* (Apr. 23, 2013)).

[12] Ex. 12 (Memorandum of Law in Support of Defendant's Motion to Dismiss or Transfer Venue, *FPL v. Verizon* (July 29, 2013)).

even the first step toward seeking . . . relief" at the FCC if it wanted the FCC to resolve the rate dispute. *Id.*at 2 (emphasis added).[13]

36. The Court declined to defer to the Commission and ordered Verizon to answer FPL's Complaint. Ex. 15 (Order Denying Motion to Dismiss or Transfer Venue, *FPL v. Verizon* (Sept. 26, 2013)). Verizon filed a Counterclaim with its Answer, which sought a declaration that the $8.52 rate that Verizon paid FPL for attachments after the effective date of the *Pole Attachment Order* was just and reasonable and fully compensated FPL. Ex. 16 (Answer and Counterclaim of Verizon Florida LLC, *FPL v. Verizon* (Oct. 16, 2013)).

37. FPL has since successfully urged the Court to dismiss Verizon's Counterclaim. According to FPL, "[o]nly the FCC can calculate a rate that might impact the contract governing the parties here." Ex. 18 at 4 (Mot. to Dismiss Verizon's Counterclaim, *FPL v. Verizon* (Dec. 5, 2013)). Therefore, FPL has argued, "[a]bsent a specific FCC ruling applicable to Verizon's attachment to FPL's poles, no statute, regulation or rule affects the validity of the Joint Use Agreement." *Id.* at 9. FPL thus informed the Court that "Verizon must pay the rate set forth in the parties' Joint Use Agreement. If it believes that rate is unjust and unreasonable, it has the right to file a complaint with the FCC." *Id.* at 11. The Court agreed, and dismissed Verizon's counterclaim on January 22, finding in part that Verizon had not exhausted its remedies because

13 [redacted]

it had not filed a Pole Attachment Complaint with the FCC. Ex. 21 (Order on Motion to Dismiss Counterclaim, *FPL v. Verizon* (Jan. 22, 2014)).

38. FPL and the Florida court have thus confirmed that this dispute requires the Commission's resolution at this time. FPL concedes that the Commission has jurisdiction to consider whether Verizon has a right to a just and reasonable rate for the nearly 67,000 FPL poles on which Verizon has existing attachments. *See* Ex. 18 at 10 (Mot. to Dismiss Verizon's Counterclaim, *FPL v. Verizon* (Dec. 5, 2013)) ("[T]he FCC has jurisdiction to adjudicate complaints filed by ILECs (such as Verizon) claiming that pole attachment rates charged by an electric utility are unjust and unreasonable.").

C. The *Pole Attachment Order* Provides Verizon A Remedy For This Precise Situation.

39. The *Pole Attachment Order* followed several years of investigation which showed that ILECs had been forced to pay rates that were significantly higher than the rates available to other attachers with whom they compete because electric companies either (1) leveraged their greater market power to obtain a high rate or (2) refused to renegotiate outdated agreements with unreasonably high rates. *See id.* at 5330-31 (¶ 208). Each of these circumstances is presented here – FPL has leveraged its bargaining power to obtain a rate four times higher than that applicable to Verizon's competitors and FPL has refused to renegotiate the outdated Joint Use Agreement, as contemplated by a renegotiation provision in that agreement, to reach a just and reasonable rate for Verizon's attachments.

2. Verizon Is Entitled To Attach At The New Telecommunications Rate Because It Is Comparably Situated To FPL's Other Attachers.

40. The Commission should find that the new telecommunications rate applies to Verizon's existing and future attachments because it is comparably situated to FPL's other attachers that compete with Verizon.[14]

41. *First*, Verizon's attachments on FPL's poles are comparable to those of the competing attachers. Like its competitors, Verizon's attachments support communications network facilities and related equipment and are used to provide voice, broadband and video services. Ex. A ¶ 7 (Lindsay Aff.).

42. *Second*, Verizon is comparably situated to its competitors because Verizon also owns few poles to which FPL has attached its facilities. As noted above, FPL attaches to only 7,000 Verizon poles, while Verizon attaches to approximately 67,000 FPL poles. *See supra* ¶ 17. The ratio of pole ownership is roughly 90% to 10% in favor of FPL. *Id.* Given this dramatic disparity, Verizon is comparably situated to other licensees.

43. *Third*, Verizon has terminated its Joint Use Agreement with FPL and indicated its willingness to have its attachments to FPL's poles governed by a license agreement like that which FPL provides its other attachers. *See, e.g.*, Exs. A ¶ 13 (Lindsay Aff.), 5 (Letter from S. Lindsay, Staff Consultant, Verizon Network Engineering, to T. Kennedy, Principal Regulatory Affairs Analyst, FPL (Dec. 9, 2011)). Verizon even offered FPL a draft license agreement for its current and future attachments to FPL's poles based on the terms and conditions of the license agreement between FPL and Verizon's affiliate, MCI Communications Services, Inc. (a

[14] There is no dispute in this matter regarding *future* attachments because [redacted]

"telecommunications carrier" under the Act). [redacted] As the Commission noted, "an incumbent LEC may seek the same term or condition that applies to a telecommunications carrier or cable operator upon a showing that it otherwise is comparably situated to that provider." *See Pole Attachment Order*, 22 FCC Rcd at 5336 (¶ 217 n.659). That is precisely what occurred here.

44. Because Verizon is comparable to FPL's other attachers, "competitive neutrality counsels in favor of affording the incumbent LECs the same rate as the comparable provider (whether the telecommunications carrier or the cable operator)." *Id.* at 5336 (¶ 217). Here, that rate is $8.52 for 2011 and 2012. Ex. B ¶ 10 (Calnon Aff.).

45. [redacted]

[15] Verizon also offered a draft reciprocal license agreement for FPL's attachments on Verizon's poles based on the terms and conditions of its affiliate's current license agreement. [redacted]

[redacted]

46. Verizon is entitled to pay a just and reasonable attachment rate that complies with the Commission's rate formula for telecommunications carriers and reflects FPL's actual data. Indeed, the Commission has repeatedly found that parties have the right to rebut any presumption in the Commission's pole attachment formulas with actual data. *See, e.g., Teleport Commc'ns Atlanta, Inc. v. Georgia Power Co.*, 17 FCC Rcd 19859, 19866 (¶ 18) (2002) ("[A]s with all our presumptions, either party may rebut this presumption with a statistically valid survey or actual data"). Verizon, accordingly, is entitled to the $8.52 rate that it paid to FPL in response to its 2011 and 2012 invoices.

3. Verizon Is Entitled To The New Telecommunications Rate For Both Existing And New Attachments To FPL's Poles.

47. In negotiations [redacted] FPL has taken the position that it will only provide Verizon a *new* agreement that covers *new* attachments on similar rates, terms, and conditions as FPL's other attachers. FPL has argued that for *existing* attachments, the parties' Joint Use Agreement, as amended, will continue to govern the rates in perpetuity, no matter how unreasonable those rates may be. *See, e.g.*, [redacted], *see also, e.g.*, Ex. 18 at 4 (FPL's Mot. to Dismiss Verizon's Counterclaim, *FPL v. Verizon* (Dec. 5, 2013)) ("FPL could not be forced to accept a lower rate than that for which it bargained.").

48. FPL's transparent attempt to eliminate essentially all rate relief provided by the *Pole Attachment Order* should be rejected.[16] It is completely contrary to the broad rate reform provided by the Commission's *Order*. FPL's refusal to budge from that unlawful rate is also contrary to the express provisions of the now-terminated Joint Use Agreement, which contemplated that parties would renegotiate rates and other terms as appropriate in light of changed circumstances.[17] FPL has refused to negotiate in good faith to do so.

49. *First,* the Commission indicated its intention to extend rate relief to existing attachments when it held that "[t]o the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new agreement, the Commission can consider that as appropriate in a complaint proceeding." *Pole Attachment Order*, 22 FCC Rcd at 5335 (¶ 216). Under FPL's construction of the *Pole Attachment Order*, as a practical matter, Verizon would never be able to terminate its existing agreement and obtain a new agreement. Instead, it would be stuck paying an inflated and unlawful rate for most (if not all) of its attachments forever, even as Verizon's competitors pay much lower rates to FPL for attachments. [redacted]

[16] As FPL well knows, Verizon has made virtually no new attachments to FPL's poles in recent years; in fact, FPL billed Verizon for fewer pole attachments in 2012 than it billed in 2007. Ex. A ¶ 8 (Lindsay Aff.).

[17] *See* Ex. 1 at Art. XI, Section 11.1 (Joint Use Agreement).

50. *Second*, the Commission confirmed that existing attachments are entitled to rate relief when it distinguished between ILECs that seek access to poles and ILECs that already have access to poles because they maintain existing attachments. The Commission clarified that the latter group – those with existing attachments – have the right to just and reasonable rates for those attachments. As the Commission explained, "where incumbent LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(l)." *Pole Attachment Order*, 22 FCC Rcd at 5327-28 (¶ 202).

51. *Third*, the Commission's description of its authority confirms that it may remedy the rates charged for existing attachments. It pointed to its authority to "terminat[e] the unjust or unreasonable rate, term, or condition," to "substitut[e] in the contract . . . a just and reasonable rate, term, or condition," and to order "a refund of amounts paid subsequent to the effective date" of *Order*. *Pole Attachment Order*, 26 FCC Rcd at 5333-34 (¶ 214 n.647) (citing 47 C.F.R. § 1.1410). Each of these remedies presupposes that the rate will be changed for existing attachments. Indeed, the Commission has long maintained that it can provide a remedy under an existing pole attachment agreement. *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 77 F.C.C.2d 187, 195 (¶ 22) (1980) (the Commission "has been clearly empowered, after hearing a complaint and responsive pleadings, to take whatever action it deems 'appropriate and necessary' if it finds a particular rate, term, or condition to be unjust or unreasonable."). The Commission has also exercised its authority to substitute a just and reasonable rate for an unjust and unreasonable rate applicable to "attachments [that] were made under a contract executed by the parties." *See Teleport Commc'ns Atlanta, Inc. v. Georgia Power Co.*, 16 FCC Rcd 20238, 20239, 20243 (¶¶ 4, 16) (2001); *see also Time Warner Entertainment v. Florida Power & Light Company*, 14 FCC Rcd 9149, 9154 (¶ 14) (1999)

(substituting new rental rate "for the existing rate in the Agreements"); *Teleprompter of Fairmont, Inc. v. Chesapeake & Potomac Tel. Co.*, 85 FCC.2d 243, 244 (¶ 2) (1981) ("[W]e substituted the maximum just and reasonable rate for the $4.00 rate set in the contract between the parties.").

52. In any event, as explained above, the Joint Use Agreement expressly contemplated that the parties would renegotiate the rates or terms of attachments as warranted by changing circumstances, yet FPL has refused to negotiate with Verizon in good faith to determine a lawful rate.

4. Even If Verizon Were Not Comparably Situated To FPL's Other Attachers, It Would Be Entitled To Attach At The Pre-Existing Telecommunications Rate.

53. Alternatively, even if Verizon were found to be dissimilar to its competitors who attach to FPL's poles, it would be entitled to a just and reasonable rate that is no higher than the rate calculated using the Commission's prior telecommunications formula. The Commission held "if a new pole attachment agreement between an incumbent LEC and a pole owner includes provisions that materially advantage the incumbent LEC *vis a vis* a telecommunications carrier or cable operator, . . . we find it reasonable to look to the pre-existing, high-end telecom rate as a reference point." *Pole Attachment Order*, 22 FCC Rcd at 5336-37 (¶ 218).

54. For 2011 and 2012, the Commission's prior telecommunications formula results in an annual per pole attachment rate of, at most, $12.91. Ex. B ¶ 10 (Calnon Aff.).

III. COUNT I – UNJUST AND UNREASONABLE POLE ATTACHMENT RATES

55. Verizon incorporates paragraphs 1 through 54 of this Complaint as if set forth fully herein.

56. The Commission has authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and

shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." 42 U.S.C. § 224(b)(1).

57. The rate that FPL charges its licensees is a just and reasonable rate for Verizon because Verizon attaches to FPL's poles on terms and conditions that are comparable to those that apply to competing attachers. *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217). FPL's refusal to offer Verizon the rental rate that FPL charges its other attachers has denied Verizon a just and reasonable rate in violation of 42 U.S.C. § 224.

58. Alternatively, if Verizon attaches to FPL's poles on terms and conditions that are materially not comparable to FPL's other attachers, Verizon is still entitled to a just and reasonable rate no higher than the rate calculated pursuant to the FCC's pre-existing telecommunications formula. *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218). Under these alternative circumstances, FPL's refusal to offer Verizon a rental rate that is not higher than the rate calculated pursuant to the FCC's pre-existing telecommunications formula has denied Verizon a just and reasonable rate in violation of 42 U.S.C. § 224.

IV. RELIEF REQUESTED

59. Verizon respectfully requests that the Commission order that the unjust and unreasonable rate provision in the parties' Joint Use Agreement, as amended, is terminated effective July 12, 2011, the effective date of the *Pole Attachment Order*.

60. Verizon respectfully requests that the Commission prescribe the rate that is calculated in accordance with the Commission's telecommunications formula, using actual data where available, as the just and reasonable rate in a new agreement that applies to Verizon's existing and future attachments. For the 2011 and 2012 rental years, the rate should be $8.52.

61. Alternatively, if the Commission concludes that the terms and conditions of the parties' Joint Use Agreement, as amended, provide Verizon a net material advantage relative to

its competitors, then Verizon requests that the Commission prescribe the rate that is calculated in accordance with the Commission's prior telecommunications formula, using actual data where available, as the just and reasonable rate in a new agreement that applies to Verizon's existing attachments. For the 2011 and 2012 rental years, the rate should be $12.91.

62. Verizon respectfully requests that the Commission order FPL to refund any amounts paid in excess of a just and reasonable rate following the July 12, 2011 effective date of the *Pole Attachment Order* and grant Verizon such other relief as the Commission deems just, reasonable, and proper.

Respectfully submitted,

VERIZON FLORIDA LLC

By: _____

William H. Johnson
Katharine R. Saunders
VERIZON
1320 N. Courthouse Rd.
9th Floor
Arlington, VA 22201

Christopher S. Huther
Claire J. Evans
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006

Attorneys for Verizon Florida LLC

Michael E. Glover
Of Counsel

Dated: January 31, 2014

V. CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2014, I caused a copy of the foregoing Complaint, exhibits and affidavits 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
(original and three copies of confidential and public versions by hand delivery)

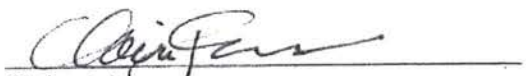
Kimberly D. Bose, Secretary
Nathaniel J. Davis, Sr., Deputy Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
(public version by overnight mail)

Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399
(public version by overnight mail)

Maria Jose Moncada
Florida Power and Light Company
700 Universe Boulevard
Juno Beach, FL 33408
maria.moncada@fpl.com
(confidential and public versions by overnight mail and email)

Eric B. Langley
Balch & Bingham LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, AL 35203
elangley@balch.com
(public version by email)

Alvin B. Davis
Squire Sanders (US) LLP
200 South Biscayne Boulevard, Suite 4100
Miami, FL 33131
alvin.davis@squiresanders.com
(public version by email)



Claire J. Evans

Before the
Federal Communications Commission
Washington, DC 20554

VERIZON FLORIDA LLC, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	)	File No.

Exhibits

A. Affidavit of Steven R. Lindsay (Jan. 31, 2014).

B. Affidavit of Mark S. Calnon, Ph.D. (Jan. 31, 2014).

1. Joint Use Agreement Between Florida Power & Light Company and General Telephone Company of Florida (Jan. 1, 1975).

2. Supplemental Agreement Between Florida Power & Light Company and General Telephone Company of Florida (Mar. 29, 1978).

3. Confidential Letter Agreement Between Florida Power & Light Company and Verizon Florida LLC (Sept. 27, 2007).

4. Letter from S. Lindsay, Staff Consultant, Verizon Network Engineering, to T. Kennedy, Principal Regulatory Affairs Analyst, Florida Power & Light Company (June 27, 2011).

5. Letter from S. Lindsay, Staff Consultant, Verizon Network Engineering, to T. Kennedy, Principal Regulatory Affairs Analyst, Florida Power & Light Company (Dec. 9, 2011).

6. Invoice from Florida Power & Light Company to Verizon Florida LLC (Feb. 28, 2012).

7. [redacted]

8. [redacted]

9. [redacted]

10. Invoice from Florida Power & Light Company to Verizon Florida LLC (Apr. 15, 2013).

11. Complaint, *Florida Power & Light Company v. Verizon Florida LLC*, No. 13-14808 (Fla. 11th Cir. Ct. Apr. 23, 2013) ("*FPL v. Verizon*").

12. Memorandum of Law in Support of Defendant's Motion to Dismiss or Transfer Venue, *FPL v. Verizon* (July 29, 2013).

13. Opposition to Amended Motion to Dismiss, *FPL v. Verizon* (Aug. 13, 2013) (exhibit omitted).

14. Notice of Voluntary Dismissal of Counts IV and V of Complaint, *FPL v. Verizon* (Sept. 25, 2013).

15. Order Denying Motion to Dismiss or Transfer Venue, *FPL v. Verizon* (Sept. 26, 2013).

16. Answer and Counterclaim of Verizon Florida LLC, *FPL v. Verizon* (Oct. 16, 2013).

17. FPL's Memorandum in Opposition to Verizon Florida LLC's Motion to Stay, *FPL v. Verizon* (Nov. 14, 2013).

18. FPL's Motion to Dismiss Verizon's Counterclaim, *FPL v. Verizon* (Dec. 5, 2013).

19. Verizon Florida LLC's Opposition to FPL's Motion to Dismiss Verizon's Counterclaim, *FPL v. Verizon* (Jan. 7, 2014).

20. Florida Power & Light Company's Reply in Support of its Motion to Dismiss Verizon Florida LLC's Counterclaim, *FPL v. Verizon* (Jan. 17, 2014) (exhibits omitted).

21. Order on Motion to Dismiss Counterclaim, *FPL v. Verizon* (Jan. 22, 2014).

Exhibit A

Before the
Federal Communications Commission
Washington, DC 20554

VERIZON FLORIDA LLC,	)	
Complainant,	)	
v.	)	File No.
FLORIDA POWER AND LIGHT COMPANY,	)	
Defendant.	)	

AFFIDAVIT OF STEVEN R. LINDSAY

STATE OF FLORIDA)
) ss.
COUNTY OF HILLSBOROUGH)

I, STEVEN R. LINDSAY, being sworn, depose and say:

1. I am a Consultant – Contract Management in the Centralized Engineering Support and Major Project Implementation Division of Verizon Florida LLC ("Verizon Florida"). I am executing this Affidavit in support of Verizon's Pole Attachment Complaint against Florida Power and Light Company ("FPL"). I know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath.

2. Verizon is a limited liability company incorporated in Florida with a principal place of business at 610 Zack Street, 4th Floor, Tampa, Florida 33602. Verizon is an incumbent local exchange carrier ("ILEC") that provides telecommunications and other services in sections of Hillsborough, Pinellas, Manatee, Sarasota, Polk, and Pasco Counties in Florida. Verizon's

overlapping service area with FPL includes Sarasota and Bradenton, Florida. One of Verizon's predecessors was the General Telephone Company of Florida, which was an independent telephone company that relied primarily on utility poles owned by electric companies to provide service to these relatively small and then-developing geographic areas within Florida.

3. Through a corporate merger, Verizon became the party to the Joint Use Agreement entered by FPL and General Telephone Company of Florida on January 1, 1975, as amended by the Supplemental Agreement entered by FPL and General Telephone Company of Florida on March 29, 1978. A true and correct copy of the Joint Use Agreement is attached to Verizon's Pole Attachment Complaint as Exhibit 1. A true and correct copy of the Supplemental Agreement is attached as Exhibit 2.

4. In my role as Consultant – Contract Management, I am responsible for the negotiation and implementation of joint use agreements and pole attachment agreements in Verizon's serving areas in Florida. I have personal knowledge of Verizon's negotiations with FPL for a just and reasonable pole attachment rental rate.

5. I have reviewed the allegations made in the Pole Attachment Complaint and the Exhibits submitted with the Pole Attachment Complaint. I verify that they are true and correct to the best of my knowledge, information and belief.

A. FPL's Unjust And Unreasonable Rates

6. FPL charges Verizon a much higher pole attachment rate than its competitors that also attach to FPL's poles. True and correct copies of FPL's invoices for 2011 and 2012 rent are attached to Verizon's Pole Attachment Complaint as Exhibits 6 and 10, respectively.

7. Although Verizon is charged much more for its attachments on FPL's poles, its attachments are comparable to those of its competitors. Like its competitors, Verizon's

attachments support communications network facilities and related equipment and are used to provide voice, broadband and video services.

8. Also, Verizon owns so few poles to which FPL has attached its facilities that Verizon is less like a pole owner and more like its competitors that attach as licensees. Verizon has made very few new attachments to FPL's poles in recent years. For example, FPL billed Verizon for fewer pole attachments in 2012 than it billed Verizon for in 2007.

9. The rental rates charged by FPL are especially unjust and unreasonable relative to the much lower rates charged competing attachers. Under the Supplemental Agreement (¶ 1), one-half of FPL's average annual cost of joint use poles is allocated to Verizon, even though the Joint Use Agreement (§ 1.1.7) allocates four feet of useable space on the pole to Verizon (less than half of the useable space). Recent audits of Verizon's facilities in Florida and elsewhere confirm that Verizon's facilities occupy on average not more than 1.25 feet of space on a joint use pole. Nevertheless, FPL collects and retains rent from third parties that attach in the space allocated to, but not used by, Verizon on the joint use poles, thereby increasing its overcompensation.

B. Negotiations with FPL

10. On June 27, 2011, I sent a letter on behalf of Verizon to FPL in which I requested that FPL begin negotiations for a rental rate reduction in light of the Commission's *Pole Attachment Order*. A true and correct copy of my letter is attached to Verizon's Pole Attachment Complaint as Exhibit 4. In the letter, I informed FPL that Verizon was open to continuing the joint use relationship through a new joint use agreement, a new amendment to the parties' existing Joint Use Agreement, as amended, or reciprocal license agreements. As negotiations progressed, I clarified that Verizon's preference was for a reciprocal license

arrangement, with Verizon attaching to FPL's poles at the rate that FPL is permitted to charge Verizon's competitors.

11. I met with FPL on numerous occasions in 2011 to try to negotiate a new rental rate. FPL consistently denied that federal law provided Verizon any right to rate relief with respect to the facilities that Verizon had attached to FPL's poles prior to the July 12, 2011 effective date of the ILEC protections in the *Pole Attachment Order*. FPL refused to negotiate in good faith to reach a just and reasonable rental rate.

12. On December 9, 2011, I sent FPL a certified letter in which I outlined the allegations that form the basis of this Complaint, invited a response within a reasonable period of time and offered to hold executive-level discussions regarding the dispute. A true and correct copy of my letter is attached to Verizon's Pole Attachment Complaint as Exhibit 5. Executive-level discussions followed on January 27, 2012, but failed to resolve the dispute.

13. I continued to try to negotiate a new agreement with FPL through informal negotiations. On several occasions, I told FPL that Verizon would agree to enter an attachment agreement that contains comparable rates, terms and conditions to those that FPL has agreed to with comparable competing attachers. FPL refused to negotiate in good faith, maintaining it was entitled under the Agreement and the FCC *Order* to the same going forward rental rate for its existing attachments to FPL's poles. On June 9, 2012, the Joint Use Agreement, as amended, terminated without a new agreement in place for the joint use of new poles.

14. [redacted]

15. [redacted]

16. [redacted]

17. While negotiations were pending, FPL filed a Complaint against Verizon in state court, seeking to compel Verizon to pay the unjust and unreasonable rental rates that FPL invoiced under the parties' terminated Agreement. True and correct copies of pleadings from the state court litigation are attached to Verizon's Pole Attachment Complaint as Exhibits 11 through 21.

C. Verizon's Invoice Payments

18. FPL invoiced Verizon for its 2011 attachments at an annual rental rate of $35.465 per pole. On or about July 23, 2012, Verizon submitted a payment to FPL that reflected (1) the invoiced rate for January through June 2011 attachments that preceded the effective date of the *Pole Attachment Order*, and (2) a just and reasonable rental rate of $8.52 per pole for July through December 2011 attachments that were entitled to rate relief under the *Order*. The $8.52 rate was calculated using the Commission's new telecommunications rate formula and the best data then available.

19. FPL invoiced Verizon for its 2012 attachments at an annual rental rate of $36.225 per pole. The invoice also included a number of adjustments to 2008 through 2011 pole counts based on a recently completed field audit. On or about June 13, 2013, Verizon submitted a

payment to FPL. Consistent with its prior payment, Verizon paid FPL at the full invoiced rate for attachments attributable to the 2008 through June 2011 period, and at a just and reasonable $8.52 rental rate for attachments attributable to the July 2011 through December 2012 period that followed the effective date of the FCC's *Pole Attachment Order*.

Steven R. Lindsay

Sworn to before me on
this 31st day of January, 2014

Notary Public

Kyle Rappley
Notary Public
State of Florida
My Commission Expires 06/27/17
Commission No. FF 31838

Exhibit B

Before the
Federal Communications Commission
Washington, DC 20554

VERIZON FLORIDA LLC, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	)	File No.

AFFIDAVIT OF MARK S. CALNON PH.D.

COMMONWEALTH OF PENNSYLVANIA)
) ss.
COUNTY OF BUCKS)

I, MARK S. CALNON, being sworn, depose and say:

1. I am a senior consultant in the Telecom Finance Group of Verizon Services Corporation. I am executing this Affidavit in support of the Pole Attachment Complaint of Verizon Florida LLC ("Verizon") against Florida Power and Light Company ("FPL"). I know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath.

2. I have a Bachelor of Arts degree in Economics from St. Michaels College and a Ph.D., also in Economics, from the University of Colorado. My professional experience began over 30 years ago and spans economic and regulatory policy issues in telecommunications and energy markets domestically and internationally. My specific areas of expertise include demand analysis, strategic planning, pricing and policy analysis focused primarily on the regulated

product and service offerings of incumbent telecom and electric distribution companies. My responsibilities have included estimating the demand for wireline telephone service, the demand for the various jurisdictional usage classifications of the wireline network (local, intralata toll, interlata toll and switched access) as well as the demand for various new / advanced service offerings. My work in the area of pricing and costing has included the design of methodologies to determine the proper price levels and rate relationships between the wholesale provision of access services (switched and special) and retail toll and private line offerings. I have also developed pricing methodologies consistent with the market-opening requirements of the Telecommunications Act of 1996 (TA96). Following passage of TA96, I have also been responsible for developing studies documenting the level of competition in various market areas and advocating market-appropriate levels of regulatory relief. I have also provided economic analysis supporting litigation in the areas of damage claims regarding alleged delays in provisioning new services and claims of unreasonable discrimination relating to the pricing and costing practices associated with third party make-ready costs and pole rental rates.

Over the course of my career I have participated in over 30 regulatory proceedings before 20 state commissions. My responsibilities in these proceedings have included the development and filing of written testimony, participation in industry workshops, settlement conferences and ex-parte presentations for Commissioners and their staff.

3. The purpose of this Affidavit is to describe the calculations that yield the presumptively just and reasonable pole rental rate that FPL was permitted to charge for the 2011 and 2012 calendar years under the Commission's new and prior telecommunications formulae.[1]

[1] These calculations are based in part on 2010 data provided to Verizon Florida by FPL. These data were not provided with fully documented supporting workpapers and Verizon Florida

My calculations are based on the guidance contained within the FCC's *Pole Attachment Order*.[2] I conclude that the new telecommunications formula results in a rental rate of $8.52 and that the prior telecommunications formula results in a rental rate of $12.91. As discussed in greater detail below, these rates are substantially lower than the rates invoiced and demanded by FPL for 2011 and 2012 calendar years. A more detailed table with my accounting inputs, sources, and calculations is attached to this Affidavit as Exhibit C-1.

4. The FCC's prior and new telecommunications formulae have two basic components: (1) the annual cost of pole ownership and (2) the percentage of that annual cost that is assigned to the telecommunications provider, which reflects the direct space occupied by the telecommunications provider and a share of the unusable space on the pole:[3]

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\begin{array}{c}\text{Carrying}\\ \text{Charge}\\ \text{Rate}\end{array}\right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\begin{array}{c}\text{Space}\\ \text{Occupied}\end{array}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

5. The new telecommunications formula differs from the prior telecommunications formula because it includes an additional multiplier applied to the annual cost of pole ownership. This case involves urbanized areas under the Commission's regulations because FPL and Verizon's overlapping service area includes the cities of Bradenton and Sarasota, Florida, which

---

reserves the right to make adjustments to these inputs at such time as the data can be reviewed and validated or as new data are made available.

[2] Report and Order and Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act*, 26 FCC Rcd 5240 (2011), *aff'd, Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 185 (D.C. Cir.), cert denied, 134 S.Ct. 118 (2013) ("*Pole Attachment Order*").

[3] 47 C.F.R. § 1.1409(e).

have populations greater than 50,000.[4] The appropriate multiplier, therefore, is 0.66.[5] When the annual pole costs used in the prior formula are multiplied by 0.66, the resulting rate should be approximately equal to the rate produced by the Commission's rate methodology for cable television providers.[6]

6. The net cost of a bare pole is determined by using the following calculation:

$$\text{Annual Pole Cost} = \frac{(\text{Net Pole Investment} \times \text{Appurtenances Factor})}{\text{Number of Poles}} \times \text{Carrying Charge Rate}$$

where net pole investment is the result of reducing gross investment assigned to the poles account by the amount of the depreciation and deferred tax reserves assigned (or allocated) to these accounts as well as a 15 percent reduction to eliminate investment in non-pole appurtenances.[7]

7. [redacted][9]

[4] *Pole Attachment Order* at ¶ 149 n. 449 ("An urbanized service area has 50,000 or higher population, while a non-urbanized service area has under 50,000 population."); Affidavit of Steven R. Lindsay ¶ 2 (Jan. 31, 2014) (stating that the overlapping service area includes Bradenton and Sarasota, Florida); State and County QuickFacts: Bradenton, Florida, U.S. Census Bureau, *available at* http://quickfacts.census.gov/qfd/states/12/1264175.html (population of 50,672); State and County QuickFacts: Sarasota, Florida, U.S. Census Bureau, *available at* http://quickfacts.census.gov/qfd/states/12/1207950.html (population of 52,811).

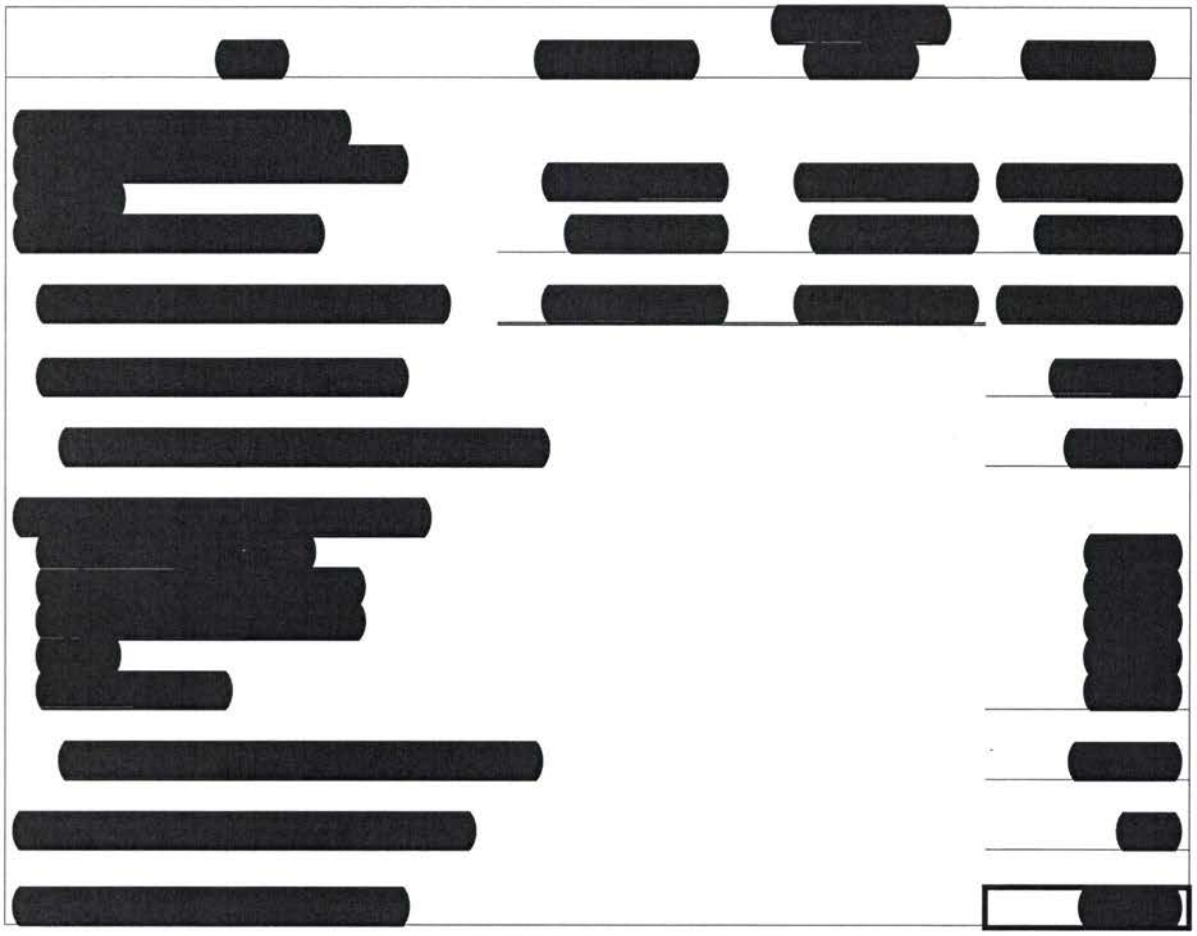
[5] *Pole Attachment Order* at ¶ 149.

[6] *Id.* at ¶¶ 149, 151.

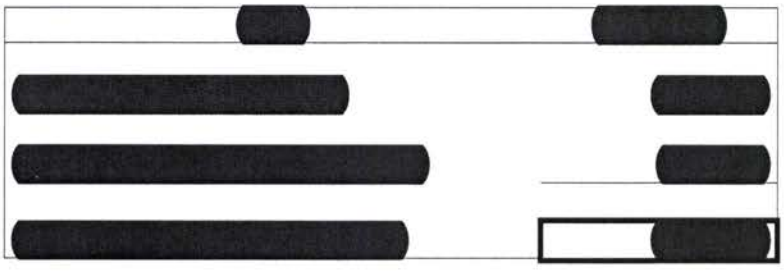
[7] Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the *Telecommunications Act of 1996*, CS Docket No. 97-98; CC Docket No. 97-151, Consolidated Order on Reconsideration, 16 FCC Rcd 12103 ¶¶ 32, 121 (2001).

[8] [redacted]

[9] The formula presented in ¶ 6 requires that depreciation reserve and deferred taxes be subtracted from gross pole investment along with a 15% appurtenance factor. The calculations above

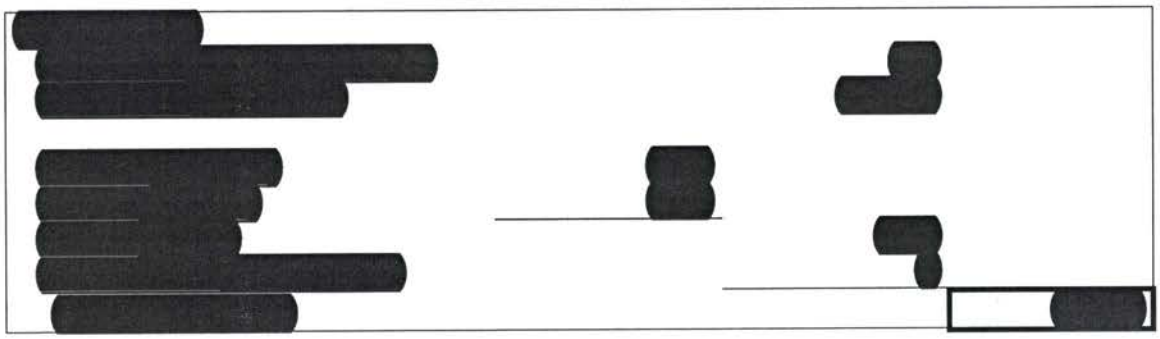


8.



9.

remove only depreciation and the appurtenance allowance. It is my understanding that this is consistent with Florida's regulatory requirements (at least as they apply to FPL).



10.

11.

[redacted]

[10] [redacted]

[11] [redacted]

[12] [redacted]

12. The rates FPL has invoiced and demanded for Verizon – $35.465 and $36.225 for 2011 and 2012[13] – are significantly greater than the rates produced by either the new or prior telecommunications formula. These rates are almost 3 times greater than the rate produced under the prior telecommunications formula and over 4 times greater than the rate produced under the current formula. For purposes of this Affidavit, I will round these rate demands to $35.47 and $36.23.

13. Straightforward comparisons highlight the unreasonableness of FPL's rate demand relative to the rates applicable to third party attachers and attachments by FPL. [redacted]

14. [redacted]

[13] Affidavit of Steven R. Lindsay ¶¶ 18-19 (Jan. 31, 2014) (stating that FPL invoiced and demanded rates of $35.465 and $36.225 for 2011 and 2012 rent, respectively).

[14] [redacted]

[15] [redacted]

[16] [redacted]

[17] [redacted]

[18] [redacted]

[redacted]

15. The rates calculated in ¶ 10 using the current and prior telecommunications formulas establish a zone of reasonableness that is significantly lower than the rate demanded and invoiced by FPL. The differential between the invoiced rate and the rate established by the new telecommunications formula provides a basis for evaluating the unreasonable burden FPL seeks to continue to impose on Verizon. The $36.23 rate demanded and invoiced by FPL for 2012[22] results in Verizon's payment of $27.71 more per pole compared to similarly situated attaching entities ($36.23 - $8.52 = $27.71). Since Verizon is attached to 67,003 FPL distribution poles, the excessively high attachment rate invoiced and demanded by FPL imposes an unreasonable financial burden on Verizon of $1.86 million annually. This premium, assuming a loaded labor rate of $100 / hour, would equate to more than 18,500 hours of work done on an annual basis for Verizon's benefit (that is not similarly performed for Verizon's

[19] [redacted]

[20] [redacted]

[21] [redacted]

[22] Affidavit of Steven R. Lindsay ¶ 19 (Jan. 31, 2014).

competitors) – or roughly 9 full time technicians entirely dedicated to Verizon's attachments on FPL's poles. Verizon, however, has not received a benefit in exchange for this premium, as it has made virtually no new attachments in recent years. Its attachments are, therefore, subject solely to the same maintenance that is provided to its competing attachers on the same utility poles. This calculation thus exposes the unreasonable burden that FPL seeks to impose on Verizon currently and the excessiveness of the payments that Verizon has made to FPL historically.

16. It is my opinion that the unreasonably high rental demands from FPL have been possible because of the insufficient bargaining power held by Verizon and its predecessor, General Telephone Company of Florida. A reasonable benchmark for determining the negotiating power of each party is the number of poles each party occupies in the common operational serving area. In 2012, Verizon occupied 67,003 FPL distribution poles whereas FPL occupied only 7,010 Verizon poles.[23] Verizon's pole ownership has not changed significantly over time.[24] Verizon, and General Telephone Company of Florida which negotiated the now-terminated Joint Use Agreement, thus owned less than 10% of the poles jointly used by the parties. This disparity clearly demonstrates that General Telephone Company of Florida was in an inferior position to negotiate fair rates and that Verizon is in an inferior position to renegotiate those unfair rates. It is my opinion that the facts of this case confirm the FCC's finding that "[d]ue to the local monopoly in ownership and control of poles, the legislative record indicated that some utilities had abused their superior bargaining position by demanding exorbitant rental

[23] These counts are based upon 2012 billing records issued by FPL.

[24] [redacted]

fees."[25] Additionally, I conclude that the FCC's statement applies fully here that "[t]he record demonstrates that incumbent LECs own fewer poles now than in the past, and this relative change in pole ownership may have left incumbent LECs in an inferior bargaining position to other utilities. As a result, at least in some circumstances, market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates, terms and conditions for incumbent LECs pole attachments."[26]

Mark S. Calnon

Sworn to before me on

this 31st day of January, 2014

Notary Public

Commonwealth of Pennsylvania
NOTARIAL SEAL
Joseph Patrick Wallace III, Notary Public
Doylestown Borough, Bucks County
My Commission Expires December 10, 2016

[25] Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the *Telecommunications Act of 1996*, CS Docket No. 97-98; CC Docket No. 97-151, Consolidated Order on Reconsideration, 16 FCC Rcd 12103 ¶ 21 (2001).

[26] *Pole Attachment Order* at ¶ 199.

REDACTED - FOR PUBLIC INSPECTION

Exhibit C-1

Confidential Exhibit

Exhibit 1

Confidential Exhibit

Exhibit 2

Confidential Exhibit

Exhibit 3

Confidential Exhibit

Exhibit 4

REDACTED - FOR PUBLIC INSPECTION

Mail Code: FLG2 937
1909 US Hwy 301 N
Building D
Tampa, FL 33619
Phone: 813-664-6047
Facsimile: 813-664-6054
steve.lindsay@verizon.com

June 27, 2011

Thomas Kennedy
Principal Regulatory Affairs Analyst
7200 NW 4th ST
Plantation, FL 33317-2211

RE: Renegotiation of the Joint Use Agreement

Dear Mr. Kennedy:

Verizon would like to meet to begin the process of negotiating a new joint use agreement or, in the alternative; a new amendment which would replace the March 29, 1978 amendment to the contract that sets forth the method for computing pole attachment rates.

The amendment was put into place during a time when the only two attachers on a pole were GTE and FP&L. As you know, the joint use of poles has changed dramatically in the last 33 years and we are no longer the only two companies occupying our poles. The 1978 amendment allows FP&L to collect 50% of its annual pole costs from Verizon in addition to 3rd party pole rent from those making attachments in the space paid for by Verizon. This is grossly unfair and unreasonable.

As you know, Verizon does not occupy 50% of the usable space on a typical FP&L pole but closer to 10% on average. Conversely, FP&L occupies 60% to 80% of the usable space on an average FP&L joint use pole. The division of pole costs needs to be adjusted to reflect the current allocation of space.

Verizon currently pays FP&L $34.13 per pole whereas our competitors such as Comcast pay less than $10 per pole. Verizon is seeking a rate comparable to that paid by Comcast. Verizon is also willing to lower the pole rates charged to FP&L.

In its recent Pole Attachment Order, the FCC prescribed certain parameters for rates paid by an incumbent LEC attacher such as Verizon. In particular, FCC explained that where incumbent LECs are attaching to other utilities' poles on

terms and conditions *comparable* to those that apply to other telecommunications carriers or cable operators, the incumbent LEC should be afforded the same rate as the comparable providers.

In order to evaluate the reasonableness of the rate paid by an incumbent LEC, the FCC noted that incumbent LECs should be provided with copies of the agreements between the electric utility (with appropriate confidentiality and/or redaction) and comparable cable and telecommunications providers. This letter constitutes Verizon's formal request that FP&L provide us with a copy of FP&L's standard license agreement containing information on FP&L's standard rates, terms and conditions for telecommunications providers and cable companies, along with additional information reflective of the extent to which FP&L's standard terms and conditions may vary between FP&L and individual licensees.

Verizon has developed a standard joint use contract that I am willing to send you to start the process of renegotiation if you don't have one available. In the alternative, I can also provide you with a new amendment to the contract that reflects an appropriate sharing of pole cost.

Verizon will also entertain the option of a reciprocal license agreement if FP&L is willing to grant Verizon the same rates afforded to our competitors. We are also willing to negotiate a rate that is somewhere between the lower bound CATV rate and the existing CLEC rate if you would like to maintain the same joint use relationship we've worked under for the last 30+ years.

Verizon looks forward to meeting with you to reach an agreement on a new joint use agreement that is fair and reasonable; please let me know when you are available to discuss our proposal.

Should you have any questions or concerns, please contact me at 813-664-6047.

Sincerely,

Steve Lindsay
Verizon Network Engineering

cc:
W. Balcerski – VZ
J. Slavin – VZ
J. Bachmore – VZ
A. Reilly - VZ

Exhibit 5

Mail Code: FLG2 937
1909 US Hwy 301 N
Building D
Tampa, FL 33619
Phone: 352-503-5017
Facsimile: 813-664-6054
steve.lindsay@verizon.com

December 09, 2011

Mr. Thomas Kennedy
Principal Regulatory Affairs Analyst
Florida Power and Light Company
DRS/AOB
7200 NW 4th ST
Plantation, FL 33317-2211

RE: Request for executive meeting and termination notification

Dear Mr. Kennedy:

Since July of this year, Verizon and Florida Power and Light (FP&L) have been meeting in an attempt to reach an agreement on new pole attachment rates. We believe those discussions have reached a point of impasse. Without attempting to summarize all of the communications exchanged between our companies over the past six months, I believe the salient points are as follows:

1. Verizon has supplied you with a proposal for a new joint use agreement for your review which would both modernize our agreement and enable Verizon to pay pole attachment rates that are equivalent to those paid by our competitors. Verizon believes that this rate, which we have calculated in accordance with the revised FCC formula, is $11.68 per pole. In contrast, FP&L continues to insist that we pay $34.13 per pole.

2. Verizon has proposed transforming the current joint-use relationship into more of a CLEC-style license arrangement, which would result in Verizon bearing certain additional costs and reduced rights in exchange for the desired rate reductions. Although FP&L provided Verizon with a copy of FP&L's standard pole attachment license agreement, FP&L stated that Verizon is not eligible for that agreement and that FP&L would refuse to offer Verizon an agreement on such terms. Specifically, in sending the agreement to Verizon, FP&L stated "It is important to note that FPL is not offering this agreement to Verizon and would not normally allow a non-applicable agreement to be used in this manner. FPL is providing this agreement to Verizon at their request, such that it is not necessary for Verizon to obtain the agreement through discovery in a complaint proceeding as noted in the FCC 11-50 Order." We see no basis for FP&L rejecting out-of-hand Verizon's request to negotiate changes to our current joint-use license agreement to bring it more in line with existing CLEC-style license agreements that FP&L maintains

with Verizon's competitors.

3. Finally, my November 17th letter suggested three different solutions to resolving the impasse on the pole rate issue, including offering to sell all existing Verizon owned jointly used poles to FP&L. The proposal would have enabled FP&L to continue to enjoy joint-use style rights on all poles on which it is attached by virtue of its acquisition of such poles, and would have enabled Verizon to transition to the type of CLEC-style license agreement, and rates, that our competitors currently enjoy. All of these proposals were rejected by FP&L during our December 7th conference call.

In light of this impasse between our respective negotiating teams, Verizon requests that executives from each company meet as soon as possible in person to attempt in good faith to resolve these issues, including reaching agreement on a just and reasonable pole attachment rate for both companies. We therefore invite Florida Power and Light's executive team to attend a meeting on January 16, 2012 from 1 PM to 3 PM in Verizon's Engineering Office – 1909 US HWY 301 N, Building "D". Please let me know if this date works for Florida Power and Light and please provide the name and title of the Florida Power and Light executives and others who will attend this meeting. If you plan on attending with attorneys, please indicate that in your response. The Verizon executives participating in this meeting will have sufficient authority to make binding decisions on behalf of Verizon regarding the subject matter of the discussions, i.e., the rates for pole attachments under either a new joint-use agreement or a new CLEC-style license agreement. We request that Florida Power and Light send executives with equivalent authority to participate in this meeting. If this date does not work for you, please provide alternative dates. We are anxious to resolve this issue as soon as possible and are hopeful that we can meet soon in order to avoid the need to seek FCC intervention.

This letter also serves as formal notice under Article 11 paragraph 11.2 that Verizon hereby terminates the existing joint use agreement. Should FP&L dispute Verizon's right to so terminate the existing joint use agreement, this letter shall also serve as formal notice of termination of the agreement under Article 16. However, we remain willing to enter into a new agreement if the rate issue is resolved.

Should you have any questions or concerns, please contact me at 352-503-5017.

Sincerely,

Steve Lindsay
Staff Consultant
Verizon Network Engineering.

cc: Alan Reilly, Tim Vogel, Jim Slavin, Bill Balcerski, Kati Saunders, Cissy George, Sanford Walker.

Exhibit 6

PAYMENT COUPON

/411500640114710000004418000141340020972937O

4,1,1500,640114,7100000044,1800014134,0,0209729370
Please mail this portion with your check

1800014134 1 of 1

Cust. No.:7100000044	Inv. No.:1800014134
This Month's Charges Past Due After	Amount Due This Invoice $ 2,097,293.70

VERIZON FLORIDA LLC
SAM WASMUNDT
1909 US HWY. 301 N.MC FLG2-750
TAMPA FL 33619

Make check payable to FPL in USD and mail payments to address below

FPL
General Mail Facility
Miami FL 33188-0001

Florida Power & Light Company

Invoice

Customer Name and Address

VERIZON FLORIDA LLC
SAM WASMUNDT
1909 US HWY. 301 N.MC FLG2-750
TAMPA FL 33619

Federal Tax Id.#: 59-0247775

Customer Number: 7100000044

Invoice Number: 1800014134

Invoice Date: 02/28/2012

4,1,1500,640114,7100000044,1800014134,0,0209729370
Please retain this portion for your records

CURRENT CHARGES AND CREDITS
Customer No: 7100000044 Invoice No: 1800014134

Description	Amount
5. FPL on VZ poles 6,857 @ $35.465	243,183.51-
1. VZ on FPL Wood pls 63,918 @ $35.465	2,266,851.87
2. VZ on FPL Conc pls wood price 1,474 @ $35.465	52,275.41
3. VZ on FPL SPC poles 4 @ $53.198	212.79
4. VZ on FPL Trans pls 149 @ $141.86	21,137.14

For Inquiries Contact:	Total Amount Due $2,097,293.70
Tom Kennedy 954-321-2241	This Month's Charges Past Due After

Exhibit 7

Confidential Exhibit

Exhibit 8

Confidential Exhibit

Exhibit 9

Confidential Exhibit

Exhibit 10

FPL.

PAYMENT COUPON

/41150064011471000000044180003755290238338840

4,1,1500,640114,7100000044,1800037552,9,0238338840
Please mail this portion with your check

1800037552 1 of 2

Cust. No.:**7100000044**	Inv. No.:**1800037552**
This Month's Charges Past Due After 05/15/2013	Amount Due This Invoice $ 2,383,388.40

VERIZON FLORIDA LLC
LARRY R. JOHNSON
1909 US HWY 301 N MC FLG2-0937
TAMPA FL 33619

Make check payable to FPL in USD and mail payments to address below

FPL
General Mail Facility
Miami FL 33188-0001

Florida Power & Light Company

Invoice

Customer Name and Address

VERIZON FLORIDA LLC
LARRY R. JOHNSON
1909 US HWY 301 N MC FLG2-0937
TAMPA FL 33619

Federal Tax Id.#: 59-0247775

Customer Number: **7100000044**

Invoice Number: **1800037552**

Invoice Date: **04/15/2013**

4,1,1500,640114,7100000044,1800037552,9,0238338840
Please retain this portion for your records

CURRENT CHARGES AND CREDITS
Customer No: 7100000044 Invoice No: 1800037552

Description	Amount
7,010 FPL atts on VZ Wd Poles @ $36.225 (2012)	253,937.25-
Adjust 2008 FPL atts on VZ Poles per Jt Fld Check*	1,284.78-
Adjust 2009 FPL atts on VZ Poles per Jt Fld Check*	2,628.01-
Adjust 2010 FPL atts on VZ Poles per Jt Fld Check*	4,005.45-
Adjust 2011 FPL atts on VZ Poles per Jt Fld Check*	5,426.91-
65,526 VZ atts on FPL Wd Poles @ $36.225 (2012)	2,373,679.35
1,473 VZ atts on FPL Con Poles @ $36.225 (2012)	53,359.43
4 VZ atts on FPL Spc Poles @ $54,338 (2012)	217.35

FPL.

CURRENT CHARGES AND CREDITS
Customer No: 7100000044 Invoice No: 1800037552

Description	Amount
146 VZ atts on FPL Trans Poles @ $144.90 (2012)	21,155.40
Adjust 2008 VZ atts on FPL Poles per Jt Fld Check*	13,456.38
Adjust 2009 VZ atts on FPL Poles per Jt Fld Check*	27,133.35
Adjust 2010 VZ atts on FPL Poles per Jt Fld Check*	41,691.51
Adjust 2011 VZ atts on FPL Poles per Jt Fld Check*	56,574.65
Int. charges on Inv # 18000014134 thru 4/16/13**	63,403.38

For Inquiries Contact: Tom Kennedy 954-321-2241	**Total Amount Due** **$2,383,388.40** This Month's Charges Past Due After 05/15/2013

Message
*Adjustments made pursuant to the Joint Field Check and Section 10.9 of the JUA. **Interest charges on unpaid balance of $917,986.43. Payment is due within 30 days from the date of this invoice.

Exhibit 11

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FLORIDA POWER & LIGHT COMPANY,
a Florida Corporation

Plaintiff,

v.

VERIZON FLORIDA LLC,
a Florida Corporation

Defendant.

_____/

CIVIL DIVISION

CASE NO.

COMPLAINT

Plaintiff, Florida Power & Light Company ("FPL"), files this Complaint for damages against Defendant, Verizon Florida LLC ("Verizon"), and states as follows:

Nature of the Dispute

1. This is an action to enforce FPL's rights under a pole attachment joint use agreement ("Joint Use Agreement") under which the parties have operated and made payments, since 1975. The Joint Use Agreement and amendments thereto, contain confidential information that is not disclosed to third parties. Accordingly, it is not attached to the Complaint as an exhibit. FPL will produce a copy of the Joint Use Agreement with all amendments once an appropriate Protective Order is in place. Verizon is in possession of a true and correct copy of the Joint Use Agreement.

2. After thirty-seven years, and prior to the termination of the Joint Use Agreement by Verizon in June of 2012, Verizon unilaterally stopped making payments pursuant to the contractual rates. It nonetheless continued to obtain all of the benefits under the contract. Verizon's actions constitute a breach of contract requiring the award of damages.

Jurisdiction and Venue

3. This is an action for damages that exceeds $15,000, exclusive of interest, attorney's fees and costs.

4. This Court has subject matter jurisdiction of this action pursuant to Section 26.012(2)(a), Florida Statutes.

5. Venue is proper in this Court because Verizon engaged in continuous and not incidental business activity in this County and because payment sought by FPL under the Joint Use Agreement is due and payable in Miami-Dade County.

General Allegations

6. FPL is a Florida corporation with its principal place of business in Palm Beach County, Florida, and it has an office for the transaction of business and engaged in extensive business activity in Miami-Dade County.

7. FPL is an electric utility that provides retail services to its customers in Florida.

8. FPL owns utility poles throughout its service territory for use in the transmission and distribution of electricity to customers.

9. Verizon is a Florida limited liability company with its principal place of business in Hillsborough County, Florida.

10. Verizon also owns utility poles throughout its service territory for use in the distribution of telephone and other services to its customers.

11. FPL and Verizon's predecessor-in-name, General Telephone Company of Florida, entered into the Joint Use Agreement on January 1, 1975, which was amended by a Supplemental Agreement dated March 29, 1978. Verizon has a copy of the Joint Use Agreement, as amended.

12. Verizon is bound by the terms of the Joint Use Agreement.

13. Under the Joint Use Agreement, each party (FPL and Verizon) allows the other to use its utility poles for purposes of attaching facilities to distribute their respective services to customers in their overlapping service territories.

14. The Joint Use Agreement benefits the parties economically and operationally by obviating the need for duplicate pole networks.

15. The Joint Use Agreement requires the parties at the end of each calendar year, acting in cooperation, to ascertain and tabulate the total number of joint use poles specifically reserved for use by each party as licensee.

16. Based upon this tabulation, the Joint Use Agreement sets forth a formula for calculating the amount due for the calendar year, if any, between the parties.

17. In this same regard, pursuant to Section 10.9 of the Joint Use Agreement, every five years or as mutually agreed upon, the parties are required to perform a joint field check consisting of a 100 percent field inventory to verify the accuracy of the joint use records and for retroactive billing of arrears in prior years. The parties are required to update the joint use records based upon the joint field check/inventory. If an adjustment is made to the count, subsequent billing is based upon the adjusted number and retroactive pro-rated billing is issued for the preceding years as defined in the Joint Use Agreement.

18. Pursuant to this requirement, the parties over the course of the Joint Use Agreement completed numerous joint field checks. With each joint field check, the parties adjusted the joint use records accordingly and retroactively issued pro-rated bills for preceding years based upon the adjusted utility pole count.

19. The most recent joint field check was completed by the parties in early 2012, which resulted in an adjustment to the joint use records ("2012 Joint Field Check"). Verizon has a copy of the 2012 Joint Field Check.

20. Verizon agreed with the results of the 2012 Joint Field Check.

21. Utilizing the count identified in the 2012 Joint Field Check, FPL issued its invoice for net rental charges incurred in the 2012 calendar year. A copy of the FPL invoice sent to Verizon, hereinafter referred to as the "2012 Invoice" is attached as Exhibit "A".

22. In accordance with Section 10.9 of the Joint Use Agreement and based upon the results of the 2012 Joint Field Check, the 2012 Invoice also included retroactive pro-rated billing for the calendar years 2008, 2009, 2010 and 2011.

23. Verizon terminated the Joint Use Agreement effective June 9, 2012 but has not removed any of its facilities and continues to utilize FPL poles to provide services to its customers, as it did under the Joint Use Agreement.

24. Under the terms of the Joint Use Agreement, its provisions remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination.

25. All conditions precedent to bringing this suit have been satisfied or waived.

COUNT I
Breach of Contract
(2011 Calendar Year)

26. FPL adopts and incorporates the allegations in each of the preceding paragraphs as if fully set forth herein.

27. Both FPL and Verizon were sharing their utility poles in 2011 throughout the entire calendar year, as in previous years, under the terms of the Joint Use Agreement.

28. The Joint Use Agreement was in effect and binding between the parties during the entire calendar year of 2011.

29. Pursuant to the formula set forth in the Joint Use Agreement, FPL was due net rental charges from Verizon for the 2011 calendar year in the principal amount of $2,097,293.70.

30. In February 2012, FPL sent Verizon an invoice for the net rental charges due for 2011. A copy of the FPL invoice sent to Verizon is attached hereto as Exhibit "B" (the "2011" Invoice").

31. Payment on the 2011 Invoice was due to FPL on or before March 29, 2012.

32. On July 12, 2012, FPL sent Verizon a written notice of default for failure to pay the 2011 Invoice~~, a copy of the written notice of default attached hereto as Exhibit "C".~~ *

33. On July 23, 2012, FPL received from Verizon a partial payment in the amount of $1,179,307.43, leaving an outstanding principal balance due on the 2011 Invoice in the amount of $917,986.27

34. On April 15, 2013, FPL sent Verizon the 2012 Invoice which reflects, among other charges, an additional charge of $51,147.74 for the 2011 calendar year per section 10.9 of the Joint Use Agreement ("2011 Adjustment"). The 2011 Adjustment is based upon the results of the 2012 Joint Field Check. A copy of the 2012 Invoice reflecting the 2011 Adjustment is attached hereto as Exhibit "A".

35. As of this date, Verizon has not made any further payments on the 2011 Invoice and has not made any payment on the 2011 Adjustment. Although the time period for making payment on the 2011 Adjustment has not yet expired, FPL anticipates that Verizon will not make payment thereon.

* The reference to Exhibit C in paragraph 32 was stricken by Court Order on July 18, 2013.

36. Verizon's failure to pay FPL the full amount of the 2011 Invoice and the 2011 Adjustment is a material breach of the Joint Use Agreement.

37. As a direct and proximate result of the material breach, in regard to the 2011 calendar year, FPL has suffered damages in the principal sum of $969,134.21, plus prejudgment interest charges.

WHEREFORE, FPL respectfully requests that this Court enter judgment against Verizon for breach of contract for unpaid rental charges due for the calendar year of 2011 and award damages in favor of FPL in the principal amount of $969,134.21, plus prejudgment interest, costs and such further relief the Court deems just and proper.

Count II
Breach of Contract
(Adjusted Retroactive Billing for 2008, 2009 and 2010 Calendar Years)

38. FPL adopts and incorporates the allegations in paragraphs 1 through 25 as if fully set forth herein.

39. Both FPL and Verizon were sharing their utility poles in the calendar years of 2008, 2009 and 2010, as in previous years, under the terms of the Joint Use Agreement.

40. Based upon the results of the 2012 Joint Field Check and pursuant to Section 10.9 of the Joint Use Agreement, FPL is entitled to a retroactive adjustment to the net rental charges due for the calendar years of 2008, 2009 and 2010.

41. The adjusted amounts due FPL in addition to the previous amounts already invoiced and paid by Verizon is $74,363.00, which is broken down as follows:

a. 2008 Calendar Year: $12,171.60
b. 2009 Calendar Year: $24,505.34
c. 2010 Calendar Year: $37,686.06
Total **$74,363.00**

42. FPL issued the 2012 Invoice to Verizon which includes, among other charges, the adjusted pro-rated retroactive billing for the 2008, 2009 and 2010 calendar years, a copy of the 2012 Invoice is attached hereto as Exhibit "A".

43. Although payment on the 2012 Invoice for the adjusted pro-rated retroactive billing is not yet past due, FPL anticipates that Verizon will refuse to pay some if not all of the adjusted billings for the calendar years 2008, 2009 and 2010.

44. Verizon's failure to pay FPL for the adjusted pro-rated retroactive billing for the calendar years of 2008, 2009 and 2010 is a material breach of the Contract.

45. As a direct and proximate result of the material breach, FPL has suffered or is shortly expected to suffer damages in the principal sum of $74,363.00, plus prejudgment interest charges.

WHEREFORE, FPL respectfully requests that this Court enter judgment against Verizon for breach of contract for unpaid rental charges due for the calendar years 2008, 2009 and 2010 and award damages in favor of FPL in the principal amount of $74,363.00, plus prejudgment interest, costs and such further relief the Court deems just and proper.

Count III
Breach of Contract
(2012 Calendar Year)

46. FPL adopts and incorporates the allegations in paragraphs 1 through 25 as if fully set forth herein.

47. Both FPL and Verizon were sharing their utility poles in 2012 throughout the entire calendar year, as in previous years, under the terms of the Joint Use Agreement.

48. Pursuant to the formula set forth in the Joint Use Agreement, FPL was due net rental charges from Verizon for 2012 in the principal amount of $2,194,474.28. These net rental

charges all concern utility poles that were jointly used at the time of the termination of the Joint Use Agreement and continued to be used by the parties after the termination throughout the 2012 calendar year.

49. Under the terms of the Joint Use Agreement, based upon the results of the 2012 Joint Field Check, FPL sent Verizon the 2012 Invoice, a copy attached hereto as Exhibit "A".

50. As of this date, Verizon has not made any payment for the net rental charges due on sharing the joint use poles for the calendar year of 2012, as such charges are reflected on the 2012 Invoice. Although the time period for making payment on the 2012 Invoice has not yet expired, Verizon has taken the position that it will not pay for the calendar year of 2012 based upon the contractual rates set forth in the Joint Use Agreement.

51. Verizon's failure to pay FPL the full amount of the net rental charges due for the sharing of the joint use poles for the calendar year of 2012 is a material breach of the Joint Use Agreement.

52. As a direct and proximate result of the material breach, FPL has suffered or is shortly expected to suffer damages in the principal sum of $2,194,474.28, plus prejudgment interest charges.

WHEREFORE, FPL respectfully requests that this Court enter judgment against Verizon for breach of contract for unpaid rental charges due for the calendar year of 2012 and award damages in favor of FPL in the principal amount of $2,194,474.28, plus prejudgment interest, costs and such further relief the Court deems just and proper.

Count IV
Quantum Meruit
(2012 Calendar Year)

53. FPL adopts and incorporates the allegations in paragraphs 1 through 23 as if fully set forth herein.

54. FPL pleads quantum meruit as an alternative cause of action in the event the Court determines that there are no enforceable contract terms that exist between the parties that govern the rental charges for the utility poles that accrued subsequent to the termination of the Joint Use Agreement.

55. Consistent with prior years, pursuant to the longstanding Joint Use Agreement, in 2012 FPL continued to allow Verizon to attach its facilities to FPL utility poles in their overlapping service territories.

56. Verizon terminated the Joint Use Agreement, with said termination effective on June 9, 2012. Despite the termination, Verizon continued to utilize FPL poles to serve its business purposes and customers without payment to FPL.

57. FPL has allowed Verizon's facilities to remain attached to FPL's utility poles subsequent to the termination of the Joint Use Agreement with the expectation that it would be compensated and Verizon is aware of this expectation.

58. Under the circumstances, a reasonable person receiving the benefit of utilizing FPL's utility poles to attach facilities for its own business purposes would expect to pay for it.

59. To date, Verizon has refused to pay FPL the fair market value for the use of the FPL utility poles subsequent to the termination of the Joint Use Agreement.

60. FPL is entitled to recover from Verizon the fair market value for the use of FPL's utility poles.

61. In the event FPL is unable to recover in an action at law in Count III of the Complaint, FPL will be left without an adequate remedy at law.

WHEREFORE, FPL respectfully demands in the alternative, judgment against Verizon under a theory of quantum meruit for the fair market value for the use of FPL utility poles from the date of the termination of the Joint Use Agreement through December 31, 2012, plus prejudgment interest, costs and such further relief the Court deems just and proper.

Count V
Unjust Enrichment
(2012 Calendar Year)

62. FPL adopts and incorporates the allegations in paragraphs 1 through 23 as if fully set forth herein.

63. FPL pleads unjust enrichment as an alternative cause of action in the event the Court determines that there are no enforceable contract terms that exist between the parties that govern the rental charges for the utility poles that accrued subsequent to the termination of the Joint Use Agreement.

64. Consistent with prior years, pursuant to the longstanding Joint Use Agreement, in 2012 FPL continued to allow Verizon to attach its facilities in their overlapping service territories.

65. Verizon terminated the Joint Use Agreement, with said termination effective on June 9, 2012. Despite the termination, Verizon continued to utilize FPL poles to serve its business purposes and customers without payment to FPL.

66. FPL conferred a benefit upon Verizon by making its utility poles available to Verizon during the 2012 calendar year, including the time period following Verizon's termination of the Joint Use Agreement. Verizon has knowledge of the benefit and has accepted the benefit conferred by keeping its facilities attached to FPL's utility poles.

67. Under the circumstances, it would be inequitable for Verizon in the operation of its business and service of its customers to retain the benefit of attaching its facilities to the FPL utility poles without paying the fair value for it.

68. Verizon has been unjustly enriched by its use of the FPL utility poles.

69. In the event FPL is unable to recover in an action at law in Count III of the Complaint, FPL will be left without an adequate remedy at law.

70. FPL is entitled to recover from Verizon the value for the use of FPL's utility poles subsequent to the termination of the Joint Use Agreement through December 31, 2012.

WHEREFORE, FPL respectfully demands in the alternative, judgment against Verizon under a theory of unjust enrichment for the value for the use of FPL utility poles incurred from the date of the termination of the Joint Use Agreement through December 31, 2012, plus prejudgment interest, costs and such further relief the Court deems just and proper.

Dated: April 23, 2013

Respectfully submitted,

SQUIRE SANDERS (US) LLP
200 S. Biscayne Blvd., Suite 4000
Miami, Florida 33131
Tel.: 305.577.2835
Fax: 305.577.7001
Counsel for FPL

By: _____
Alvin B. Davis
Florida Bar No. 218073
alvin.davis@squiresanders.com

EXHIBIT A

REDACTED - FOR PUBLIC INSPECTION

PAYMENT COUPON

/%1,1500,640114,7100000044,1800037552,9,0238338840

4,1,1500,640114,7100000044,1800037552,9,0238338840
Please mail this portion with your check

1800037552 1 of 2

Cust. No.:7100000044	Inv. No.:1800037552
This Month's Charges Past Due After 05/15/2013	Amount Due This Invoice $ 2,383,388.40

VERIZON FLORIDA LLC
LARRY R. JOHNSON
1909 US HWY 301 N MC FLG2-0937
TAMPA FL 33619

Make check payable to FPL in USD and mail payments to address below

FPL
General Mail Facility
Miami FL 33188-0001

Florida Power & Light Company
Invoice
Customer Name and Address

VERIZON FLORIDA LLC
LARRY R. JOHNSON
1909 US HWY 301 N MC FLG2-0937
TAMPA FL 33619

Federal Tax Id.#: 59-0247775

Customer Number: 7100000044
Invoice Number: 1800037552
Invoice Date: 04/15/2013

4,1,1500,640114,7100000044,1800037552,9,0238338840
Please retain this portion for your records

CURRENT CHARGES AND CREDITS
Customer No: 7100000044 Invoice No: 1800037552

Description	Amount
7,010 FPL atts on VZ Wd Poles @ $36.225 (2012)	253,937.25-
Adjust 2008 FPL atts on VZ Poles per Jt Fld Check*	1,284.78-
Adjust 2009 FPL atts on VZ Poles per Jt Fld Check*	2,628.01-
Adjust 2010 FPL atts on VZ Poles per Jt Fld Check*	4,005.45-
Adjust 2011 FPL atts on VZ Poles per Jt Fld Check*	5,426.91-
65,526 VZ atts on FPL Wd Poles @ $36.225 (2012)	2,373,679.35
1,473 VZ atts on FPL Con Poles @ $36.225 (2012)	53,359.43
4 VZ atts on FPL Spc Poles @ $54.338 (2012)	217.35

EXHIBIT A

FPL

CURRENT CHARGES AND CREDITS
Customer No: 7100000044 Invoice No: 1800037552

Description	Amount
146 VZ atts on FPL Trans Poles @ $144.90 (2012)	21,155.40
Adjust 2008 VZ atts on FPL Poles per Jt Fld Check*	13,456.38
Adjust 2009 VZ atts on FPL Poles per Jt Fld Check*	27,133.35
Adjust 2010 VZ atts on FPL Poles per Jt Fld Check*	41,691.51
Adjust 2011 VZ atts on FPL Poles per Jt Fld Check*	56,574.65
Int. charges on Inv # 18000014134 thru 4/16/13**	63,403.38

For Inquiries Contact:
Tom Kennedy 954-321-2241

Total Amount Due **$2,383,388.40**
This Month's Charges Past Due After 05/15/2013

Message
*Adjustments made pursuant to the Joint Field Check and Section 10.9 of the JUA. **Interest charges on unpaid balance of $917,986.43. Payment is due within 30 days from the date of this invoice.

EXHIBIT B

PAYMENT COUPON

4,1,1600,640114,7100000044,1800014134,0,0209729370

4,1,1600,640114,7100000044,1800014134,0,0209729370
Please mail this portion with your check

1800014134 1 of 1

Cust. No: 7100000044	Inv. No: 1800014134
This Month's Charges Past Due After 03/29/2012	Amount Due This Invoice $2,097,293.70

VERIZON FLORIDA LLC
SAM WASMUNDT
1909 US HWY 301 N.MC FLG2-750
TAMPA FL 33619

Make check payable to FPL in USD and mail payments to address below

FPL
General Mail Facility
Miami,FL 33188-0001

Florida Power & Light Company
Invoice
Customer Name and Address

VERIZON FLORIDA LLC
SAM WASMUNDT
1909 US HWY 301 N.MC FLG2-750
TAMPA FL 33619

Federal Tax Id.#: 59-0247775

Customer Number:	7100000044
Invoice Number:	1800014134
Invoice Date:	02/28/2012

4,1,1600,640114,7100000044,1800014134,0,0209729370
Please retain this portion for your records

CURRENT CHARGES AND CREDITS
Customer No: 7100000044 Invoice No: 1800014134

Description	Amount
5. FPL on VZ poles 6,857 @ $35.465	243,183.51
1. VZ on FPL Wood pls 63,918 @ $35.465	2,266,851.87
2. VZ on FPL Conc pls wood price 1,474 @ $35.465	52,275.41
3. VZ on FPL SPC poles 4 @ $53.198	212.79
4. VZ on FPL Trails pls 149 @ $141.86	21,137.14

For Inquiries Contact: Tom Kennedy 954-321-2241	Total Amount Due $2,097,293.70 This Month's Charges Past Due After 03/29/2012

1800014134 1 of 1

EXHIBIT B

Exhibit 12

REDACTED - FOR PUBLIC INSPECTION

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FLORIDA POWER & LIGHT CO., Plaintiff, v. VERIZON FLORIDA LLC, Defendant.	Case No. 13014808CA01

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR TRANSFER VENUE

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. BACKGROUND 3

A. Federal Regulation of Pole Attachment Rental Rates 3

B. The FCC's 2011 *Pole Attachment Order* 4

C. The Parties' Disagreement Over The *Pole Attachment Order* 6

III. THE COURT SHOULD DISMISS FPL'S COMPLAINT UNDER THE PRIMARY JURISDICTION DOCTRINE 8

A. The FCC Should Resolve The Parties' Rate Dispute Under The Doctrine Of Primary Jurisdiction 9

B. This Dispute Is Particularly Suited For FCC Resolution 10

IV. THE COURT SHOULD DISMISS WITHOUT PREJUDICE TO PERMIT REFILING IN A PROPER VENUE 13

V. CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

American Electric Power Service Corp. v. FCC,
708 F.3d 183 (D.C. Cir. 2013) 6

Arbelo v. Gainsco, Inc.,
No. 2:06-cv-263, 2007 WL 1079616 (M.D. Fla. Apr. 9, 2007) 9

Bal Harbour Village v. City of North Miami,
678 So.2d 356 (Fla. Dist. Ct. App. 1996) 9

Davel Communications, Inc. v. Qwest Corp.,
460 F.3d 1075 (9th Cir. 2006) 10

Far East Conference v. United States,
342 U.S. 570 (1952) 9

Flo-Sun, Inc. v. Kirk,
783 So.2d 1029 (Fla. 2001) 8, 9, 13

Hacienda Villas, Inc. v. MIA Consulting Group, Inc.,
47 So.3d 848 (Fla. Dist. Ct. App. 2010) 14

Kansas City Power & Light Co. v. American Fiber Systems,
No. 03-2330, 2003 WL 22757927 (D. Kan. Nov. 5, 2003) 10

PDM Bridge Corp. v. JC Industrial Manufacturing,
851 So.2d 289 (Fla. 3d DCA 2003) 14

Public Service Company of Colorado v. FCC,
328 F.3d 675 (D.C. Cir. 2003) 10

Public Service Company of Colorado v. Mile Hi Cable Partners,
995 P.2d 310 (Colo. App. 1999) 10

Quest Communications Company v. Tekstar Communications Inc.,
No. 10-490, 2010 WL 2772442 (D. Minn. July 12, 2010) 11

RJG Environmental, Inc. v. State Farm Florida Insurance Company,
62 So.3d 678 (Fla. App. 2 Dist. 2011) 14

Splitrock Properties, Inc. v. Sprint Communications Co.,
No. 09-4075, 2010 WL 1329634 (D.S.D. Mar. 30, 2010) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Sprint Spectrum L.P. v. AT&T Corp.,
168 F. Supp. 2d 1095 (W.D. Mo. 2001) 10

Sunshine Yacht Sales, Inc. v. Bob Anslow Yacht Sales, Inc.,
669 So. 2d 342 (Fla. 3d DCA 1996) 14

Union Electric Co. v. Cable One, Inc.,
No. 4:11-cv-299, 2011 WL 4478923 (E.D. Mo. Sept. 27, 2011) 10

United States v. Western Pacific Railroad Company,
352 U.S. 59 (1956) 9

STATUTES

47 U.S.C. § 224 ..... 1, 4, 5, 9

Fla. Stat. § 47.051 13

ADMINISTRATIVE MATERIALS

47 C.F.R. § 1.1410 2

Notice of Proposed Rulemaking, *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*
22 FCC Rcd 20195 (2007) 4

Public Notice, *States That Have Certified That They Regulate Pole Attachments*,
25 FCC Rcd 5541 (2010) 4

Report and Order and Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act*, 26 FCC Rcd 5240 (2011) ..... *passim*

OTHER AUTHORITIES

American Electric Power Service Corp. v. FCC,
No. 12-1396 (S. Ct. petition filed May 24, 2013) 6

Pole Attachment Complaints, *available at* http://transition.fcc.gov/eb/mdrd/PoleAtt.html 13

Verizon in Florida: About Us, *available at* http://www22.verizon.com/ 14

I. INTRODUCTION

The Court should defer resolution of this dispute to the Federal Communications Commission ("FCC") under the doctrine of primary jurisdiction, as deciding the contested issues between the parties depends on interpreting that agency's rules and a recent, seminal Order that it issued. The Pole Attachment Act, 47 U.S.C. § 224(b)(1), enacted in 1978, first empowered the FCC to regulate the rates charged cable television companies to ensure that they are "just and reasonable" and to resolve complaints concerning such rates. In 1996, Congress extended the protection of the Pole Attachment Act to providers of "telecommunications services." The FCC has used this authority to set procedures for calculating applicable pole attachment rates and to establish a process for filing complaints about such rates with its Enforcement Bureau.

Of most importance here, on April 7, 2011, the FCC issued an Order confirming that pole attachments from traditional wireline telephone companies like Verizon Florida also are entitled to just and reasonable rates under the Pole Attachment Act and establishing procedures governing complaints by those entities.[1] The Commission's *Pole Attachment Order* set forth the criteria it would consider in determining whether the pole attachment rates that electric companies (such as Florida Power & Light ("FPL)) sought to charge these companies were "just and reasonable" under the statute, and whether and when a company would be entitled to a new rate than one previously charged. *Pole Attachment Order*, 26 FCC Rcd at 5333-38 (¶¶ 214-20). These factors include comparisons of the rates charged to cable companies and other comparably situated telecommunications providers, an assessment of the relative bargaining power of the contracting parties, and an acknowledgment that so-called "evergreen" provisions may make re-negotiating existing agreements difficult. *Id.* at 5334-38 (¶¶ 215-19). The FCC indicated that it

[1] Report and Order and Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act*, 26 FCC Rcd 5240, 5330 (¶ 208) (2011) ("*Pole Attachment Order*" or "*Order*").

would flesh out its approach and application of these factors "on a case-by-case basis." *Id.* at 5333-34 (¶ 214).

The FCC also amended its complaint procedures to authorize companies like Verizon Florida to bring pole attachment complaints before the Commission's Enforcement Bureau. *Id.* The Commission made clear that available remedies include: (1) termination of the rate charged by the electric company; (2) determination and imposition of a different rate; and (3) a refund of prior overpayments by the telephone company. *Id.* at 5334 (¶ 214 n.647) (citing 47 C.F.R. § 1.1410).

FPL informs the Court of none of this federal regulatory background, nor that every disputed issue between the parties can best be resolved by the FCC's application and interpretation of the *Pole Attachment Order*. Instead, its Complaint purports to present a simple contract dispute, with unjust enrichment, and quantum meruit claims added as stop gaps in the event the Court finds that the contract does not govern the rate after its termination by Verizon in June of 2012. The doctrine of primary jurisdiction, however, prevents FPL from by-passing the FCC in this manner. This dispute should be decided by the FCC—the agency that already has familiarity with this dispute and whose interpretation of its own *Order* is essential to resolving every contested issue.

This Court should dismiss FPL's Complaint under the primary jurisdiction doctrine and direct the parties to resolve their dispute at the FCC. Alternatively, the Court may stay the case pending FCC resolution of the disputed issues. If it does, the Court should transfer this case to the proper venue (Manatee or Hillsborough County) where the parties have offices for the transaction of business and where the property at issue is located.

II. BACKGROUND

FPL alleges here that Verizon Florida has not properly compensated FPL under a longstanding agreement – entered in 1975, amended in 1978, and terminated in 2012 – that, among other things, sets the rates for Verizon Florida's attachments on FPL's poles, and vice versa. FPL's allegations of breach arise against a backdrop of federal regulation, which culminated in a lengthy FCC inquiry, and the April 2011 *Pole Attachment Order* that expressly provides that telephone companies like Verizon Florida are entitled to just and reasonable pole attachment rates. At its core, the Complaint concerns whether and when Verizon Florida was entitled to a new rate under that *Order*, and what that rate should be under FCC rules. The history of the FCC's regulation, and the 2011 *Order* in particular, is set out below.

A. Federal Regulation of Pole Attachment Rental Rates

Historically, two parties owned and used utility poles—traditional incumbent telephone companies[2] and electric companies. The term "joint use" was coined to refer to their shared use of separately owned utility poles, which avoided deploying duplicative networks. The advent of cable television and the introduction of competition into local telephone markets increased the number of companies that attach to utility poles and upset this traditional dual ownership/attacher arrangement.

In response to the evolving attachment landscape, Congress gradually created a federal right to FCC rate regulation to safeguard against pole owners leveraging their pole ownership to impose exorbitant attachment rates. The first step was taken in 1978, when Congress enacted the

[2] The FCC refers to traditional wireline telephone companies as "incumbent local exchange carriers," or ILECs, in contrast to the later entrants to the local telephone market, which are referred to as "competitive local exchange carriers," or CLECs. In this brief, the former are sometimes referred to as traditional or incumbent telephone companies and the latter are referred to as competitive telephone companies.

federal Pole Attachment Act, which gave the FCC authority to regulate the pole rental rates that could be charged cable companies. 47 U.S.C. § 224.[3] The FCC implemented the Act by (1) adopting a rate methodology referred to as the "cable rate," and (2) creating a complaint procedure before its Enforcement Bureau. The next step occurred in 1996, when Congress expanded the FCC's rate oversight authority by amending the Pole Attachment Act to reach the rental rates that are charged "provider[s] of telecommunications service." 47 U.S.C. § 224(a)(4). The FCC, in turn, adopted a rate methodology referred to as the "telecom rate."

B. The FCC's 2011 *Pole Attachment Order*

Incumbent telephone companies like Verizon Florida compete for customers with cable companies and competitive telephone companies. The rates that the incumbent telephone companies have been charged by electric companies, however, have typically far exceeded the rates charged to cable companies and competitive telephone companies. This occurred in large part because electric companies own a disproportionate share of utility poles and incumbent telephone companies were originally not offered the opportunity to contest the rates charged them before the FCC.

The rate disparity became significant enough, and had severe enough consequences for the national policy promoting broadband deployment, that in 2007 the FCC initiated an inquiry into whether incumbent telephone companies should receive pole attachment rate protection from the FCC.[4] Over the next several years, the FCC received and "reviewed tens of thousands

---

[3] The Pole Attachment Act governs rates in States that have not chosen to regulate pole attachments through the Pole Attachment Act's "reverse-preemption" provision. Florida has not reverse-preempted federal regulation. *See* Public Notice, *States That Have Certified That They Regulate Pole Attachments*, 25 FCC Rcd 5541, 5541-42 (2010).

[4] *See* Notice of Proposed Rulemaking, *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 22 FCC Rcd 20195 (2007).

of pages of comments, convened public workshops, and participated in many *ex parte* meetings" with interested parties on the topic. *Pole Attachment Order*, 26 FCC Rcd at 5285 (¶ 96).

Those years of investigation and rulemaking culminated with the FCC issuing its *Pole Attachment Order* on April 7, 2011, with an effective date of June 8, 2011. The FCC held that incumbent telephone companies are statutorily entitled to pay just and reasonable rental rates to electric companies and to obtain FCC oversight of the rates they pay because they, too, are "provider[s] of telecommunications services." *Id.* at 5330 (¶ 208) (interpreting 47 U.S.C. § 224). In the *Order*, the FCC also concluded that incumbent telephone companies are generally in an inferior bargaining position to the electric companies and are unable to negotiate appropriate attachment rates without FCC oversight. *See id.* at 5327 (¶ 199). As a consequence, they had been forced to pay rates that were significantly higher than the rates available to other attachers, as electric companies either leveraged their greater market power to obtain a high rate or refused to renegotiate outdated agreements with unreasonably high rates and ongoing "evergreen" clauses that, according to electric companies, governed rates for existing attachments in perpetuity. *See id.* at 5330-31 (¶ 208).

The FCC did not adopt one uniform and comprehensive rate methodology for incumbent telephone companies, as it had with cable companies and competitive telephone companies. *Id.* at 5334 (¶ 214). Instead, it decided that it would approach the question of what constitutes a "just and reasonable" rate for an incumbent telephone company, and when and under what circumstances the FCC would intervene to set such a rate, on a case-by-case basis in subsequent complaint proceedings between incumbent telephone companies and electric companies. *Id.*

The FCC provided significant guidance in the *Order* about its intended approach to such complaints. *Id.* at 5334 (¶¶ 214-20). The Commission outlined a principle of "competitive

neutrality" under which it would consider an incumbent telephone company rate "just and reasonable" if comparable to the rate charged a comparable cable company or competitive telephone company. *Id.* at 5336 (¶ 217). It also indicated that it would assess the relative market power of the incumbent telephone company and the electric company in determining the appropriate rate.

Of particular importance here, the FCC stated that rates charged after the June 2011 effective date of the *Order* were subject to challenge before the Enforcement Bureau and that incumbent telephone companies could obtain refunds of amounts paid subsequent to that June 2011 date. *Id.* at 5334 (¶ 214 n.647). The FCC also made clear that, while it would not invalidate existing joint use agreements across the board, it would intervene to do so if an electric company prevented an incumbent telephone company from terminating an existing agreement and thereby obtain a new rate arrangement. *Id.* at 5334-35 (¶ 216).

On February 26, 2013, the U.S. Court of Appeals for the D.C. Circuit affirmed the *Pole Attachment Order* in full—including the FCC's decision to extend pole attachment rate protection to incumbent telephone companies. *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 185 (D.C. Cir. 2013). A petition for review by the United States Supreme Court is now pending. *Am. Elec. Power Serv. Corp. v. FCC*, No. 12-1396 (petition filed May 24, 2013).

C. The Parties' Disagreement Over The *Pole Attachment Order*

On June 27, 2011, about three weeks after the *Pole Attachment Order* took effect, Verizon Florida requested renegotiation of its Joint Use Agreement ("JUA") with FPL. FPL

owns 90 percent of the poles that FPL and Verizon Florida share.[5] It charges Verizon Florida rates that are nearly four times the amount it charges Verizon Florida's competitors.[6]

Verizon Florida and FPL met on numerous occasions to try to negotiate a new agreement and new rental rate under the principles set forth in the *Pole Attachment Order*. Verizon Florida sought a new agreement, at the rate paid by comparable competitive telephone companies, for ***all*** of its attachments. FPL refused to provide such an agreement, asserting that it interpreted the *Pole Attachment Order* to only justify rate relief for ***new*** attachments installed after its effective date. In FPL's view of the *Order*, it was entitled to continue to charge the old rate in perpetuity for all existing attachments to its poles as long as those attachments remained in place. Verizon Florida disagreed, stating that it was entitled to a just and reasonable rate as of the effective date of the *Order* and should only be obligated to pay that substantially lower amount.

Unable to bridge this critical divide, nor agree to the just and reasonable rate that would apply going forward, Verizon Florida gave formal notice to terminate the JUA effective June 9, 2012. Compl. ¶ 23.[7] Verizon Florida and FPL continued to engage in settlement discussions, but did not resolve their differences over the meaning and application of the *Pole Attachment Order*.

In spite of these on-going discussions, FPL filed this Complaint. Each claim is based on Verizon Florida's decision to pay only the lower FCC telecom rate to which, under its view of

---

[5] Verizon Florida presently attaches to about 65,000 of FPL's poles and FPL attaches to about 7,000 of Verizon Florida's poles. *See* Compl., Ex. A.

[6] FPL invoiced Verizon Florida at annual rental rates of $35.46 and $36.22 for its attachments in 2011 and 2012, respectively. Compl., Exs. A, B. Using the FCC's methodology and conservatively high assumptions, Verizon Florida calculated the 2011 annual rental rate that FPL could charge competitive telephone companies as $8.52. *See* Affidavit of Steven R. Lindsay ("Lindsay Aff.") ¶ 5.

[7] Following termination, the non-rate provisions of the JUA remained in full force and effect with respect to all poles jointly used by the parties at the time of termination. Compl. ¶ 24.

the *Order*, it is entitled from the effective date of the *Order* forward. Two invoices are at issue. The first invoice is for Verizon Florida's 2011 pole attachments, which FPL billed at a $35.46 rate and which Verizon Florida paid for the post-*Order* period at the $8.52 rate that FPL is permitted to charge competitive telephone companies under federal law (the telecom rate). *See* Lindsay Aff. ¶ 5; Compl., Ex. B; *see also* Compl. ¶ 33. The second invoice is for Verizon Florida's 2012 pole attachments, which FPL billed at a $36.22 rate and Verizon Florida paid for the year at the same $8.52 rate that it paid the year prior. Lindsay Aff. ¶ 7; Compl., Ex. A.[8]

III. THE COURT SHOULD DISMISS FPL'S COMPLAINT UNDER THE PRIMARY JURISDICTION DOCTRINE

FPL has asked this Court to adjudicate a rate dispute that is subject to the FCC's jurisdiction and that should be resolved under the FCC's recent *Pole Attachment Order*. FPL's Complaint should be dismissed under the doctrine of primary jurisdiction so that it can be resolved by the agency that has the expertise and policy-making authority to interpret and apply its own *Order*.[9] This is particularly appropriate here, where an *Order* of far-reaching importance is in its earliest stages of interpretation and application.

---

[8] The second invoice also includes a number of "adjustments" to 2008 through 2011 bills based on a recently completed field audit. Compl., Ex. A; Compl. ¶¶ 17-22. Verizon Florida has paid all amounts invoiced for 2008 through the first half of 2011 at the old JUA rate, and the last half of 2011 at the lower telecom rate. Lindsay Aff. ¶ 7. Thus, the only issue remaining in FPL's Complaint is whether Verizon Florida should be required to pay additional amounts—amounts in excess of the existing FCC telecom rate that Verizon Florida has already paid—for the period of time subsequent to the FCC's *Pole Attachment Order*.

[9] While "the doctrine of primary jurisdiction is a matter of deference, policy and comity, not subject matter jurisdiction," *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1037-38 (Fla. 2001), the Florida Supreme Court has recognized that it is appropriately invoked at the motion to dismiss stage, *see id.* at 1041 (finding that trial court properly granted motion to dismiss on basis of primary jurisdiction).

A. The FCC Should Resolve The Parties' Rate Dispute Under The Doctrine Of Primary Jurisdiction

As the Florida Supreme Court has explained, "[t]he doctrine of primary jurisdiction dictates that when a party seeks to invoke the original jurisdiction of a trial court by asserting an issue which is beyond the ordinary experience of judges and juries, but within an administrative agency's special competence, the court should refrain from exercising its jurisdiction over that issue until such time as the issue has been ruled upon by the agency." *Flo-Sun,* 783 So. 2d at 1036-37. The doctrine applies where expertise is held by a federal agency, like the FCC. *See Bal Harbour Vill. v. City of North Miami*, 678 So. 2d 356, 364 (Fla. Dist. Ct. App. 1996) (dismissing claims in deference to United States Environmental Protection Agency).

The primary jurisdiction doctrine promotes two important principles applicable here. ***First,*** courts may not usurp an agency's authority when Congress has assigned that agency significant discretion in shaping policy in a particular field. *See United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956). ***Second,*** specialized agencies should resolve complex questions raised by their own regulations in the first instance to ensure that they are interpreted and implemented with uniformity and consistency. *See, e.g., Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952). Where these two principles will be furthered, the Court should not hear the case in deference to the agency. *See, e.g., Arbelo v. Gainsco, Inc.*, No. 2:06-cv-263, 2007 WL 1079616, at *2 (M.D. Fla. Apr. 9, 2007).

Congress, pursuant to Section 224, has specifically assigned discretion to the FCC relating to pole attachment rates.[10] The FCC's authority and expertise regarding rate regulation

[10] In limited instances, States may certify that they will regulate the rates, terms, and conditions of pole attachments; however, even in those cases, if the State fails to act in any particular case, the complaint will revert to the FCC. 47 U.S.C. § 224(c)(1), (2) and (3).

is indisputable[11] and extends fully to pole attachment rate disputes, including the exact contested issues here.[12] As detailed above, the FCC has not only examined and set pole attachment rates for thirty-five years, it recently undertook a lengthy process examining pole attachment rules and related complaint procedures. *See Pole Attachment Order*, 26 FCC Rcd at 5285 (¶ 96). Even at the most general level of analysis, it is apparent that the primary jurisdiction doctrine applies here and should result in dismissal in favor to the FCC's authority.

B. This Dispute Is Particularly Suited For FCC Resolution

The primary jurisdiction doctrine strongly supports deference to the FCC in this case in particular because FPL's Complaint is the result of the parties' inability to agree about (1) the interpretation of the *Pole Attachment Order*, and (2) the application of the *Pole Attachment Order*, including both the appropriate rate methodology and the inputs used in that methodology.[13]

---

[11] *See, e.g., Splitrock Props., Inc. v. Sprint Commc'ns Co.*, No. 09-4075, 2010 WL 1329634, at *10 (D.S.D. Mar. 30, 2010) ("It is well established that the FCC is specially positioned to determine the reasonableness of rates."); *Sprint Spectrum L.P. v. AT&T Corp.*, 168 F. Supp. 2d 1095, 1101 (W.D. Mo. 2001) ("[T]hese [rate] issues should be referred to the FCC for determination under the doctrine of primary jurisdiction, as they involve matters within the agency's special expertise and which require a uniform national resolution.").

[12] *See, e.g., Kansas City Power & Light Co. v. Am. Fiber Sys.*, No. 03-2330, 2003 WL 22757927, at *4 (D. Kan. Nov. 5, 2003) (Pole attachment disputes "require the expertise of the FCC, and . . . their resolution is a part of the regulatory scheme Congress delegated to the FCC under the Pole Attachment Act."); *Union Elec. Co. v. Cable One, Inc.*, No. 4:11-cv-299, 2011 WL 4478923, at *5 (E.D. Mo. Sept. 27, 2011) ("[T]he FCC's issuance of new regulations governing pole attachments on April 7, 2011 provides further support for application of the primary jurisdiction doctrine . . . because it demonstrates the FCC's increasing involvement in pole attachment disputes and the need for consistent interpretation and application of these newly issued rules."); *Pub. Serv. Co. of Colo. v. Mile Hi Cable Partners*, 995 P.2d 310, 312 (Colo. App. 1999) ("The regulation of pole attachment agreements is appropriately addressed by the special competence of the FCC."); *see also Pub. Serv. Co. of Colo. v. FCC*, 328 F.3d 675, 677 (D.C. Cir. 2003) (noting that the FCC agreed that it had "primary jurisdiction to regulate the alleged unjust and unreasonable terms and conditions in the agreement.").

[13] *See, e.g., Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1089 (9th Cir. 2006) ("[T]he interpretation of an agency order issued pursuant to the agency's congressionally granted

First, FPL's Complaint requires the resolution of the parties' disagreement about the ***meaning*** of the *Pole Attachment Order*. Most prominently, FPL's claims for damages pivot almost completely on whether and when Verizon Florida is entitled to a lower rental rate for the nearly 65,000 FPL poles to which it attached before the *Order*'s effective date. FPL has taken the position that the *Order* provides no rate relief for attachments that existed as of that date because the *Order* was not given retroactive effect. In Verizon Florida's view, on the other hand, the *Order* authorizes rate relief for all attachments—existing or new—as soon as the *Order* took effect. The answer to this question, concerning when and for what attachments the *Order* provides rate relief, essentially will resolve the entirety of the dispute.

Second, FPL's reliance on the rates in the parties' prior agreement implicates disagreements about the ***application*** of the *Pole Attachment Order*. For example, FPL asserts that Verizon Florida can only escape the old JUA rates if it can prove that Verizon has lost bargaining power since it first contracted with FPL in 1975 and 1978. Verizon Florida reads the *Pole Attachment Order* to provide rate relief whenever an incumbent telephone company is ***currently*** in an inferior bargaining position (irrespective of its past bargaining power, or lack thereof) and unable to ***currently*** either negotiate a fair market rental rate or terminate a longstanding contract and obtain a new rate that way.

FPL's Complaint also requires adjudication of the applicable ***rate methodology*** under the *Pole Attachment Order*. FPL seeks to use the JUA's methodology for all periods, including those following termination of the agreement. It has also argued that even if the JUA's methodology does not apply post-termination, Verizon Florida can never obtain the "telecom

---

regulatory authority falls within the agency's primary jurisdiction where the order reflects policy concerns or issues requiring uniform resolution."); *Quest Commc'ns Co. v. Tekstar Commc'ns Inc.*, No. 10-490, 2010 WL 2772442, at *6 (D. Minn. July 12, 2010) ("It is particularly within the FCC's area of expertise to explain footnote 96 [in its prior order].").

rate" that competitive telephone companies receive because Verizon Florida can never be considered "comparably situated" to those competitive providers even if it attaches under identical terms. Verizon Florida disagrees. The question of whether and when incumbent telephone companies are—or can ever be—"comparably situated" to competitive telephone companies is one of far-reaching importance in the industry, and one which the FCC is uniquely and expertly positioned to answer.

Finally, the parties disagree about how to calculate the final, ***exact rate*** using the FCC's telecom methodology for competitive telephone companies. To date, FPL maintains that it properly adhered to the formula and used appropriate inputs. But Verizon contends that FPL's calculation improperly uses certain "default" assumptions instead of actual data as inputs to the formula in order to produce higher rates. Whether and how those default assumptions should apply here thus bear directly on the calculation of the "just and reasonable" rate itself.

Each of FPL's claims (except for Count II, which is now moot)[14] requires a decision on the meaning or interpretation of the *Pole Attachment Order*. Count I is premised on FPL's position that the *Pole Attachment Order* does not authorize rate relief as of its effective date, claiming a breach of contract based on Verizon Florida's failure to pay the full JUA rate for all of 2011. In Count III, FPL asks the Court to deny rate relief for existing attachments, alleging a breach of contract for Verizon Florida's failure to pay the full JUA rate even after the agreement was terminated. Compl. ¶¶ 48-52. Counts IV and V revolve around FPL's position that the JUA's rate methodology continues to apply for purposes of establishing a reasonable rate under unjust enrichment and quantum meruit claims, apparently relying on its contention that the rates

[14] In Count II, FPL alleges that Verizon breached the JUA by failing to pay for the 2008 through 2010 attachments based on a recently completed field audit. Compl. ¶¶ 38-45. Verizon does not dispute that these amounts are due, and has now paid them in full. *See* Lindsay Aff. ¶ 7. Accordingly, Count II need not be part of the primary jurisdiction analysis.

continue absent proof that Verizon Florida has lost bargaining power after contracting for them. Every claim thus depends on how to interpret and apply the FCC's *Order*.

Because of the FCC's specific expertise based on its *Order*, and its intention that questions such as those at issue here should be presented on a case-by-case basis through its Enforcement Bureau mediation and complaint procedure, primary jurisdiction here rests with the FCC.[15] Accordingly, the Court should dismiss this action without prejudice and allow the parties to resolve this matter before the Enforcement Bureau. *See Flo-Sun*, 783 So. 2d at 1041 (dismissal without prejudice is procedurally appropriate where primary jurisdiction applies).

IV. THE COURT SHOULD DISMISS WITHOUT PREJUDICE TO PERMIT REFILING IN A PROPER VENUE

The Court's dismissal in this case should be without prejudice to permit refiling in a proper venue. According to the Complaint:

> Venue is proper in this Court because Verizon engaged in continuous and not incidental business activity in this county and because payment sought by FPL under the Joint Use Agreement is due and payable in Miami-Dade County.

Compl. ¶ 5. FPL further alleges that Verizon Florida is a limited liability company with its principal place of business in Hillsborough County, Florida. *Id.* ¶ 9. FPL does not allege that Verizon Florida has an office of customary business in Miami-Dade County, nor does it allege that the "property" at issue is located in Miami-Dade County. *See* Fla. Stat. § 47.051 ("Actions against domestic corporations shall be brought only in the county where such corporation has, or usually keeps, an office for transaction of its customary business, where the cause of action accrued, or where the property in litigation is located."). Indeed, Verizon Florida is not engaged

[15] *Pole Attachment Complaints*, *available at* http://transition.fcc.gov/eb/mdrd/ (encouraging parties to attempt to settle or narrow their dispute before filing a pole attachment complaint and emphasizing mediation of pole attachment disputes, preferably prior to the actual filing of a complaint).

in either continuous or incidental business in Miami-Dade County. Lindsay Aff. ¶ 2.[16] Therefore, the sole basis for venue in this Court is the allegation that payment was "due and payable in Miami-Dade County." Compl. ¶ 5.

FPL's suggestion that venue is proper in Miami-Dade is likely based on cases that site venue where payment is due in a contract for the payment of money. *See, e.g., Sunshine Yacht Sales, Inc. v. Bob Anslow Yacht Sales, Inc.*, 669 So. 2d 342 (Fla. Dist. Ct. App. 1996). Such cases are inapplicable here because this case does not involve a contract between a debtor and creditor for a specified payment and because the amount of FPL's "recovery, if any, must be determined by presentation of evidence." *RJG Envtl., Inc. v. State Farm Florida Ins. Co.*, 62 So. 3d 678, 679 (Fla. Dist. Ct. App. 2011); *Hacienda Villas, Inc. v. MIA Consulting Grp., Inc.*, 47 So. 3d 848, 850 (Fla. Dist. Ct. App. 2010) ("The present case does not involve an agreement to pay a liquidated sum in Miami-Dade County. This is a suit for damages which are unliquidated. Accordingly the debtor-creditor rule does not apply."); *PDM Bridge Corp. v. JC Indus. Mfg.*, 851 So.2d 289, 291-92 (Fla. Dist. Ct. App. 2003) (finding that special venue rule requires "an express contractual promise to pay a certain sum of money owed" and is inapplicable where damages are "subject to proof"). Rather, this case involves a dispute over the rate that applies after the effective date of the *Pole Attachment Order* during negotiations for a new pole attachment contract both before and after its termination.

FPL's allegations relate to the proper rental rate for Verizon Florida's attachment of its facilities to poles owned by FPL, but Verizon Florida does not attach facilities to any FPL poles in Miami-Dade County. Venue, therefore is improper in this Court. The vast majority of the

---

[16] *See* Verizon in Florida: About Us, *available at* http://www22.verizon.com/about/community/fl_about.html ("Verizon provides voice, data and video services in Hillsborough, Pinellas, Pasco, Polk, Sarasota and Manatee counties - in west central Florida.").

parties' overlapping service areas is in Manatee County, so dismissal should be without prejudice to permit refiling (should it be necessary following FCC review) in a proper venue such as Manatee County.

V. CONCLUSION

For the foregoing reasons, the Court should dismiss this action without prejudice and permit the parties to seek appropriate relief before the Enforcement Bureau of the FCC.

BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP

/s/Lewis F. Collins, Jr.

LEWIS F. COLLINS, JR., ESQ.
Florida Bar No.: 267422
WILLIAM P. SCHOEL, ESQ.
Florida Bar No.: 0014673
777 S. Harbour Island Boulevard
Suite 500
Tampa, Florida 33602
Telephone: (813) 281-1900
Facsimile: (813) 281-0900
Attorneys for Defendant, Verizon Florida LLC

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Memorandum of Law in Support of Defendant's Motion to Dismiss or Transfer Venue was furnished to:

Alvin B. Davis, Esq.
Squire Sanders (US) LLP
200 S. Biscayne Boulevard, Suite 4000
Miami, FL 33131
alvin.davis@squiresanders.com

by e-mail on July 29, 2013.

/s/Lewis F. Collins, Jr.

LEWIS F. COLLINS, JR., ESQ.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FLORIDA POWER & LIGHT CO.,
Plaintiff,

v.

VERIZON FLORIDA LLC,
Defendant.

Case No. 13014808CA01

AFFIDAVIT OF STEVEN R. LINDSAY

STEVEN R. LINDSAY, being duly sworn, deposes and says:

1. I am a Staff Consultant in the Centralized Joint Use Division of Verizon Florida LLC ("Verizon Florida"). In that capacity, I have personal knowledge of the facts set forth herein. I am over 18 years of age and of sound mind. I respectfully submit this affidavit in support of Verizon's Motion To Dismiss Or Transfer Venue.

2. Verizon Florida is not engaged in either continuous or incidental business in Miami-Dade County. Its operations are limited to areas in Hillsborough, Pinellas, Pasco, Polk, Sarasota and Manatee counties.

3. On or about June 27, 2011, Verizon Florida requested renegotiation of its Joint Use Agreement ("JUA") with Florida Power & Light ("FPL").

4. While negotiations were ongoing, Verizon Florida received Invoice No. 1800014134, dated February 23, 2012, from FPL. The invoice charged Verizon Florida for its 2011 attachments to FPL's poles at an annual rental rate of $35.46 per pole.

5. On or about July 23, 2012, Verizon Florida remitted payment to FPL in the amount of $1,179,307.43 in response to Invoice No. 1800014134. Verizon Florida calculated the

amount that it paid by reducing the invoiced rate for the period following the June 2011 effective date of the *Pole Attachment Order* issued by the Federal Communications Commission ("FCC") to an annual rental rate of $8.52 per pole for Verizon Florida's attachments to FPL's poles. Verizon calculated this rental rate by conservatively applying the FCC's methodology that governs pole attachment rates for comparably situated competitive telephone companies.

6. While negotiations for a new JUA continued, Verizon Florida received from FPL Invoice No. 1800037552, dated April 15, 2013. The invoice charged Verizon Florida for its 2012 attachments to FPL's poles at an annual rental rate of $36.22 per pole. The invoice also included a number of adjustments to 2008 through 2011 pole counts based on a recently completed field audit.

7. On or about June 13, 2013, Verizon Florida remitted payment to FPL in the amount of $638,413.55 in response to Invoice No. 1800037552. This payment included $532,407.05 for Verizon's 2012 attachments to FPL's poles, which was calculated by reducing the invoiced rate for 2012 to an annual rental rate of $8.52 per pole, following the FCC's methodology. The payment also included $106,006.50 for the adjusted pole counts, which covers the full invoiced amount for 2008 through June 2011 attachments and an amount calculated using an annual rental rate $8.52 per pole for July 2011 through December 2011 attachments.

Steven R. Lindsay

Sworn to before me on
this 17th day of June, 2013

Notary Public

Kimberly E. Currier
Notary Public
State of Florida
My Commission Expires 08/24/2015
Commission No. EE 124823

Exhibit 13

REDACTED - FOR PUBLIC INSPECTION

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FLORIDA POWER & LIGHT COMPANY,

Plaintiff,

vs.

VERIZON FLORIDA LLC,

Defendant.

_____/

CIVIL DIVISION

CASE NO. 13014808CA01

OPPOSITION TO AMENDED MOTION TO DISMISS

INTRODUCTION

Verizon Florida LLC's ("Verizon's") Amended Motion to Dismiss (the "Motion") is most striking for what it fails to do. First, it calculatedly ignores, in wholesale fashion, the standard for motions to dismiss, which requires that the moving party limit itself to the four corners of the Complaint. Skipping past that apparently inconvenient requirement, Verizon provides a tutorial of sorts on an order, legislative analysis and the history of the parties' purported negotiations that find no mention whatsoever in the Complaint and, for that reason, have no relevance to the Court's consideration of the Motion.

Secondly, although Verizon is perhaps more vigorous than necessary in deriding this Court's ability to address the issues in Florida Power & Light's ("FPL's") Complaint, as entirely and improperly reshaped by the Motion, it calculatedly neglects to advise this Court that Verizon is litigating these precise issues itself, in Hillsborough Circuit Court. Presumably Verizon omitted that detail to avoid having to explain why one circuit court is up to the task, but this circuit court is not.

Finally, after waxing, if not eloquently, at least at length, about the availability of rate relief for entities such as Verizon before the Federal Communications Commission (the "FCC"), Verizon calculatedly provides no explanation for its failure to take even the first step toward seeking that relief. Although it has had more than two years to do so, it has contented itself with calculating – and only paying – its own, unilaterally developed rates and not troubling the agency with the expertise to do so.

Verizon has been paying a self-created rate many times lower than the rate to which it agreed after comprehensive, arms-length contract negotiations. By its Motion, Verizon demonstrates its ambition to continue doing so indefinitely. If this Court can't provide relief for an obvious breach of contract, and if the FCC can only be involved through an initiative that Verizon has manifested no intention of pursuing, FPL will be left in a grotesquely unfair and unintended limbo. FPL's Complaint prevents that from occurring.

LAW & ARGUMENT

On a motion to dismiss, it is black-letter law that courts must (1) limit their analysis to the four corners of the complaint, including any attached exhibits; (2) assume all facts alleged in the complaint are true; and (3) construe and resolve "all ambiguities and inferences drawn from the recitals in the complaint, together with the exhibits attached . . . in the light most favorable to the plaintiff." *Pizzi v. Central Bank & Trust Co.*, 250 So. 2d 895 (Fla. 1971); *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 494 (Fla. 4th DCA 2001) (when considering a motion to dismiss, the court "must accept the facts alleged in a complaint and exhibits attached to the complaint as true"); *Lonestar Alternative Solution, Inc., v. Leview-Boymelgreen Soleil*

Developers, LLC, 10 So. 3d 1169, 1172 (Fla. 3d DCA 2009).

I. Verizon's Motion Is Based Entirely on Facts and Argument Outside the Four Corners of the Complaint

It is axiomatic that motions to dismiss must be decided on the basis of the complaint alone. *Samuels*, 782 So. 2d at 494 (when considering a motion to dismiss, "[a] court may not go beyond the four corners of the complaint"); *Mancher v. Seminole Tribe*, 708 So. 2d 327, 328 (Fla. 4th DCA 1998) ("[a] motion to dismiss a complaint is not a motion for summary judgment in which the court may rely on facts adduced in depositions, affidavits, or other proofs"). Verizon ignores that fundamental tenet and insists that this Court do the same. Specifically, Verizon asks this Court to disregard the Complaint and instead decide its motion on the basis of Verizon's summary of "federal regulatory background" and a self-serving affidavit from one of its employees. (*See* Motion at Exh. A.) Florida law does not permit consideration of either.

The subject of FPL's Complaint is clear: "[t]his is an action to enforce FPL's rights under [the Joint Use Agreement], under which the parties have operated and made payments, since 1975." (Cmplt. at ¶ 1.) The Complaint states three claims for breach of contract that seek recovery of payments due under the terms of the Joint Use Agreement for Verizon's use of FPL's utility poles from 2008 through 2012. (*Id.* at ¶¶ 26-52.) The Complaint also includes two alternative counts, for quantum meruit and unjust enrichment. (*Id.* at ¶¶ 53-70.) This is not a "rate dispute." The rates at issue are contract rates, agreed to by the parties. (Motion at 8.) FPL has no need to ask this Court to determine whether the rates established by the Joint Use Agreement rates are "reasonable," or to otherwise modify the Agreement's unambiguous terms. Those terms must be enforced as written, which is precisely, and all, that FPL asks this Court to do.

Verizon never addresses these claims.

Unable to deny the allegations in FPL's Complaint, Verizon re-writes it. Verizon inventively attempts to explain that "FPL's Complaint is the *result* of the parties' inability to agree about (1) the interpretation of the Pole Attachment Order, and (2) the application of the Pole Attachment Order." (Motion at 10 (emphasis added).) The contract, of course, requires neither interpretation nor application of that Order. Comforted by its speculation as to the Complaints' genesis, Verizon launches into a lengthy, wholly gratuitous discourse about "regulatory background" and ultimately lands on the insupportable conclusion that "[e]ach of FPL's claims ... requires a decision on the meaning or interpretation of the Pole Attachment Order." (*Id.* at 12.) But "regulatory background" and Verizon's wishful conclusion that this discourse somehow renders this Court unfit to decide a straightforward contract claim are entirely inapposite, as Verizon readily admits that the Complaint does not address "regulatory background" at all. (*Id.* at 12). As such, it cannot be considered on a motion to dismiss. *Samuels*, 782 So. 2d at 494; *Mancher*, 708 So. 2d at 328. The same is true for the Affidavit of Steven R. Lindsay.[1] *Id.*

FPL's Complaint is based upon a straightforward commercial contract and Verizon's failure to live up to its terms. A complaint essentially identical to the complaint

[1] In addition to being entirely improper on a motion to dismiss, the Lindsay Affidavit offers improper lay opinion testimony regarding the calculation of a "rental rate" by "applying the FCC's methodology that governs pole attachment rates for comparably situated competitive telephone companies." (Lindsay Affidavit at ¶ 5.) Moreover, Lindsay's attempt to "calculate" a "rental rate by conservatively applying the FCC's methodology" is entirely inconsistent with Verizon's acknowledgement that the FCC "did not adopt one uniform and comprehensive rate methodology for incumbent telephone companies." (Motion at 5.) Verizon can hardly contend that Lindsay's Affidavit and "calculation" should be afforded any weight given Verizon's acknowledgment that no FCC methodology even exists.

Verizon is addressing on the merits across the state. Verizon's Motion is based entirely upon matters outside that contract, and, more importantly here, outside the Complaint. Indeed, Verizon does not make a single argument that is confined to the four corners of the Complaint. What Verizon has filed cannot fairly be characterized as a motion to dismiss at all. Whatever the Motion, it must be denied.

II. Verizon Neglects To Mention That It Already Asked Another Florida Court To Decide The Same Issues It Claims This Court Is Not Fit To Address

Verizon's insistence that this Court defer to the FCC is at best disingenuous. It fails to meet a fundamental obligation of candor with the Court. In another currently pending case, Verizon asked the Hillsborough County Circuit Court[2] to decide whether the rental rate it had unilaterally imposed on a similar pole-sharing agreement was "just and reasonable." (December 10, 2012 Answer and Counterclaim of Verizon Florida, LLC ("Counterclaim"), attached hereto as Exhibit A, at 22.) In that case, Tampa Electric Company ("TEC"), like FPL here, sued Verizon for breach of a joint use agreement, seeking recovery of amounts due and owing under the rental rates established by the terms of that agreement. (*See* Counterclaim at ¶ 8.) As it does here, Verizon cavalierly admitted ignoring the terms of its joint use agreement with TEC and paying for its use of TEC's poles as it deems fit. (*Id.* at ¶ 22.) Tellingly, Verizon was content to litigate that pole attachment dispute in Circuit Court, never even raising primary jurisdiction in Hillsborough, and not contending anywhere in its response to TEC's Complaint that the FCC's expertise was necessary to resolve the parties' dispute. Rather, Verizon affirmatively *asked* the Hillsborough Circuit Court to decide whether the rate Verizon

[2] *Tampa Electric Co. v. Verizon Florida, LLC*, Case No. 12-016349 in the 13th Judicial Circuit in and for Hillsborough County, Florida (the "Hillsborough Case")

"calculated" on its own was "just and reasonable" and that Verizon is entitled to the lower rate paid by competitive telephone and cable companies, and it asked that Court to award Verizon the difference between what it paid at the contract rate and what it would have paid at the "just and reasonable" rate it invented. (*Id.* at ¶¶ 39-41.)

Here, in stark contrast, Verizon contends that FPL's breach of contract claims are "beyond" the competency of this Court and require the "special competence" of the FCC. (Motion at 8-9.) The demands by the Court here are measurably less than the relief sought in Tampa Electric. This Court is not being asked to determine a "just and reasonable" rate – only to enforce the existing rate in the Joint Use Agreement and enter judgment for the sum certain due and owing on the 2012 Invoice. Oddly, Verizon is obviously comfortable having the Hillsborough Circuit Court decide what is, in fact, a true rate dispute. Conversely, but equally oddly, Verizon goes to great lengths to recast FPL's contract case as a "rate dispute" to justify its request that this Court step aside and defer to the FCC. Not surprisingly, Verizon does not mention the *Hillsborough Case* in its Motion. Nor does it – or could it – explain why the Hillsborough Circuit Court has happened upon the special competence that Verizon claims this Court lacks. In light of its undisclosed embrace of the Hillsborough Circuit Court, Verizon's insistence that this Court defer to the FCC under the doctrine of primary jurisdiction is disingenuous at best, not to say sanctionable.

III. Even if It Could Be Considered, Verizon's Primary Jurisdiction Argument Provides No Basis To Dismiss FPL's Complaint

Verizon's primary jurisdiction argument lies far beyond the four corners of the Complaint and cannot be considered on a motion to dismiss. But there is no basis to invoke primary jurisdiction here in any event. The doctrine of primary jurisdiction serves

two purposes. First, it "enables a court to have the benefit of an agency's experience and expertise in matters with which the court is not as familiar." *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1037 (Fla. 2001). Second, the doctrine "protects the integrity of the regulatory scheme administered by the agency, and promotes consistency and uniformity in areas of public policy." *Id.* Dismissing FPL's Complaint would serve neither of those aims.

A. *This Is a Contract Case, Not a "Rate Dispute"*

Recognizing that this Court needs no assistance to adjudicate a straightforward contract case, Verizon attempts to recast this case as a "rate dispute." (Motion at 8.) No contract rate is in dispute. FPL and Verizon together established the only rate formula relevant to this case nearly forty years ago in the Joint Use Agreement. FPL does not ask this Court to determine a "reasonable" rate or otherwise alter its agreement with Verizon. Because FPL's claims here neither request nor require that this Court set any rate, interpret any FCC regulations, or do anything other than enforce a contract, Verizon's insistence on deference to the FCC's "specific expertise" is unfounded. *See United States v. Western Pacific Railroad Co.*, 352 U.S. 65, 66 (1956) ("where the question is simply one of construction the courts may pass on it as an issue 'solely of law'" and the doctrine of primary jurisdiction does not apply). It is also somewhat unpersuasive. Verizon was pleased to interpret the Pole Attachment Order[3] on its own in arriving at the "reasonable rate" it was willing to pay FPL, entirely without the FCC's assistance.

[3] Report and Order and Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act*, 26 FCC Red 5 (2011) ("Pole Attachment Order").

B. *Verizon Has Never Sought FCC Relief*

That Verizon's Motion focuses entirely upon the Pole Attachment Order and Verizon's own conclusions about its import does not remotely compel dismissal of this case out of deference to the FCC. The Pole Attachment Order only grants Verizon the right to file a complaint with the FCC to address whether the rates, terms and conditions applicable to its pole attachments are just and reasonable. Of enormous significance here is the bizarre fact that Verizon has never bothered to avail itself of that right. While trumpeting the universal benefits to be enjoyed under the Pole Attachment Order, Verizon has for two years assiduously avoided petitioning for them as to either the FPL or the TEC contract. It has, instead, adopted the Pole Attachment Order as a pretext for unilaterally breaching the Joint Use Agreement and setting its own rate. As the Motion recognizes, the Pole Attachment Order does not grant Verizon the authority to do either. (Motion at 5). That Verizon manipulates the Pole Attachment Order here as it did in *Tampa Electric* to avoid meeting its contractual obligations does not transform this case into a "rate dispute" in which the FCC's expertise might prove beneficial.

C. *There Is No Potential for Conflict*

Dismissing this case will not serve the second purpose of primary jurisdiction either. Because FPL's Complaint neither requests nor requires that this Court set any rate, interpret any FCC regulations, or do anything other than enforce a contract, there is no risk that adjudicating FPL's contract claims will compromise the integrity or uniformity of the FCC's regulatory scheme. If Verizon decides to invoke the FCC's expertise at some future time by filing a complaint under the Pole Attachment Order, this Court's interpretation of the *meaning* of the Joint Use Agreement would have no

bearing upon the FCC's review of the *reasonableness* of the rates set by the parties in that agreement. Moreover, the FCC has specifically advised that it "question[s] the need to second guess the negotiated resolution of arrangements" and is "unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable." *See* Fed. Reg. at 74, 26629. It is difficult to see how enforcing those terms as written could present any risk to uniformity or the FCC's regulatory scheme.

D. *This Court Should Not Invoke Primary Jurisdiction Because Only This Court Can Grant FPL the Relief It Seeks*

The Pole Attachment Order provides "traditional wireline telephone companies" like Verizon with the right to file complaints with the FCC. (Motion at 1.) FPL is not afforded that right, and cannot obtain any relief from the FCC. Only Verizon has that right. And, importantly here, Verizon has no obligation to exercise it, and, indeed, Verizon, for obvious tactical reasons, has not. Rather, Verizon bypassed the FCC altogether and determined a "reasonable rate" on its own, using the Pole Attachment Order as a pretext for ignoring its contractual obligations. Only now that it faces accountability before this Court does Verizon suddenly fasten upon the importance of FCC's expertise.

Verizon's insistence that this Court dismiss this case out of deference to the FCC is a transparent and insupportable commercial device. If this case is dismissed, Verizon can simply continue doing what it has done for the last two years: ignore the Joint Use Agreement, use FPL's poles, and decide, on its own, how much it is going to pay FPL in return. FPL will be left without recourse against Verizon unless and until Verizon files a complaint with the FCC – something Verizon has not bothered to do and has no

incentive to do – since the FCC issued the Pole Attachment Order more than two years ago.

E. *The Pole Attachment Order Does Not Even Apply to the Majority of the Relief FPL Seeks*

Verizon's primary jurisdiction transformation of the Complaint rests entirely upon the Pole Attachment Order. (*See, e.g.*, Motion at 2 ("every disputed issue between the parties can best be resolved by the FCC's application and interpretation of the Pole Attachment Order").) Specifically, Verizon contends that this Court should defer to the FCC under the doctrine of primary jurisdiction because the FCC "has the expertise and policy-making authority to interpret and apply [the Pole Attachment Order]." (*Id.* at 8.) But the Pole Attachment Order does *not* even apply to payment due and owing under the Joint Use Agreement that FPL seeks in this lawsuit.

In the Pole Attachment Order, the FCC indicated that it would consider complaints arising from "agreements between incumbent LECs and other utilities entered into following the adoption of this Order," but would only consider complaints arising from *existing* joint use agreements if "the incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new agreement." Pole Attachment Order at 5334-35, ¶ 216. The Joint Use Agreement between FPL and Verizon existed long before the Pole Attachment Order took effect on June 8, 2011. (Motion at 3.) Verizon did not terminate the Joint Use Agreement until a year later, on June 9, 2012. (*Id.* at 7.) Accordingly, the Pole Attachment Agreement is clear that Verizon is not entitled to any relief for, at a minimium, any pole use occurring prior to June 9, 2012.[4] In its Complaint, FPL seeks recovery of payments due from

[4] Because the Joint Use Agreement provides that its terms remain in full force and

Verizon for pole usage during the years 2008-2012.[5] (*See* Cmplt. at ¶¶ 37, 41, 48.) Save for amounts due for Verizon's usage for any new attachments subsequent to the June 9, 2012 effective date of termination, all of the damages FPL seeks in this case are founded upon a contract that already existed when the Pole Attachment Order took effect. Verizon does not, and cannot, contend that it lacked the ability to terminate the Joint Use Agreement, as it admits doing just that. (Motion at 7.) Accordingly, by its own terms the Pole Attachment Order is entirely inapposite to nearly all relief sought by FPL in this action. It certainly provides no basis to invoke primary jurisdiction and dismiss this case in its entirety.

IV. Venue is Proper in This Court Because FPL Seeks Recovery of Certain Sums Due and Payable in Miami-Dade County

Like its primary jurisdiction argument, Verizon's argument that improper venue argument goes far beyond the four corners of the Complaint. Verizon acknowledges that venue is proper in a county where payment is due and payable and there is "'an express contractual promise to pay a certain sum of money owed.'" (Motion at 14 (quoting *PDM Bridge Corp. v. JC Indus. Mfg.*, 851 So. 2d 289, 291-92 (Fla. 3d DCA 2003)). However, Verizon contends that such circumstances are not present here because "this case involves a dispute over the rate that applies after the effective date of the Pole Attachment Order during negotiations for a new pole attachment contract both before and after its termination." (Motion at 14.) The Complaint does not contain

---

effect upon termination with respect to all poles jointly used by FPL and Verizon at the time of termination, Verizon's subsequent usage of such poles is governed by an agreement existing at the time the Pole Attachment Order took effect, and to which it accordingly has no application. (*See* Cmplt. at ¶¶ 23-24.)

[5] Verizon's assertion that Count II "is now moot" is based entirely upon the Lindsay Affidavit, and, as such, must be disregarded. *Mancher*, 708 So. 2d at 328.

any allegations that there is any rate, term or amount in dispute. Verizon's argument and self-serving conclusions fall outside the four corners of the Complaint and cannot be considered on a motion to dismiss. *Samuels*, 782 So. 2d at 494; *Mancher*, 708 So. 2d at 328. And, in any event, Verizon is mistaken.

As explained above, this case does not involve a "rate dispute." Nowhere in its Complaint does FPL ask this Court to determine a rate. FPL asks this Court to award it the outstanding amount due and owing on the invoice FPL issued to Verizon for rental charges incurred during the 2012 calendar year ("2012 Invoice"), which is attached to the Complaint as Exhibit A.[6] (Cmplt. at ¶¶ 21-22, Exh. A.) Specifically, FPL seeks recovery of the following outstanding balances of the specific items identified in the 2012 Invoice: rental charges for the year 2011 in the amount of $969,134.21; retroactive rental charges for the years 2008, 2009 and 2010 in the amount of $74,363.00; and rental charges for the year 2012 in the amount of $2,194,474.28. (*Id.* at ¶¶ 37, 41, 48.) Verizon cannot credibly contend that these amounts are not "certain sum[s] of money." (Motion at 14.) Verizon does not dispute that terms of the parties' Joint Use Agreement dictate payment of those exact amounts. The demand for those sums certain in the Complaint and Verizon's wholesale reliance on matters outside it compel rejection of Verizon's improper venue argument and denial of its Motion. *See Sunshine Yacht Sales v. Anslow Yacht Sales*, 669 So. 2d 342, 344 (Fla. 3d DCA 1996) ("where, as here, the suit is for money due under a contract, venue is proper where payment was due").

[6] FPL requests judgment on Count I in the amount of $969,134.21, which reflects the outstanding principal balance of the rental charges due from Verizon for year 2011 calendar year "[p]ursuant to the formula set forth in the Joint Use Agreement." (*Id.* at 6; ¶¶ 29, 33-34.) Similarly, FPL requests judgment on Counts II and III in the specific amounts of $74,363.00 and $2,194,474.28, respectively. (*Id.* at 7-8.) Both sums are established by the express terms of the Joint Use Agreement. (*Id.* at ¶¶ 40, 48.)

WHEREFORE, Plaintiff FPL requests that Verizon's Motion to Dismiss be denied.

SQUIRE SANDERS (US) LLP
200 South Biscayne Boulevard, Suite 4100
Miami, FL 33131-2398
Telephone: (305) 577-2835
Facsimile: (305) 577-7001
Email: adavis@ssd.com

By *s/Alvin B. Davis*
Alvin B. Davis
Florida Bar No. 218073
Daniel C. Mazanec
Florida Bar No. 88737

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing has been furnished via E-mail to Lewis F. Collins, Jr. (lcollins@butlerpappas.com) and William P. Schoel (wschoel@butlerpappas.com) on this 13th day of August, 2013.

By: *s/Daniel C. Mazanec*
Daniel C. Mazanec

Exhibit 14

REDACTED - FOR PUBLIC INSPECTION

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FLORIDA POWER & LIGHT COMPANY,

Plaintiff,

vs.

VERIZON FLORIDA LLC,

Defendant.

_____/

CIVIL DIVISION

CASE NO. 13014808CA01

NOTICE OF VOLUNTARY DISMISSAL OF COUNT IV AND V OF COMPLAINT

Pursuant to the provisions of Rule 1.420 (a) of the Florida Rules of Civil Procedure, Plaintiff, Florida Power & Light Company, provides this notice of its voluntary dismissal, without prejudice, of Count IV (Quantum Meruit) and Count V (Unjust Enrichment) of its Complaint in this action.

SQUIRE SANDERS (US) LLP
200 South Biscayne Boulevard, Suite 4100
Miami, FL 33131-2398
Telephone: (305) 577-2835
Facsimile: (305) 577-7001
Email: adavis@ssd.com

By *s/ Alvin B. Davis*
Alvin B. Davis
Florida Bar No. 218073
Daniel C. Mazanec
Florida Bar No. 88737

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing has been furnished via E-mail to Lewis F. Collins, Jr. (lcollins@butlerpappas.com) and William P. Schoel (wschoel@butlerpappas.com) on this 25th day of September, 2013.

By: *s/ Alvin B. Davis*
Alvin B. Davis

Exhibit 15

REDACTED - FOR PUBLIC INSPECTION

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

Complex Business Litigation Division
Case No.13-14808 -CA-40

FLORIDA POWER & LIGHT COMPANY, ETC.

Plaintiffs,

vs.
VERIZON FLORIDA, LLC, ETC.

Defendants

_____/

ORDER DENYING MOTION TO DISMISS OR TRANSFER VENUE

THIS MATTER came before the Court on Defendant's Motion to Dismiss or Transfer Venue, and the Court having reviewed the file, the motion, memoranda, hearing argument of counsel and being otherwise fully advised in the premises, it is

ORDERED and **ADJUDGED** the motion to Dismiss or Transfer is **DENIED**. The Court determines that this breach of contract case is properly brought before this Court. Count I for 2011 and Count III for 2012 are the remaining counts. Plaintiff has advised the Court in open Court that it has dropped Count II. Defendant shall have twenty (20) days from the date hereof within which to file its answer to the two remaining Counts.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 09/26/13.

JOHN W. THORNTON
CIRCUIT COURT JUDGE

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall

IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed and stamped original Order sent to court file by Judge Thornton's staff.

cc: Counsel / Parties of record
adavis@ssd.com;lcollins@butlerpappas.com;wschoel@butlerpappas.com

Exhibit 16

 Electronically Filed 10/16/2013 05:24:50 PM ET

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
CIVIL DIVISION

FLORIDA POWER & LIGHT CO.,	)	
	)	
Plaintiff,	)	CASE NO. 13-014808-CA-01
	)	
v.	)	
	)	
VERIZON FLORIDA LLC,	)	
	)	
Defendant.	)	

ANSWER AND COUNTERCLAIM OF VERIZON FLORIDA LLC

Defendant Verizon Florida LLC ("Verizon Florida"), by and through its undersigned counsel, hereby answers the Complaint of Plaintiff Florida Power & Light Company ("FPL") as follows:

Nature of the Dispute

1. Verizon Florida admits that FPL and Verizon Florida's predecessor, General Telephone Company of Florida, entered into a Joint Use Agreement dated January 1, 1975 ("Joint Use Agreement") and a Supplemental Agreement dated March 29, 1978 ("Supplemental Agreement"), that the agreements contain confidential information, and that Verizon Florida possesses a copy of each agreement. The remaining allegations of paragraph 1 contain conclusions of law requiring no response, but to the extent a response may be required, Verizon Florida denies the remaining allegations of paragraph 1.

2. Paragraph 2 contains conclusions of law requiring no response, but to the extent a response may be required, Verizon Florida admits that, beginning in June 2012, Verizon Florida has paid FPL's invoices at the rate FPL is permitted to charge Verizon Florida's competitive local exchange company ("CLEC") competitors under federal law in accordance with the *Pole*

Attachment Order issued by the Federal Communications Commission ("FCC"), *see* Report and Order and Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act*, 26 FCC Rcd 524 (2011). Verizon Florida denies the remaining allegations of paragraph 2.

Jurisdiction and Venue

3. Verizon Florida admits that FPL has brought this action for damages and that it alleges that the amount in controversy exceeds $15,000, exclusive of interest, attorneys' fees and costs.

4. Paragraph 4 states a conclusion of law requiring no response, but to the extent a response is required, Verizon Florida admits that a Circuit Court has subject matter jurisdiction of this action pursuant to Fla. Stat. § 26.012(2)(a), but denies that the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County should hear this matter.

5. Paragraph 5 states a conclusion of law requiring no response, but to the extent a response is required, Verizon Florida denies the allegations of paragraph 5, including the allegations that venue is proper in this Court, that Verizon Florida is engaged in continuous and not incidental business activity in this County, and that this litigation is for recovery of a sum certain due under a contract and made payable in this County. Verizon Florida further avers that venue is proper in Hillsborough or Manatee County, but that the dispute should first be adjudicated at the FCC pursuant to the doctrine of primary jurisdiction. However, Verizon Florida acknowledges that this Court has concluded otherwise. *See* Order Denying Motion to Dismiss or Transfer (Sept. 26, 2013).

General Allegations

6. On information and belief, Verizon Florida admits that FPL is a Florida corporation with its principal place of business in Palm Beach County, Florida and that it has an office for the transaction of business in Miami-Dade County.

7. On information and belief, Verizon Florida admits that FPL is an electric utility that provides retail services to its customers in Florida.

8. On information and belief, Verizon Florida admits that FPL owns utility poles throughout its service territory for use in the transmission and distribution of electricity to customers.

9. Verizon Florida admits that it is a limited liability company incorporated in Florida with its principal place of business in Hillsborough County, Florida.

10. Verizon Florida admits that it owns utility poles throughout its service territory, which includes areas in Hillsborough, Pinellas, Manatee, Sarasota, Polk, and Pasco counties, for use in the distribution of telephone and other services to its customers.

11. Verizon Florida admits that FPL and Verizon Florida's predecessor, General Telephone Company of Florida, entered into a Joint Use Agreement dated January 1, 1975 and a Supplemental Agreement dated March 29, 1978. Verizon Florida further admits that it has a copy of the Joint Use Agreement and the Supplemental Agreement.

12. Paragraph 12 states a conclusion of law requiring no response, but to the extent a response is required, Verizon Florida denies that it is bound by all the terms of the Joint Use Agreement, as amended, for the entire time period alleged in the Complaint.

13. Paragraph 13 states a conclusion of law requiring no response, but to the extent a response is required, Verizon Florida avers that the Joint Use Agreement, as amended, speaks for itself as to this issue.

14. Verizon Florida admits that joint use agreements historically benefited the parties by allowing them to minimize the costs associated with duplicative pole networks and to enjoy the aesthetic and safety benefits associated with avoiding dual pole lines throughout their overlapping service areas. Verizon Florida denies the remaining allegations of paragraph 14, including any implication that Verizon Florida receives the same economic benefit from the arrangement as FPL, which has used its greater pole ownership interest to impose excessive and unreasonable rental rates on Verizon Florida.

15. Paragraph 15 states conclusions of law requiring no response, but to the extent a response is required, Verizon Florida avers that the Joint Use Agreement, as amended, speaks for itself as to this issue.

16. Paragraph 16 states a conclusion of law requiring no response, but to the extent a response is required, Verizon Florida denies that the method for establishing annual pole rent under the Joint Use Agreement, as amended, is currently operative and that it produces a rental rate for Verizon Florida that is just and reasonable as required by federal law.

17. Paragraph 17 states conclusions of law requiring no response, but to the extent a response is required, Verizon Florida avers that the Joint Use Agreement, as amended, speaks for itself as to this issue.

18. Verizon Florida admits that from time to time the parties have undertaken or commissioned joint field checks of their overlapping service territories and avers that their

respective joint use records and invoices speak for themselves. Verizon Florida denies the remaining allegations of paragraph 18 as phrased.

19. Verizon Florida admits that the most recent joint field check undertaken or commissioned by or on behalf of the parties was completed in early 2012 and that it resulted in an adjustment to the parties' respective joint use records. Verizon Florida admits that it has a copy of certain of the records produced during the 2012 joint field check. Verizon Florida denies the remaining allegations of paragraph 19 as phrased.

20. Verizon Florida admits that it does not dispute the adjusted pole counts resulting from the 2012 joint field check.

21. Verizon Florida admits that it received an invoice from FPL dated April 15, 2013 and that Exhibit A to the Complaint appears to be a copy of that invoice. Verizon Florida avers that the invoice speaks for itself. Verizon Florida denies the remaining allegations of paragraph 21, including any implication that FPL was due the amount invoiced or that the amount invoiced is just and reasonable as required by federal law.

22. Paragraph 22 states conclusions of law requiring no response, but to the extent a response is required, Verizon Florida avers that the Joint Use Agreement, as amended, and the invoice speak for themselves. Verizon Florida denies the remaining allegations of paragraph 22, including any implication that FPL was due the amount invoiced or that the amount invoiced is just and reasonable as required by federal law.

23. Paragraph 23 states conclusions of law requiring no response, but to the extent a response is required, Verizon Florida admits that it gave formal notice to terminate the Joint Use Agreement effective June 9, 2012 and that it continues to utilize FPL poles to provide services to

its customers. Verizon Florida denies the remaining allegations of paragraph 23, including any implication that it was required to remove its attachments from FPL's poles upon termination.

24. Paragraph 24 states a conclusion of law requiring no response, but to the extent a response is required, Verizon Florida denies that all the terms of the Joint Use Agreement, as amended, remain in full force and effect.

25. Verizon Florida denies the allegations of paragraph 25.

COUNT I
Breach of Contract
(2011 Calendar Year)

26. Verizon Florida repeats and realleges its responses to the allegations of all preceding paragraphs as though fully set forth herein.

27. Paragraph 27 contains conclusions of law requiring no response, but to the extent a response is required, Verizon Florida denies the allegations of paragraph 27, including any implication that all the terms of the Joint Use Agreement, as amended, were in full force and effect during the entire 2011 calendar year.

28. Paragraph 28 contains conclusions of law requiring no response, but to the extent a response is required, Verizon Florida denies the allegations of paragraph 28, including any implication that all the terms of the Joint Use Agreement, as amended, were in full force and effect during the entire 2011 calendar year.

29. Paragraph 29 contains conclusions of law requiring no response, but to the extent a response is required, Verizon Florida denies the allegations of paragraph 29, including any implication that FPL was due the amount alleged or that the amount alleged is just and reasonable as required by federal law

30. Paragraph 30 contains conclusions of law requiring no response, but to the extent a response is required, Verizon Florida admits that it received an invoice from FPL dated February 28, 2012 and that Exhibit B to the Complaint appears to be a copy of that invoice. Verizon Florida denies the remaining allegations of paragraph 30, including any implication that FPL was due the amount invoiced or that the amount invoiced is just and reasonable as required by federal law.

31. Paragraph 31 contains conclusions of law requiring no response, but to the extent a response may be required, Verizon Florida denies that FPL properly invoiced Verizon Florida for 2011 pole rent.

32. Paragraph 32 states conclusions of law requiring no response, but to the extent a response may be required, Verizon Florida admits that it received a letter from FPL dated July 12, 2012 and denies that it was or is in default.

33. Paragraph 33 states a conclusion of law requiring no response, but to the extent a response may be required, Verizon Florida admits that, on or about July 23, 2012, in response to FPL's invoice, Verizon Florida paid FPL in the amount of $1,179,307.43. Verizon Florida denies the remaining allegations of paragraph 33, including any implication that FPL is due any amounts additional to those already paid by Verizon Florida.

34. Paragraph 34 contains conclusions of law requiring no response, but to the extent a response is required, Verizon Florida admits that it received an invoice from FPL dated April 15, 2013 and that Exhibit A to the Complaint appears to be a copy of that invoice. Verizon Florida denies the remaining allegations of paragraph 34, including any implication that FPL was due the amount invoiced or that the amount invoiced is just and reasonable as required by federal law.

35. Verizon Florida admits that it has not made any further payments on the 2011 Invoice and denies the remaining allegations of paragraph 35, including the allegation that Verizon Florida has not made any payment for the adjusted pole counts that resulted from the 2012 joint field check. Verizon Florida further denies any implication that FPL was due the amounts invoiced in the 2011 Invoice and 2011 Adjustment or that the amounts invoiced and 2011 Adjustment are just and reasonable as required by federal law. By way of further answer, Verizon Florida avers that, on or about June 13, 2013, in response to FPL's invoice for 2008 through 2011 adjusted pole counts, Verizon Florida paid FPL in the amount of $106,006.50.

36. Verizon Florida denies the allegations of paragraph 36.

37. Verizon Florida denies the allegations of paragraph 37.

Count II
Breach of Contract
(Adjusted Retroactive Billing for 2008, 2009 and 2010 Calendar Years)

38-45. Paragraphs 38 through 45 require no response because FPL has voluntarily dismissed Count II. *See* Order Denying Motion to Dismiss or Transfer Venue (Sept. 26, 2013).

Count III
Breach of Contract
(2012 Calendar Year)

46. Verizon Florida repeats and realleges its responses to the allegations of all preceding paragraphs as though fully set forth herein.

47. Paragraph 47 contains conclusions of law requiring no response, but to the extent a response is required, Verizon Florida denies the allegations of paragraph 47, including any implication that Verizon Florida was bound by all the terms of the Joint Use Agreement, as amended, during the 2012 calendar year.

48. Paragraph 48 contains conclusions of law requiring no response, but to the extent a response may be required, Verizon Florida denies the allegations of paragraph 48, including any implication that FPL was due the amount alleged or that the amount alleged is just and reasonable as required by federal law.

49. Paragraph 49 contains conclusions of law requiring no response, but to the extent a response is required, Verizon Florida admits that it received an invoice from FPL dated April 15, 2013 and that Exhibit A to the Complaint appears to be a copy of that invoice. Verizon Florida denies the remaining allegations of paragraph 49, including any implication that FPL was due the amount invoiced or that the amount invoiced is just and reasonable as required by federal law.

50. Paragraph 50 contains conclusions of law requiring no response, but to the extent a response is required, Verizon Florida admits that it has taken the position that the method for establishing annual pole rent under the Joint Use Agreement, as amended, is not currently operative and does not produce a rental rate for Verizon Florida that is just and reasonable as required by federal law. Verizon Florida denies the remaining allegations of paragraph 50, including the allegation that it has not made any payment on the 2012 Invoice and any implication that FPL was due the amount invoiced or that the amount invoiced is just and reasonable as required by federal law. By way of further answer, Verizon Florida avers that, on or about June 13, 2013, in response to FPL's 2012 Invoice, Verizon Florida paid FPL in the amount of $532,407.05.

51. Verizon Florida denies the allegations of paragraph 51.

52. Verizon Florida denies the allegations of paragraph 52.

Count IV
Quantum Meruit
(2012 Calendar Year)

53-61. Paragraphs 53 through 61 require no response because FPL has voluntarily dismissed Count IV. *See* Notice of Voluntary Dismissal of Count IV and V of Complaint (Sept. 25, 2013).

Count V
Unjust Enrichment
(2012 Calendar Year)

62-70. Paragraphs 62 through 70 require no response because FPL has voluntarily dismissed Count V. *See* Notice of Voluntary Dismissal of Count IV and V of Complaint (Sept. 25, 2013).

Verizon Florida hereby denies anything not specifically admitted in the Answer.

AFFIRMATIVE DEFENSES

Verizon Florida reserves the right to assert additional affirmative defenses based on facts that are revealed during discovery.

FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

Some or all of the claims asserted in the Complaint fail to state a claim upon which relief may be granted, as more fully set forth in the Counterclaim served herein.

SECOND AFFIRMATIVE DEFENSE
(Estoppel, Laches, Release (Discharge or Surrender) and/or Unclean Hands)

Some or all of the claims asserted in the Complaint are barred under the doctrines of estoppel, laches, release (discharge or surrender), and unclean hands, as more fully set forth in the Counterclaim served herein.

THIRD AFFIRMATIVE DEFENSE
(Jurisdiction and Ripeness)

This court lacks jurisdiction to consider this controversy as this matter is not ripe because the rate FPL is permitted to charge Verizon Florida should be determined in the first instance by the FCC under federal law in accordance with its *Pole Attachment Order*, *see* Report and Order and Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act*, 26 FCC Rcd 524 (2011).

FOURTH AFFIRMATIVE DEFENSE
(Venue)

If this matter is ripe for consideration at this point, venue of this matter is improper in this Court as the amount in controversy was unliquidated and the parties did not occupy the status of debtors and creditors. Therefore, the only proper venue is in the Circuit Court of Hillsborough or Manatee County.

WHEREFORE, Verizon Florida prays as follows:

1. That FPL's Complaint be dismissed pursuant to the doctrine of primary jurisdiction;
2. That FPL's Complaint be dismissed for improper venue;
3. That FPL take nothing by reason of its Complaint;
4. That judgment be rendered in favor of Verizon Florida;
5. That Verizon Florida be awarded the costs of suit, including reasonable attorneys' fees, incurred in defense of this action; and
6. For such other relief as may be just and proper.

COUNTERCLAIM OF VERIZON FLORIDA LLC

Verizon Florida LLC ("Verizon Florida"), by its undersigned counsel, hereby seeks a declaratory judgment that Verizon Florida has fully compensated Florida Power and Light Company ("FPL") for its attachments to FPL's utility poles. Without waiving its rights under the

doctrine of primary jurisdiction to have this controversy resolved by the Federal Communications Commission ("FCC"), the agency that has the expertise and policy-making authority to interpret and apply federal law and its own *Pole Attachment Order* that governs the rates charged for pole attachments in Florida, Verizon Florida alleges for its Counterclaim as follows:

Parties

1. Verizon Florida is a limited liability company incorporated in Florida with its principal place of business in Hillsborough County, Florida.

2. FPL is a corporation incorporated under the laws of the State of Florida with its principal place of business in Palm Beach County, Florida.

Jurisdiction and Venue

3. In its Complaint, FPL admits that it has brought an action for damages and alleges that the amount in controversy exceeds $15,000, exclusive of interest, attorney's fees and costs.

4. In its Complaint, FPL admits that it has invoked the subject matter jurisdiction of this Court over the claims asserted in its Complaint. Pursuant to Fla. Stat. § 26.012(2)(a) and (c), Circuit Courts in Florida also have subject matter jurisdiction over this Counterclaim.

5. Venue is proper in Hillsborough or Manatee County where the property at issue is located, Fla. Stat. § 47.051, but this dispute should first be adjudicated at the FCC pursuant to the doctrine of primary jurisdiction. However, without waiving its right to challenge this Court's Order, Verizon Florida acknowledges that this Court has concluded otherwise. *See* Order Denying Motion to Dismiss or Transfer Venue (Sept. 26, 2013). Verizon Florida, accordingly, asserts its Counterclaim in this venue pursuant to Fla. R. Civ. P. 1.170 because it arises out of the same transaction or occurrence that is the subject matter of FPL's Complaint.

GENERAL ALLEGATIONS

Background of Joint Use

6. Historically, the term "joint use" referred to the shared use of a utility pole by the telephone company (an "incumbent local exchange carrier" or "ILEC") and the electric company ("electric utility"). By sharing a single pole instead of installing two separate poles to support each company's facilities, ILECs and electric utilities were able to jointly minimize costs and enjoy the aesthetic and safety benefits associated with avoiding dual pole lines throughout their overlapping serving areas.

7. The ILEC and electric utility generally entered into joint use agreements in which costs were allocated in a manner that was roughly proportional to the amount of space occupied by each company on the pole. When joint use first began in the 1920s, these space allocations were roughly equal, as was the percentage of poles owned by each company. As a result, no net rental payments were generally exchanged.

8. Over the years, however, three fundamental changes in pole usage and ownership rendered obsolete the original joint use assumptions:

a. *First*, the space used by the electric utility has increased greatly (from three to four feet historically, to eight to twelve feet today), while the space used by the ILEC has decreased (from three feet historically, to one to two feet today).

b. *Second*, dramatic changes in the telecommunications market, including the entry of new competitive providers, have greatly increased the number of entities that attach to utility poles. Historically, only the ILEC and electric utility occupied the pole. Today, space allocated to and paid for by the ILEC is also occupied and paid for by cable companies, wireless carriers, and competitive local exchange carriers ("CLECs") –

entities that compete directly with ILECs, but have received protection from the FCC against unjust and unreasonable pole rents.

c. *Third*, the number of electric utility-owned utility poles has increased substantially, while the number of ILEC-owned poles has declined. This shift in pole ownership is largely attributable to the fact that (1) in new construction areas, the builder usually contacts the electric utility first, and thus the electric utility is typically the party to install new poles; and (2) when there is a natural disaster or a pole otherwise is damaged and needs to be replaced, the electric utility is typically the first utility contacted by emergency services due to safety concerns, and thus has the first opportunity to install its own poles, and replace existing poles that may have been damaged.

9. These three changes – combined with the fact that ILECs have had "carrier-of-last-resort" obligations and limited or no options to relocate their facilities – have given the electric utilities an unfair superior bargaining position that they have used to extract monopoly rents from ILECs in order to maximize their profits. The result of FPL's bargaining power is evident in the $35.27 per pole rate it charged Verizon Florida in 2011 – a rate that is more than four times the $8.52 per pole rate that it was then permitted to charge Verizon Florida's CLEC competitors under federal law.

The FCC's *Pole Attachment Order*

10. Having received complaints that electric utilities were "leverag[ing] the growing imbalance in pole ownership to engage in unjust and unreasonable practices" and "refus[ing] to renegotiate outdated joint-use arrangements," the FCC initiated an inquiry into "whether pole attachment rates paid by incumbent LECs could affect the vitality of competition to deliver telecommunications, video services, and broadband Internet access service." Notice of Proposed

Rulemaking, *In the Matter of Implementation of Section 224 of the Act*, 22 FCC Rcd 20195, 20204-05 (¶¶ 23-25) (2007).

11. The FCC's investigation confirmed that ILECs are generally in "an inferior bargaining position to other utilities" and are not able to achieve "just and reasonable rates, terms and conditions" for attachments through private negotiations. Report and Order and Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act*, 26 FCC Rcd 5240, 5327 (¶ 199) (2011) ("*Pole Attachment Order*"). The record also showed that ILECs were often "forced to pay rates for pole attachments that are unreasonably higher than those available to other attachers." Order and Further Notice of Proposed Rulemaking, *In the Matter of Implementation of Section 224 of the Act*, 25 FCC Rcd 11864, 11925 (¶¶ 145, 147) (2010). For example, it was estimated that ILECs, "in aggregate, . . . annually pay pole attachment rates that are $320 to $350 million greater than they would pay at the cable rate." *Pole Attachment Order*, 26 FCC Rcd at 5330-31 (¶ 208).

12. "[P]ersuaded by evidence in the record that widely disparate pole rental rates distort infrastructure investment decisions and in turn could negatively affect the availability of advanced services and broadband, contrary to the policy goals of the Act," *id.* at 5243 (¶ 6), the Commission held that ILECs are entitled to protection under 47 U.S.C. § 224, which requires that "the rates, terms, and conditions for pole attachments" be "just and reasonable." In order to "enable better informed pole attachment negotiations between incumbent LECs and electric utilities," *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218), the Commission adopted a principle of "competitive neutrality" that cabins the range of rates considered "just and reasonable" for ILEC attachments to joint use poles to rates that are comparable to those charged

other attachers, such as cable companies, wireless carriers, and competitive telephone providers, *id.* at 5336 (¶ 217).

The Joint Use Relationship of Verizon Florida and FPL

13. FPL and General Telephone Company of Florida, Verizon Florida's predecessor, entered into an agreement dated January 1, 1975 for the joint use of their respective poles ("Joint Use Agreement"), and a Supplemental Agreement dated March 29, 1978 ("Supplemental Agreement"), which amended the Joint Use Agreement. Because the Joint Use Agreement and Supplemental Agreement contain confidential information, they are not attached to this Answer and Counterclaim. FPL avers that it possesses a copy of the Joint Use Agreement and Supplemental Agreement. Complaint ¶ 1.

14. FPL owns nearly 90 percent of the poles that FPL and Verizon Florida share (about 65,000 of the 72,000 shared poles). FPL thus has extraordinary leverage to extract unjust and unreasonable rates from Verizon Florida.

15. In 2011, FPL charged Verizon Florida an annual per pole rental rate of $35.46, even though it was permitted under federal law to charge Verizon Florida's CLEC competitors just $8.52 per pole to attach to the same poles. FPL collected rent from Verizon Florida's CLEC competitors even if they attached to FPL's poles in space allocated to, and paid for by, Verizon Florida under the Joint Use Agreement, as amended.

16. After the FCC recognized that ILECs like Verizon Florida have a federal statutory right to competitively neutral just and reasonable pole attachment rates, Verizon Florida sent FPL a letter dated June 27, 2011 in which it stated that it "would like to meet to begin the process of negotiating a new joint use agreement or, in the alternative; a new amendment which would replace the March 29, 1978 amendment to the contract that sets forth the method for

computing pole attachment rates." Verizon Florida emphasized that it was seeking a rate comparable to that paid by its competitors, and that the FCC's *Pole Attachment Order* clarified that "where incumbent LECs are attaching to other utilities' poles on terms and conditions *comparable* to those that apply to other telecommunications carriers or cable operators, the incumbent LEC should be afforded the same rate as the comparable providers."

17. Beginning on the July 12, 2011 effective date of the *Pole Attachment Order*, Verizon Florida was entitled to a just and reasonable rental rate for all of its attachments to FPL's poles. For 2011, that per pole rate was $8.52, the rate FPL was permitted under federal law to charge Verizon Florida's CLEC competitors.

18. Verizon Florida and FPL met on numerous occasions in 2011 to try to negotiate a new agreement and a new rental rate. FPL denied that federal law provided Verizon Florida any right to rental rate relief with respect to facilities that it had already attached to FPL's poles and refused to reduce its rental rate.

19. In order to reinvigorate negotiations, and to comply with the *Pole Attachment Order*'s requirement that parties engage in executive level discussions prior to seeking adjudication of any dispute at the FCC, Verizon Florida sent FPL a letter dated December 9, 2011, in which it requested "that executives from each company meet as soon as possible in person to attempt in good faith to resolve these issues, including reaching agreement on a just and reasonable pole attachment rate for both companies." Verizon Florida also provided formal notice of termination of the Joint Use Agreement, as amended, effective June 9, 2012, but emphasized that it "remain[ed] willing to enter into a new agreement if the rate issue is resolved."

20. Verizon Florida and FPL continued to try to negotiate a new agreement, but FPL continued to refuse to reduce its rental rate. Accordingly, when FPL sent Verizon Florida an invoice dated February 23, 2012 for 2011 pole rent, which purported to charge Verizon Florida $35.46 per pole per year, Verizon Florida did not pay the invoiced rate for the six months of 2011 during which the FCC's *Pole Attachment Order* entitled Verizon Florida to a competitively neutral rental rate.

21. Instead, on or about July 23, 2012, Verizon Florida paid FPL at the invoiced rate for January through June 2011 and at a just and reasonable rental rate of $8.52 per pole for July through December 2011. The $8.52 rental rate is the rate that FPL is permitted to charge Verizon Florida if Verizon Florida attaches to FPL's poles on terms that are comparable to Verizon Florida's CLEC and cable competitors. Verizon Florida has on several occasions offered to enter a pole attachment agreement that contains comparable terms and conditions to those that govern FPL's CLEC and CATV attachers, but FPL has refused to enter such an agreement.

22. The parties continued to participate in negotiations and other alternate dispute resolution procedures during 2012 and 2013. FPL still refused to recognize Verizon Florida's right to a just and reasonable rental rate under federal law. Accordingly, when FPL sent Verizon Florida an invoice dated April 15, 2013 for 2012 pole rent, which purported to charge Verizon Florida $36.22 per pole per year, Verizon Florida did not pay the invoiced rate. Instead, on or about June 13, 2013, Verizon Florida paid FPL at a just and reasonable rental rate of $8.52.

23. FPL's April 15, 2013 invoice also included charges for 2008 through 2011 pole rent associated with adjusted pole counts from a joint field check. Consistent with its prior payments, Verizon Florida paid FPL at the full invoiced rate for attachments attributable to the

2008 through June 2011 period, and at a just and reasonable $8.52 rental rate for attachments attributable to the July 2011 through December 2011 period that followed the effective date of the FCC's *Pole Attachment Order*.

CAUSES OF ACTION

Count I – Declaratory Relief

24. Verizon Florida restates and realleges its allegations in the preceding paragraphs as if fully set forth herein.

25. Federal law entitles Verizon Florida to just and reasonable rates, terms, and conditions of attachment to poles owned by FPL. In June 2011, the FCC clarified in its *Pole Attachment Order* that a just and reasonable rate for an ILEC like Verizon Florida under federal law is a rate that is comparable to that charged a comparable CLEC or cable attacher.

26. FPL has refused to recognize that Verizon Florida is entitled to a just and reasonable pole attachment rental rate under federal law.

27. For 2011 pole rent, FPL charged Verizon Florida at an annual per pole rental rate of $35.46. Verizon Florida paid FPL the full invoiced rate for the six months preceding the FCC's issuance of the *Pole Attachment Order* and at a just and reasonable rental rate of $8.52 per pole for the six months following the FCC's issuance of the *Pole Attachment Order*. The $8.52 per pole rental rate applies to Verizon Florida's CLEC competitors.

28. For 2012 pole rent, FPL charged Verizon Florida at an annual per pole rental rate of $36.22. Verizon Florida paid FPL at a just and reasonable rental rate of $8.52 per pole, which is the rate that applies to Verizon Florida's CLEC competitors.

29. As a result of FPL's refusal to recognize Verizon Florida's right to a just and reasonable pole attachment rental rate under federal law, a question is presented as to whether

Verizon Florida has fully compensated FPL for its July 2011 through December 2012 pole attachments.

30. Verizon Florida is entitled to a declaratory ruling that it has fully compensated FPL for its July 2011 through December 2012 pole attachments at the just and reasonable rate of $8.52 per pole.

WHEREFORE, Verizon Florida prays as follows:

1. That FPL's Complaint and this Counterclaim be dismissed pursuant to the doctrine of primary jurisdiction;
2. That FPL's Complaint and this Counterclaim be dismissed for improper venue;
3. That the Court issue a ruling that the $8.52 per pole per year rate paid by Verizon Florida to FPL for its July 2011 through December 2012 pole attachments was just and reasonable and fully compensated FPL; and
4. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

VERIZON FLORIDA LLC

/s/Lewis F. Collins, Jr.

Lewis F. Collins, Jr.
FL Bar #0267422
William P. Schoel
FL Bar #0014673
BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP
777 S. Harbour Island Boulevard, #500
Tampa, FL 33602
(813) 281-1900
lcollins@butlerpappas.com

Christopher S. Huther (*pro hac vice*)
Claire J. Evans (*pro hac vice* forthcoming)
WILEY REIN LLP

1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wileyrein.com
cevans@wileyrein.com

Dated: October 16, 2013

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Answer and Counterclaim was furnished to:

Alvin B. Davis, Esq.
Squire Sanders (US) LLP
200 S. Biscayne Boulevard, Suite 4000
Miami, FL 33131
alvin.davis@squiresanders.com

by e-mail on October 16, 2013.

/s/Lewis F. Collins, Jr.

LEWIS F. COLLINS, JR., ESQ.

Exhibit 17

Electronically Filed 11/14/2013 04:13:22 PM ET

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FLORIDA POWER & LIGHT CO.,

Plaintiff,

Complex Business Litigation Section (40)
Case No. 13-14808

v.

VERIZON FLORIDA LLC,

Defendant.
_____/

FPL's MEMORANDUM IN OPPOSITION TO VERIZON FLORIDA LLC'S MOTION TO STAY

INTRODUCTION

Venue is a phantom issue.

There is no distinguishing local characteristic about this dispute in terms of substance, process or discovery. Both parties already have the contract at issue and the related payment documents. There will be no expedition mounted to count power poles. Verizon Florida ("Verizon") has acknowledged that it is not making payment pursuant to the contract terms. Verizon identifies no burden or prejudice that it will be forced to endure by proceeding in Miami-Dade County. The contract can be enforced by a circuit judge on either coast. Verizon's lead counsel can just as easily travel from Washington, D.C. to Miami as from Washington, D.C. to Tampa (with a further drive to Hillsborough or Manatee County.)

Verizon's defense and counterclaim, to the extent the counterclaim is not merely a resuscitation of its failed motion to dismiss, suggest that in Verizon's view this dispute doesn't belong in Miami-Dade or Hillsborough or Manatee County, but in Washington

D.C. It has, of course, done nothing and continues to do nothing to raise this issue there.

Verizon's appeal of the venue order and its companion motion to stay these proceedings are nothing more than a regrettable reinforcement of its strategy of paying one-quarter of what it agreed to pay under the contract for as long as it possibly can get away with it.

To be clear, Verizon is not paying the contract rate it agreed to pay after an arms-length negotiation with Florida Power & Light Company ("FPL"). It has never been excused from that obligation. Verizon is not paying a rate established pursuant to a determination by the Federal Communications Commission ("FCC"). It has never petitioned the FCC for the determination of such a rate. It is paying what it simply chooses to pay, regardless of the terms of the longstanding contract, and will continue to do so for as long as it can delay resolution of this case by this Court. Thus, the appeal and this motion to stay are simply intended to sustain this profitable delay for Verizon. There is no fundamental legal principle implicated in the motion to stay.

ARGUMENT

Verizon properly notes that a stay may be appropriate when the issue on appeal is a simple legal one and there is both the likelihood of success on appeal and a likelihood of harm if the stay is denied. The application of these standards does not provide a basis for a stay in this case.

1. The Absence of a Stay Presents No Risk of Harm to Verizon

The "harm" that Verizon perceives is the potential need to appear, conduct discovery and otherwise litigate here in Miami-Dade County. With a nod to the Court,

Verizon also seeks to preserve the Court's resources by avoiding "discovery management." Beyond the mere recitation of boilerplate language, Verizon fails to demonstrate any harm whatsoever if a stay is not entered, let alone meaningful harm.

Discovery – Very limited discovery will be required to establish FPL's claim. The contract by which the Parties have been bound since 1975 and which is in the possession of both parties, is undisputed, as is the fact that Verizon is not paying in accordance with the contract. Nor is there a dispute as to the FCC Order itself by which Verizon hopes to evade its contractual obligation. Verizon's application of the FCC Order to the facts here is clearly disputed, but that is not a matter that requires discovery. The Parties already have essentially all of the documents implicated in FPL's requested relief.

Verizon's counterclaim, which FPL will be moving to dismiss shortly, would appear to require information exclusively from FPL. That information is not found in either Hillsborough or Manatee County.

More to the point, Verizon fails to explain how any of the limited discovery that may be conducted here will be "wasted" if its venue appeal succeeds. The documents produced and the depositions conducted will simply be used in the transferee court proceedings. Nothing will be wasted. To the contrary, proceeding here pursuant to the Court's existing, detailed trial plan, agreed to by Verizon, will allow the case to arrive in a transferee court, if any, well advanced toward trial. No sound argument can be constructed that supports the notion that it benefits either party or any court, to delay preparing this matter for trial.

Verizon enjoys obvious unintended benefits from any stay, by extending the period of time during which it pays its home-grown rates for attaching to FPL's poles. A benefit, it should be noted, that finds no support in any of the cases relied upon by Verizon.

Need to Appear – This factor requires little discussion. Verizon's lead counsel is resident in Washington, D.C. As noted, he can appear as readily in Miami-Dade County as in Hillsborough or Manatee Counties. Verizon proposes to require both lead counsel to travel to a jurisdiction foreign to both, rather than have its lead counsel travel to a jurisdiction no less convenient for him than the jurisdiction Verizon proposes. Common sense must be permitted to play some role here.

Otherwise Litigate - It is not clear what activity Verizon contemplates by this category. The only "other" litigation on the horizon is its own Motion to Stay. Verizon is hardly in a position to seek relief from whatever "harm" may be caused by the filing of its own motion.

2. Verizon is Unlikely to Succeed on the Merits

FPL chose this venue because it is where the cause of action accrued.[1] Verizon, which had been making payments to FPL in this jurisdiction for approximately thirty-seven years, pursuant to a mutually negotiated contract formula, simply stopped making the full required contract payments in this jurisdiction.[2] Accordingly, FPL's cause of action accrued here and FPL filed its complaint here.[3] "Plaintiff's choice of venue is

[1] Under § 47.051 of the Florida Statutes venue "against [a] foreign corporation" is proper when it is brought "where the cause of action accrued."
[2] As recently as July 2013, Verizon sent partial payment- substantially less than the amount due under the contract- to FPL's general office located in Miami, Florida.
[3] FPL is suing Verizon for breach of contract. "A cause of action for breach of contract accrues for venue purposes where the contract is breached." *Suncoast Home Improvements, Inc. v. Robichaud*, 106 So. 3d 969, 972 (Fla. 2d DCA 2013).

generally given favor if it has been properly exercised under the applicable statutes." *Rayman v. Langdon Asset Mgmt.,* 745 So. 2d 426, 427 (Fla. 3d DCA 1999).

The allegations regarding venue in the Plaintiff's complaint were sufficient to establish venue in this jurisdiction. Nothing more was required. Verizon's challenge to that choice of venue does require more, however. The law in Florida is clear that a challenge such as Verizon purports to mount here must be based on an affidavit. Failure to file an affidavit precludes a ruling in Verizon's favor. *See Suncoast Home Improvements, Inc. v. Robichaud*, 106 So. 3d 969, 972-73 (Fla. 2d DCA 2013) ("The allegations with the attached contract and invoice are sufficient to show a liquidated debt, especially in light of the defense failure to file any affidavits challenging venue."); *see also Loiaconi v. Gulfstream Seafood,* 830 So. 2d 908, 909-10 (Fla. 2d DCA 2002) ("The right to initially select venue belongs to the plaintiff. [citation omitted]. It is the defendant's burden to plead and prove that venue is improper. *Id.* That burden is not met where a defendant files an unsworn motion and does not present affidavits or other sworn proof in support of the motion."); *see also Chrysler Credit Corp., v. Laliberty,* 506 So. 2d 67, 68 (Fla. 1st DCA 1987) (holding same).

The affidavit filed in support of Verizon's motion to transfer venue was limited to the issue of where Verizon engages in business. It never addressed the fact that Verizon has paid FPL's invoices in Miami-Dade County continuously for nearly four decades. Nor did Verizon's affidavit suggest in any manner that its obligations to FPL were somehow "unliquidated." To the contrary, when read in conjunction with the Complaint and its exhibits and Verizon's own Answer, the affidavit confirms the existence of liquidated obligations.

FPL's Complaint specifically recited the amounts due from Verizon pursuant to invoices issued by FPL in accordance with the contract formula. As in *Suncoast,* the invoices themselves were attached to the Complaint. In its Answer, Verizon does not dispute the pole count which is the basis for the rate calculation. *See* Answer at ¶20. Importantly, Verizon does not dispute in any manner whatsoever, the calculation of the amount being invoiced. There is no challenge to the rate being charged.[4] Verizon simply attempts to sidestep the contract itself by denying that the "Joint Use Agreement...is currently operative." Which is, of course, the issue that this Court is being asked to resolve.

Verizon's Answer goes on to specify the amounts that it has paid toward each invoice, based on its own undisclosed calculation of what Verizon speculates would be a fair and reasonable rate were the FCC to be engaged on this issue.

To the extent that the Court looks beyond Verizon's fatal failure to properly support by affidavit its venue challenge, Verizon goes on to suggest, again in boilerplate language, that the debtor-creditor rule is not applicable here because this case involves an unliquidated debt. It purports to support this argument by ignoring the pleadings and arguing, irrelevantly, that the contract "broadly governs rental rates" and "sets forth a formula for calculating the amount due." Mot. to Stay at p. 4. Aside from cynically glossing over the 38-year payment history between the parties, a plain reading of the

[4] In fact, in Steve Lindsay's affidavit attached to the Memorandum of Law in Support of Verizon's Motion to Dismiss or Transfer Venue, at ¶ 7, Verizon acknowledges that it was making full payment on the FPL invoices through June of 2011.

definition of liquidated and unliquidated debt in the case law invalidates Defendant's argument and supports the obvious conclusion that the debt in this case is liquidated.[5]

"Damages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law." *Bowman v. Kingsland Dev.,* 432 So. 2d 660, 662 (Fla. 5th DCA 1983). Damages are unliquidated "if ascertainment of their exact sum requires the taking of testimony to ascertain facts upon which to base a value judgment." *Id.* (finding the damages were unliquidated because "reasonable attorney's fees" could not be determined without presentation of additional facts).

In this case, as in *Suncoast*, no value judgment is required and never has been. The rate Defendant was supposed to pay is, and has always been, clear. No testimony or other similar external application of any sort has ever been required. FPL calculated the annual payment as required by the contract, consistent with the decades long practice of the Parties, and sent an invoice to Verizon. Verizon has paid each FPL invoice since 1975 until it recently determined it was going to unilaterally set its own rates and breach its obligations under the longstanding contract.

---

[5] The cases cited by Defendant establishing the exceptions to the creditor-debtor rule are distinguishable. In *RCG Envtl., Inc. v. State Farm Ins. Co.,* 62 So. 2d 678 (Fla. 2d DCA 2011), the court found the damages were unliquidated because it could not determine the exact amount due from the pleadings. *Id.* at 679. In this case, the exact amount due can be determined by the pleadings because it has been calculated in accordance with the agreed formula and transmitted in the form of customary invoices to Verizon. Moreover, the court in *RCG* was unable to find that the cause of action accrued at the "place of payment" because the only evidence in the record was that State Farm had offices "everywhere." *Id.* at 680. Here, the contract and the parties' course of dealing makes clear that payment was to be made in Miami-Dade County. Further, *Hacienda Villas, Inc., v. MIA Consulting Grp., Inc.,* 47 So. 3d 848 (Fla. 3d DCA 2010) cited by Verizon is also distinguishable. In *Hacienda*, the exact amount of damages resulting from the breach was unknown, and the breach that caused the cause of action to accrue was not failure to make payments, but failure to retain plaintiff for services. *Id.* at 849. This case involves a sum certain and the breach that caused the cause of action to accrue is clearly Defendant's failure to make payments for the full amount that is due.

As described above, Verizon did not challenge the formula applied or the resulting invoices. Based on a fair, undisputed reading of the pleadings, this is not a dispute over what Verizon owes under the contract. It has simply refused to pay the invoices based on the contract formula because it has unilaterally determined that the contract is no longer "operative." When the Court determines that Verizon remains bound by the contract, the amount due will be the invoiced amounts – which are certain and acknowledged in the pleadings – less the amounts that Verizon deigned to pay – which are certain and acknowledged in the pleadings. No amount is "unliquidated." It is simply the difference between what Verizon is contractually committed to pay, in accordance with undisputed invoices, and what it has actually been paying. Because the debt due is liquidated, the debtor-creditor rule applies, and venue is proper in Miami-Dade County.

CONCLUSION

This case is where it belongs. It is likely to remain here. Accordingly, it should proceed consistent with this Court's trial order. There is no basis for a stay. There is no need for a stay. There is no sensible argument that can be articulated to support a stay.

Dated: November 14, 2013

SQUIRE SANDERS (US) LLP
Suite 4100
200 South Biscayne Boulevard
Miami, Florida 33131-2398
Telephone: 305-577-2835
Fax: 305-577-7001

By: *s/ Alvin B. Davis*
Alvin B. Davis
Florida Bar No. 218073
alvin.davis@squiresanders.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished via e-mail to Lewis F. Collins, Jr., (lcollins@butlerpappas.com), Butler Pappas Weihmuller Katz Craig, LLP, Suite 500, 777 S. Harbour Island Boulevard, Tampa, Florida 33602 and Christopher Huther (chuther@wileyrein.com), Wiley Rein LLP, 1776 K. Street NW, Washington, D.C. 20006, on this 14th day of November, 2013.

s/Alvin B. Davis
Alvin B. Davis

Exhibit 18

 Electronically Filed 12/05/2013 04:59:07 PM ET

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FLORIDA POWER & LIGHT CO.,

Plaintiff,

Complex Business Litigation Section (40)
Case No. 13-14808

v.

VERIZON FLORIDA LLC,

Defendant.

_____/

FPL's MOTION TO DISMISS VERIZON'S COUNTERCLAIM

INTRODUCTION

Verizon Florida LLC ("Verizon") proposes a curious sort of exercise for the Court. Verizon had a written contract with Florida Power & Light Company ("FPL") since 1975. Which it acknowledges. That contract required payments pursuant to a formula in the contract. Which it acknowledges. For most of the past thirty-eight years, Verizon paid in strict compliance with the contract. Which it acknowledges. Then Verizon stopped paying in accordance with the contract. Which it acknowledges. FPL has sued to collect the amounts which Verizon obligated itself to pay when it entered into the contract.

Manifestly hamstrung by these unfortunate facts, Verizon invites the Court to join it in a grand frolic and detour, both complex and futile. Verizon, it has become clear by now, has never requested that the Federal Communications Commission ("FCC") calculate a rate different than that called for in its written contract with FPL. That agency, Verizon has repeatedly advised this

Court, is the only entity capable of calculating such a rate. Faced with an insurmountable breach of contract claim, Verizon has had an epiphany of sorts. Now, this Court has apparently become imbued with the ability to duplicate the skills of the FCC, previously thought to be unique.

Employing, most likely for the first and only time, the FCC's rules, regulations, formulae and pronouncements, Verizon asks the Court to establish a "fair and reasonable" rate for Verizon's use of FPL's poles. To replace, it must be presumed, the bargained-for rate contained in the long-standing, binding, uncontradicted contract between the parties.

Therein lies the fatal flaw and the ultimate futility in the Verizon counterclaim. Whatever the result of this ambitious and complicated mathematical pas de deux, there is no possible use for the resulting number in this litigation. It cannot, as a matter of black letter law, replace the bargained for number established by the written contract. The calculation of what might be considered, under other circumstances, to be fair and reasonable may be an enlightening abstraction. It is wholly irrelevant to this dispute. The Court is not at liberty to re-write the parties' four-decades old contract. That being the case, and it is certainly the case, there is no point to the exercise and, accordingly, no basis for the counterclaim.

ARGUMENT

To invoke the Court's jurisdiction under the Declaratory Judgment Act, a complaint must allege that there is bona fide dispute between parties, that the plaintiff has a justiciable question as to existence or nonexistence of some right or status, or as to some fact upon which existence of such right or status does or may depend, that the plaintiff is in doubt as to such right or status, and, perhaps most importantly here, that there is a bona fide, actual, present need for the declaration. *Rhea v. District Bd. of Trustees of Santa Fe College*, 109 So. 3d 851, 859 (Fla. 1st DCA 2013); § 87.021, Fla. Stat. The party seeking a declaration of rights bears the burden to

demonstrate entitlement. *Id.* (citing *Groover v. Adiv Holding Co.*, 202 So. 2d 103, 104 (Fla. 3d DCA 1967)).

Verizon never remotely approaches its burden here; it cannot demonstrate entitlement to a declaratory judgment that it may pay significantly less than the contract rate to which it agreed and still somehow compensate its contract partner fully for its attachments to FPL's utility poles. First, the requested declaratory judgment would serve no useful purpose because the "calculated rate", whatever the formula employed, cannot replace the rate set forth in the contract. Second, Verizon fails to allege a valid need for construction of the Joint Use Agreement. It has chosen to ignore that agreement entirely. Finally, Verizon failed to exhaust the much-trumpeted administrative remedy available to it before the FCC.

A. Verizon's declaratory judgment claim must be dismissed because it serves no useful purpose and leads to no enforceable relief.

The decision to grant or refuse declaratory relief lies within the Court's discretion. *Garner v. De Soto Ranch, Inc.*, 150 So. 2d 493, 495 (Fla. 1963). The two principal criteria guiding a court's decision to exercise that discretion are whether the declaration will serve a useful purpose in clarifying and settling the legal relations in question, and whether the declaration will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Id.* The Florida Supreme Court has long held that Courts should decline to render declarations that would serve no useful purpose. *Sheldon v. Powell*, 128 So. 258 (Fla. 1930); *Kendrick v. Everheart,* 390 So. 2d 53, 59 (Fla. 1980) (a petition for declaratory relief must show "some useful purpose will be served" by the relief sought); *B.J. Mountain v. National Airlines, Inc.*, 75 So. 2d 574 (Fla. 1954) ("We have repeatedly held that the declaratory decree statute cannot be used in a case wherein the decree prayed for would serve no useful purpose") (internal citations omitted).

Verizon has failed to identify any useful purpose that would be served here. Only the FCC can calculate a rate that might impact the contract governing the parties here. The FCC has not done so. It might not do so even if Verizon sought that relief. But Verizon has not requested such a calculation from the FCC.

Verizon, nonetheless, seeks a declaration that a rate it somehow developed is "just and reasonable." Arguably, the Court might agree that, in the absence of a binding agreement, Verizon's rate might seem "just and reasonable". Such a declaration, if the Court found reason and time to devote to the bothersome effort, would not terminate the contractual dispute between FPL and Verizon. To the contrary, nothing would change with respect to the parties' contractual rights and obligations. Verizon would remain bound by the rate set forth in the Joint Use Agreement, and FPL could not be forced to accept a lower rate than that for which it bargained. Verizon suggests no means by which the Court may replace the agreed-upon contractual rate with some non-binding formulation. There is none.

It is axiomatic that a party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract. *Medical Center Health Plan v. Brick*, 572 So. 2d 548, 551 (Fla. 1st DCA 1990) (citing *Nat'l Health Laboratories,* Inc. *v. Bailmar, Inc.*, 444 So. 2d 1078, 1080 (Fla. 3d DCA 1984)). Clear and unambiguous contracts should be construed as written, and the court can give them no other meaning. *Id.* (citing *Walgreen Co. v. Habitat Dev. Corp.*, 655 So. 2d 164, 165 (Fla. 3d DCA 1995) ("When a contract is clear and unambiguous, the court is not at liberty to give the contract any meaning beyond that expressed.")). This is because clear and unambiguous terms constitute the best evidence of the parties' intent. *Fernandez v. Homestar at Miller Cove, Inc.*, 935 So. 2d 547, 551 (Fla. 3d DCA 2006). It is not the role of the courts to make an otherwise valid contract more reasonable from the standpoint of one

contracting party. *Stack v. State Farm Mut. Auto. Ins. Co.*, 507 So. 2d 617, 619 (Fla. 3d DCA 1987). That is precisely the unauthorized relief Verizon seeks.

The pole attachment rate is governed by the express terms of the Joint Use Agreement. Verizon does not allege that the Joint Use Agreement is ambiguous or unclear in any way. The only way the Joint Use Agreement is implicated at all in the counterclaim is by Verizon's insistence that it be ignored entirely. Verizon's answer and counterclaim reflect the pertinent facts: Verizon and FPL entered the Joint Use Agreement in 1975, amended in 1978. Countercl. ¶ 13. The rate formula was established then and observed ever since. Countercl. ¶ 13. Verizon provided notice of terminating the contract effective June 2012. Countercl. ¶19. Verizon's facilities remain attached on FPL poles, even after the effective date of the termination. Countercl. ¶¶ 22, 23; Verizon Answer ¶ 23. Verizon admits that it ceased paying the contractual rate. Countercl. ¶¶ 20, 22.

No question remains. Certainly not one that will be resolved by Verizon's almost whimsical suggestion that a better rate might be found. Verizon is bound by the terms of the agreement, as to which no challenge has been asserted. There is no allegation that Verizon was, for example, fraudulently induced in 1978 to agree to a rate it might disfavor in thirty-five years later. Absent any ambiguity, the Court must enforce the contract as written. The Court must enforce the rate set forth in the contract, not one that Verizon might prefer three decades later. *Applica Inc. v. Newtech Elecs. Indus., Inc.*, 980 So. 2d 1194 (Fla. 3d DCA 2008) ("The Court must enforce the contract as written, no matter how disadvantageous the language might later prove to be.").

The FCC's Pole Attachment Order does not itself establish the right to a new rate for Verizon, let alone establish any such rate. Verizon's claimed reliance on the FCC Pole

Attachment Order for its purported entitlement to a $8.52 rate is misleading at best, and transparently so. While Verizon correctly recites that the Pole Attachment Order established the FCC's jurisdiction over the rates, terms and conditions for attachments by incumbent local exchange companies ("ILEC"), such as Verizon, Verizon omits critical details, determinative here, regarding what the Pole Attachment Order did *not* do. Of paramount importance, the FCC did not establish a pole attachment rate that is applicable to Verizon or any other ILEC. To the contrary, the Pole Attachment Order merely declared that ILECs, such as Verizon, have the right to file a complaint with the FCC if they believe the joint use rates charged by other utilities are unjust and unreasonable. Pole Attachment Order ¶ 203. The FCC expressly declined to establish a rate for ILECs, choosing instead to evaluate each ILEC complaint on a case-by-case basis. Pole Attachment Order ¶ 214. The Order also provides that the FCC "is unlikely to find the rates, terms and conditions in existing joint use agreements unjust and unreasonable." Pole Attachment Order ¶ 216. Which may explain the "self-help" technique attempted here by Verizon.

Verizon does not – and cannot – allege that the FCC determined the existing contractual joint use rate to be unjust and unreasonable. Accordingly, it never fashioned a new rate.[1] In the absence of a new rate formulated by the FCC, the contract rate governs. Period. A declaration that some other rate might be reasonable would thus amount to a non-justiciable, purely advisory opinion that serves no useful purpose and is outside of the jurisdiction of this Court. The Court must enforce the rate set forth in the contract, not one that Verizon prefers three decades later. *Applica Inc.*, 980 So. 2d at 1194 (Fla. 3d DCA 2008); *see also Beach Resort Hotel Corp. v. Wieder*, 79 So. 2d 659, 663 (Fla. 1955) ("It is well settled that courts may not rewrite a contract

[1] As explained in more detail in Section "C," Verizon never instituted a formal complaint with the FCC claiming that the contractual rate is unjust.

or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain."). Because the requested declaratory decree would not settle the contractual dispute, the Court must decline to entertain Verizon's declaratory judgment claim.

B. Verizon's declaratory judgment claim must be dismissed because it fails to allege a valid need for construction of the Joint Use Agreement

A declaratory judgment is not available to settle factual issues bearing on liability under a contract which is clear and unambiguous and which presents no need for its construction. *New Amsterdam Cas. Co. v. Intercity Supply Corp.*, 212 So. 2d 110, 112-13 (Fla. 4th DCA 1968) (internal citations omitted) (affirming dismissal of declaratory judgment claim where the declaratory plaintiff asserted no claim of doubt or ambiguity in the insurance policy); *Johnson v. Travelers Indemnity Co.*, 191 So. 2d 61 (Fla. 1st DCA 1966) (insurer was not entitled to a declaratory judgment where there was no construction of the policy in issue but only the factual question of sufficiency of notice). Verizon's declaratory judgment claim must be dismissed on the additional ground that it fails to allege a valid need for construction of the Joint Use Agreement. As in *New Amsterdam*, Verizon makes no allegation the contract is ambiguous or that any particular term in unclear. Nor does Verizon allege that it is in doubt as to its right under the Joint Use Agreement. Rather, Verizon is choosing to ignore the contract altogether and inviting the Court to do the same.

At most, Verizon attempts to inspire some doubt regarding its contractual obligation on the ground that the Pole Attachment Order entitles it to pay a rate comparable to Verizon's CLEC and cable competitors rather than the contract rate. The Pole Attachment Order provides no such entitlement. As alluded to above, the Order provides ILECs such as Verizon the right to file a complaint with the FCC to challenge pole attachment rates as unjust and unreasonable.

Pole Attachment Order ¶ 203. While ILECs might be entitled to the CLEC rate under some circumstances, that will not always be the case. Pole Attachment Order ¶¶ 203, 214. The FCC expressly declined to define ILEC rates and chose instead to consider each ILEC complaint on a case-by-case basis. Pole Attachment Order ¶ 214. The District Court of Appeal for the District of Columbia thrice emphasized this point:

> The [Pole Attachment] Order . . . reformulates the ceiling on the rate that pole-owning utilities can charge ''telecommunications carriers'' seeking to make pole attachments. . . . The reader should note that because § 224(a)(5) excludes ILECs from the definition of ''telecommunications carriers,'' the newly reformulated rates do not directly affect the rates chargeable to ILECs.
>
> * * *
>
> We reiterate, to make clear just what the Commission has and has not done, that **it has not purported to bring ILECs under the new telecom rate adopted under § 224(e)(1). The [Pole Attachment] Order simply classifies ILECs as among the potential beneficiaries of § 224(b)(1), which authorizes the Commission to regulate the rates, terms and conditions of ''pole attachments'' and assure that they are ''just and reasonable.''** For now, noting the existence of possible distinctions between ILECs and other pole attachers, the Commission says that it will handle any complaints by ILECs ''on a case-by-case basis.''
>
> * * *
>
> The new telecom rates, **unless the Commission should apply them independently to ILECs via its ratesetting authority** under § 224(a)(4) and (b), apply only to telecommunications carriers . . . .

American Elec. Power Serv. Corp. v. Federal Communication Comm'sn, 708 F.3d 183, 185, 186 and 188 (D.C. Cir. 2013) (emphases added). Again, the FCC noted that it "is unlikely to find the rates, terms, and conditions in existing joint use agreements unjust and unreasonable." Pole

Attachment Order ¶ 216. Indeed, the FCC left open the possibility that it will deem the just and reasonable rate higher than the contractual rate. 47 C.F.R § 1.1410(a)(3).[2]

In short, contrary to Verizon's representations, the Pole Attachment Order does not entitle it to any rate. Absent a specific FCC ruling applicable to Verizon's attachment to FPL's poles, no statute, regulation or rule affects the validity of the Joint Use Agreement. Having alleged no ambiguity or other basis for the need to construe the Joint Use Agreement, Verizon's declaratory judgment claim must be dismissed. *Wood/Fay Realty Group, Inc. v. New Aquarius Corp.*, 842 So.2d 914, 917 (Fla. 3d DCA 2003) (concluding that clear and unambiguous contractual terms require no interpretation).

C. The Declaratory Judgment Claim Must Be Dismissed Due to Verizon's Failure To Exhaust Administrative Remedies

Florida courts historically and consistently have refused to entertain declaratory judgments when the declaratory plaintiff has not exhausted its administrative remedies. *See Sheldon v. Powell*, 128 So. 2d 258, 262 (Fla. 1930) (declaratory judgments have been refused "where special tribunals have been provided to handle specified controversies"); *School Bd. of Leon County v. Mitchell*, 346 So. 2d 562 (Fla. 1st DCA 1977) (same). Only in exceptional cases may courts assume jurisdiction to render declaratory and injunctive relief without requiring exhaustion of administrative remedies. *State, Dept. of Environmental Regulation v. Falls Chase Special Taxing Dist.*, 424 So.2d 787, 794 (Fla. 1st DCA 1982). In order to bypass the administrative channels, the party seeking the declaration generally must demonstrate that no

[2] 47 C.F.R § 1.1410(a)(3) states: "If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may . . . [o]rder a refund, **or payment**, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission . . . ." (emphasis added).

adequate administrative remedy remains available. *Florida Public Employees Council 79 v. Dept of Children and Families*, 745 So. 2d 487 (Fla. 1st DCA 1999).

The Court here should decline to entertain Verizon's efforts here because Verizon has not exhausted its exhaustively described administrative remedy. Verizon repeatedly acknowledges that the FCC has jurisdiction to adjudicate complaints filed by ILECs (such as Verizon) claiming that pole attachment rates charged by an electric utility are unjust and unreasonable. Countercl. ¶ 12, 19; Pole Attachment Order ¶ 208. Verizon has not pursued the FCC's complaint process. Verizon is hardly in a position to allege that the FCC remedy is inadequate or beyond the FCC's jurisdiction. To the contrary, Verizon has expressed its desire to have this controversy resolved by the FCC. Countercl. p. 11 and ¶ 5.

To be clear, FPL requires no access to the FCC. Verizon's declaratory judgment claim does not seek the same type of relief as FPL's breach of contract claim. FPL's complaint is based strictly on the parties' Joint Use Agreement and requires only the enforcement of the terms set forth in the contract. Verizon, by contrast, seeks an apparently binding determination of "just and reasonable" rates that the FCC has jurisdiction to provide. FPL's breach of contract claim does not. Verizon's declaratory judgment claim requires application of the FCC's Pole Attachment Order – an order that to date has never been applied to an ILEC pole attachment dispute. FPL's breach of contract claim requires no such application. Simply put, the claims are different. FPL's breach of contract claim is appropriate for disposition by this Court. Verizon's counterclaim is appropriate for disposition by the FCC.

The pole attachment order provides Verizon an administrative avenue for redress before the FCC through its formal complaint process. Pole Attachment Order ¶¶ 203, 208. FPL is not afforded the same rights for relief. The FCC's complaint process is intended to address

challenges to unjust pole attachment rates. FPL maintains that the rate formula set forth in the parties' Joint Use Agreement is binding upon the parties as a matter of contract law. Thus, the FCC complaint process is not designed to address FPL's breach of contract claim.

CONCLUSION

Verizon must pay the rate set forth in the parties' Joint Use Agreement. If it believes that rate is unjust and unreasonable, it has the right to file a complaint with the FCC. It has not done so. Verizon's counterclaim is nothing more than a misguided attempt to use the Declaratory Judgment Act as a tool to sanction its breach of the parties' long-standing agreement. There is no basis for imposing a pole attachment rate other than the contractual rate.

Dated: December 5, 2013

SQUIRE SANDERS (US) LLP
Suite 4100
200 South Biscayne Boulevard
Miami, Florida 33131-2398
Telephone: 305-577-2835
Fax: 305-577-7001

By: *s/ Alvin B. Davis*
Alvin B. Davis
Florida Bar No. 218073
alvin.davis@squiresanders.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished via e-mail to Lewis F. Collins, Jr., (lcollins@butlerpappas.com), Butler Pappas Weihmuller Katz Craig, LLP, Suite 500, 777 S. Harbour Island Boulevard, Tampa, Florida 33602 and Christopher Huther (chuther@wileyrein.com), Wiley Rein LLP, 1776 K. Street NW, Washington, D.C. 20006, on this 5th day of December 2013.

s/ Alvin B. Davis
Alvin B. Davis

Exhibit 19

IN THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
CIVIL DIVISION

Case No.: 13-014808-CA-01 – Division 40

FLORIDA POWER & LIGHT CO.,

Plaintiff,

v.

VERIZON FLORIDA LLC,

Defendant.

_____/

VERIZON FLORIDA LLC'S OPPOSITION TO
FPL'S MOTION TO DISMISS VERIZON'S COUNTERCLAIM

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STANDARD OF REVIEW 3

III. FPL'S MOTION SHOULD BE DENIED BECAUSE VERIZON HAS BROUGHT A PROPER COUNTERCLAIM. 3

A. This Court Has Authority To Interpret And Apply The *Pole Attachment Order* To The Facts Of This Case 4

B. Application Of The *Pole Attachment Order* Presents Factual Questions That Cannot Be Resolved On A Motion To Dismiss. 5

C. There Are No Mandatory Administrative Remedies That Verizon Must Exhaust 8

IV. CONCLUSION 8

I. INTRODUCTION

In its Motion to Dismiss, Plaintiff Florida Power and Light ("FPL") asks the Court to accept its interpretation and application of the Federal Communication Commission's *Pole Attachment Order*.[1] Accordingly, FPL asks the Court to dismiss Verizon's Counterclaim, which presents a contrary interpretation of the *Pole Attachment Order* that, when applied to the facts of this case, entitles Verizon to a just and reasonable rental rate lower than that contained in the parties' now-terminated agreement. It is premature for this Court to adopt either approach at the Motion to Dismiss stage.

As Verizon argued in the context of its prior Motion to Dismiss, every disputed issue in this case can best be resolved by the FCC's application and interpretation of the *Pole Attachment Order*. *See* Mem. of Law in Support of Def.'s Mot. to Dismiss or Transfer Venue (July 29, 2013). The *Order* institutes a new approach to rental rate disputes between incumbent telephone companies, like Verizon, and electric companies, like FPL. The new approach looks to several case-specific facts, such as the relative market power of the parties, the rates that the electric company charges other companies that attach to its poles, and whether the agreement has been terminated, in order to determine *whether* a particular rental rate is just and reasonable as statutorily required – and *when*, if the rate is not, it must be replaced with a lower rate. Indeed, the *Order* explains that where incumbent telephone companies like Verizon are attaching to poles under comparable terms and conditions as other attachers, "competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider (whether the telecommunications carrier or the cable operator)." 26 FCC Rcd at 5336 (¶ 217).

---

[1] Report and Order and Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act*, 26 FCC Rcd 5240 (2011) ("*Pole Attachment Order*" or "*Order*").

This Court accepted FPL's invitation to decide this dispute instead of referring it to the FCC. *See* Order Denying Mot. to Dismiss or Transfer (Sept. 26, 2013). As a result, the fact-specific questions about *whether* and *when* Verizon is entitled to rate relief under the FCC's *Pole Attachment Order* are before this Court. Verizon, for example, has alleged that it is entitled to rate relief because the rental rates sought by FPL are not just and reasonable, Counterclaim ¶¶ 27-28 (Oct. 16, 2013), FPL has vastly superior market power, *id.* ¶ 14, and FPL has used that market power to extract unjust and unreasonable rental rates from Verizon that are nearly four times the amount that FPL charges other comparable companies that attach to its poles, *id.* ¶ 15. Verizon has also alleged that it was entitled to this rate relief as of July 12, 2011, the effective date of the *Pole Attachment Order*. *Id.* ¶ 17.

FPL tries to sidestep the question of *whether* Verizon is entitled to rate relief by arguing that rate relief is still not available under the *Pole Attachment Order* because the parties' agreement extends its rates past its termination. FPL's Mot. to Dismiss Verizon's Counterclaim ("FPL Br.") at 5 (Dec. 5, 2013). Presumably, FPL relies on a "Term of Agreement" section in the agreement that FPL has previously asserted has an evergreen effect on the agreement's rate provision, such that its rates can never be changed after termination. But FPL makes this argument before the Court has even had an opportunity to review the agreement, which was not attached to FPL's Complaint, or to consider Verizon's contrary interpretation, and ignores the Commission's guidance that such "evergreen" provisions may force an incumbent telephone company to adhere to rates, terms, or conditions that are unjust or unreasonable simply to maintain pole access as a result of an electric company's unequal bargaining power. *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.655). For this reason especially, FPL's Motion to Dismiss is premature and cannot be granted. Accepting the facts as alleged by Verizon as true

(as the Court must on a Motion to Dismiss), Verizon has stated a proper claim for declaratory rate relief under its interpretation and application of the *Pole Attachment Order*. FPL's Motion should be denied.[2]

II. STANDARD OF REVIEW

A counterclaim "should not be dismissed for failure to state a cause of action unless the movant can establish beyond any doubt that the [counter]claimant could prove no set of facts whatever in support of his or her claim." *Johnson v. Gulf Cty.*, 965 So.2d 298, 299 (Fla. 1st DCA 2007) (emphasis added). This is because, "[f]or the purposes of a motion to dismiss for failure to state a cause of action, allegations of the [counterclaim] are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the [counterclaimant]," here Verizon. *Ralph v. City of Daytona Beach*, 471 So.2d 1, 2 (Fla. 1983).

III. FPL'S MOTION SHOULD BE DENIED BECAUSE VERIZON HAS BROUGHT A PROPER COUNTERCLAIM.

FPL seeks dismissal of Verizon's Counterclaim by arguing that a declaratory judgment will serve no "useful purpose." FPL Br. at 3. To the contrary, Verizon's Counterclaim presents the Court with the questions that will resolve this rate dispute – questions of whether and when Verizon is entitled to a new rental rate under federal law, 47 U.S.C. § 224, as interpreted by the *Pole Attachment Order*. These questions (1) present issues that this Court has authority to decide, (2) involve factual issues that cannot be resolved on a Motion to Dismiss, and (3) need not be presented in the first instance to the FCC.

---

[2] Pending before the Third District Court of Appeal is Verizon's appeal of this Court's decision siting venue in Miami-Dade County. *See* Case No. 3D13-2789. By filing this Opposition, Verizon does not waive its arguments that venue should be sited in Hillsborough or Manatee County, where the property at issue is located, and that all proceedings in this Court – including any decision on this Motion – will be void should Verizon succeed on appeal. *See Straughn v. Grootemaat*, 291 So. 2d 669, 669 (Fla. 2d DCA 1974) (holding that a motion to dismiss "should be considered after the change of venue has been accomplished.") (emphasis added).

A. This Court Has Authority To Interpret And Apply The *Pole Attachment Order* To The Facts Of This Case.

FPL devotes much of its brief to an argument that the *Pole Attachment Order* does not entitle Verizon to just and reasonable rental rates – but only to "the right to file a complaint with the FCC." *See* FPL Br. at 6, 7-8, 11. FPL thus argues that this Court has no authority to interpret the *Pole Attachment Order* and apply it to the facts of this case. FPL's argument does not survive a reading of the *Pole Attachment Order* and stands in stark contrast to the position taken by FPL earlier in this litigation.

The FCC's *Order* states in no uncertain terms that it seeks to "reduce the number of disputes for which Commission resolution is required." *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218). It explains that incumbent telephone companies like Verizon are "entitled" to just and reasonable rental rates for their attachments. *See id.* at 5328 (¶ 202). It clarifies that the right to just and reasonable rates is held by telephone companies, like Verizon, that had existing agreements with electric companies, like FPL, when the *Order* was issued. *See id.* at 5327 (¶ 208). And it provides detailed guidance to ensure that the right is recognized in private negotiations and in State proceedings without the need for FCC intervention. *See id.* at 5337, 5338 (¶¶ 218, 220). FPL's argument that this Court cannot interpret and apply the *Pole Attachment Order* flies in the face of the *Order* itself.

FPL's argument is also at odds with the position that FPL took with respect to Verizon's prior Motion to Dismiss, where it assured the Court that it had the authority and ability to decide all issues in this case – including those raised by the *Pole Attachment Order*. *See, e.g.*, Opp. to Am. Mot. to Dismiss at 1 (Aug. 13, 2013). Indeed, Verizon also did not argue that this Court *could* not decide the questions raised by the FCC's *Pole Attachment Order* in this case. Verizon instead argued that the Court *should* not decide them because each and every claim in this case

turns on the interpretation and application of the *Pole Attachment Order*, such that a decision on the issues in this case from the FCC would provide needed clarity to the industry. Verizon clarified that it was not arguing "that all pole attachment disputes – or even all disputes that relate in some way to the *Pole Attachment Order* – should be decided by the FCC." Reply Mem. In Support of Def.'s Mot. to Dismiss or Transfer Venue at 7 (Aug. 20, 2013). It further emphasized that it was not arguing "that the Court lacks the expertise required to preside over pole attachment disputes." *Id.* Verizon simply argued that this case in particular raises questions on which the FCC's policy guidance and expertise would be invaluable. *Id.*

This Court disagreed and decided not to refer the case to the FCC pursuant to the doctrine of primary jurisdiction, which "is a matter of deference, policy and comity, not subject matter jurisdiction," *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1037-38 (Fla. 2001). Accordingly, this Court has before it the questions raised by the *Pole Attachment Order* and central to the resolution of this contract dispute.

B. Application Of The *Pole Attachment Order* Presents Factual Questions That Cannot Be Resolved On A Motion To Dismiss.

Application of the *Pole Attachment Order* in this case will require the Court to determine whether the rate produced by the parties' agreement is just and reasonable and, if not, when Verizon was entitled to rate relief. The FCC provided significant guidance in its *Order* about how to determine *whether* an incumbent telephone company is being charged a just and reasonable rate for its pole attachments. *See* 26 FCC Rcd at 5334 (¶¶ 214-20). It also provided guidance about *when* the rate relief was warranted, authorizing telephone companies to challenge rates charged after the July 12, 2011 effective date of the *Order*, and to obtain refunds of amounts paid after that July 2011 date. *Id.* at 5334 (¶ 214 n. 647).

In so doing, the FCC highlighted several factual circumstances that must be considered by the Court when deciding whether the rate is just and reasonable – and when it must be replaced by a lower rate that is. A comparison of three of these factual circumstances to the allegations in Verizon's Counterclaim confirms that the Counterclaim cannot be dismissed. Too many factual disputes remain that, if decided in Verizon's favor, establish that the rate in the parties' agreement is not just and reasonable and must be replaced with one that is.

First, the FCC stated that a rate in an existing agreement is more likely to be unjust and unreasonable – and requiring replacement by a new rate as of the effective date of the *Pole Attachment Order* – if the telephone company "genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement." *Id.* at 5335-36 (¶ 216). That is the situation here, where FPL has refused to provide a lower rate for any of Verizon's attachments that were in place when the *Order* became effective or when the parties' joint use agreement terminated. Counterclaim ¶¶ 19, 22. FPL disputes Verizon's position by pointing to a section in the parties' agreement that FPL tries to use to give existing rates an evergreen effect upon termination, such that they can never be changed. But FPL makes its argument without providing the Court an opportunity to consider the language of the agreement, Verizon's contrary construction of it, or the *Pole Attachment Order*'s discussion of such clauses. This factual dispute thus precludes dismissal.

Second, the FCC indicated that a rate in an agreement will not likely be considered just and reasonable if it was agreed to by a telephone company that lacked bargaining power, 26 FCC Rcd at 5327 (¶ 199), something that exists where the telephone company owns about 25-30 percent of the poles in the parties' overlapping service areas, and the electric company owns 65-70 percent, *id.* at 5329 (¶ 206); *see also id.* at 5329 (¶ 206 n.618) (illustrating the effect on

bargaining power when "the electric company own[s] 90% of poles in an area and the incumbent LEC own[s] 10%."). That also is the case here, where Verizon owns just 10 percent and FPL "owns nearly 90 percent of the poles that FPL and Verizon share." Counterclaim ¶ 14. FPL thus "has extraordinary leverage to extract unjust and unreasonable rates from Verizon," *id.*, which must be replaced with just and reasonable rates that comply with federal law.

Third, the FCC held that a rate will not be just and reasonable if it is not comparable to the rate that the electric company charges comparable cable or competitive telephone companies. *Id.* at 5336 (¶ 217). That is most certainly the situation here, where Verizon has alleged that it is entitled to a rate that is comparable to that charged its competitors – and yet FPL has insisted on rates that are nearly four times the rate that FPL charges Verizon's competitors. *See, e.g.*, Counterclaim ¶¶ 25 (alleging that Verizon is entitled to a rate comparable to that charged comparable cable and competitive telephone companies), 27, 28 (alleging that FPL charged Verizon at a $35.46 per pole rate for 2011 rent, and at a $36.22 per pole rate for 2012 rent, when it could charge Verizon's competitors just $8.52). This rate disparity is so significant that FPL itself concedes that the Court may conclude that the parties' agreement does not produce a rate that is "just and reasonable." FPL Br. at 4.

Given these factual issues, dismissal of Verizon's Counterclaim would be improper. Any resolution of this dispute requires the Court to consider the law and apply it to the parties' agreement and practice. *See, e.g.*, *Local No. 234 v. Henley & Beckwith, Inc.*, 66 So.2d 818, 821 (Fla. 1953); *Harris v. Gonzalez*, 789 So.2d 405, 409 (Fla. 4th DCA 2001) (recognizing role of statutory and regulatory standards in contract cases). Here, the law will establish – when applied to the facts – that Verizon fully compensated FPL under the *Pole Attachment Order* when it paid a rental rate of $8.52 as of the *Order*'s effective date.

C. There Are No Mandatory Administrative Remedies That Verizon Must Exhaust.

Finally, FPL argues that Verizon's request for declaratory relief is premature because Verizon has not exhausted its administrative remedies. FPL Br. at 9-11. There are, however, no administrative remedies that Verizon must exhaust prior to seeking relief from this Court. The FCC explicitly stated that it was not requiring parties to raise their rate claims at the FCC in the first instance. *See Pole Attachment Order*, 26 FCC Rcd at 5338 (¶ 220). Indeed, the FCC expressed an intention that private negotiations and state proceedings would eliminate the need for the FCC to consider rate disputes, and that electric companies would abide by the guidance in the *Order*. *See id.* at 5337 (¶ 218) (providing guidance to "enable better informed pole attachment negotiations between incumbent LECs and electric utilities" and to "reduce the number of disputes for which Commission resolution is required"). It would thus be completely contrary to the FCC's *Pole Attachment Order* to accept FPL's argument – which would require that every pole attachment rate dispute be presented to the FCC.

Moreover, as FPL well knows, Verizon was pursuing its non-mandatory options before the FCC when FPL abruptly filed its Complaint. FPL, accordingly, should not now be heard to complain that Verizon did not complete the process in time to file a Counterclaim.

IV. CONCLUSION

For the foregoing reasons, the Court should deny FPL's Motion to Dismiss.

BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP

/s/ Lewis F. Collins, Jr.

LEWIS F. COLLINS, JR., ESQ.
Florida Bar No.: 267422
777 S. Harbour Island Boulevard, Suite 500
Tampa, Florida 33602
Tel: (813) 281-1900
lcollins@butlerpappas.com
eservice@butlerpappas.com
Attorneys for Defendant, Verizon Florida LLC

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to:

Alvin B. Davis, Esq.
Squire & Sanders, LLP
200 South Biscayne Boulevard, Suite 4000
Miami, FL 33131
alvin.davis@squiresanders.com
Attorney for Florida Power & Light Co.

via email on January 7, 2014.

/s/ Lewis F. Collins, Jr.

LEWIS F. COLLINS, JR., ESQ.

Exhibit 20

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FLORIDA POWER & LIGHT CO.,

Plaintiff,

Complex Business Litigation Section (40)

Case No. 13-14808

v.

VERIZON FLORIDA LLC,

Defendant.

_____/

FLORIDA POWER & LIGHT COMPANY'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS VERIZON FLORIDA LLC'S COUNTERCLAIM

INTRODUCTION

Let's be clear on three fundamental points:

1. **This Court Cannot Re-write the Thirty-Eight Old Pole Attachment Agreement**

The law in this jurisdiction is crystal clear: courts are not empowered to simply re-write contracts. Understandably, Verizon Florida LLC ("Verizon") has cited no case law to the contrary. There is none. Verizon's half-hearted citation to cases dealing with contracts contrary to public policy has no application here and Verizon suggests none.

2. **The Pole Attachment Order Does Not Authorize This Court to Impose a New Contract Rate**

On this point, Verizon has abandoned any pretense of accuracy. It recites that "This Court Has Authority To Interpret And Apply The *Pole Attachment Order* To The Facts Of This Case." Verizon Opp. to Mot. to Dismiss Countercl., at p. 4. It cites to paragraphs 218 and 220 of

the Pole Attachment Order, without providing the language of the Order itself.[1] With good reason. Paragraph 218 says nothing about what entities may "apply" the Order. Paragraph 220, on the other hand, is quite explicit. It provides that parties may pursue complaints before **state commissions** rather than before the Federal Communications Commission ("FCC"). Nowhere in the entire Order is there any suggestion, let alone authorization, for parties to seek application of the Order's guidelines before a state court. Verizon seeks to deliberately lead this Court into error.

3. Florida Power & Light Company ("FPL") Never Stated That This Court Could or Should Address the Pole Attachment Order

Verizon has not limited its gift for misstating the record to the Pole Attachment Order. It advises the Court that FPL is taking inconsistent positions since, according to Verizon, FPL previously "assured the Court that the Court had the authority and ability to decide all issues in this case – including those raised by the *Pole Attachment Order*." *See* Verizon Opp. to Mot. to Dismiss Countercl., at p. 4 (citing to page 1 of FPL's Opp. to Verizon's Mot. to Dismiss Compl.). We invite the Court to review that page. FPL never took that position. Rather, consistent with its position throughout these proceedings, FPL advised the Court that the Pole Attachment Order had no relevance to these proceedings. Accordingly, the Complaint never relied in any manner on the Pole Attachment Order.

Verizon's unfortunate word games do nothing to advance the resolution of the issues before the Court. Not only are they regrettable in themselves, but they necessarily inspire fatal doubt on the validity of Verizon's entire argument in support of its obviously flawed Counterclaim. Built on this troublesome foundation, it cannot survive FPL's Motion to Dismiss.

---

[1] FPL attaches as Exhibit "1", a compilation of the various paragraphs of the FCC's Pole Attachment Order cited by the parties. The entire Order totals 144 pages. FPL will provide a copy of the entire Order if the Court would find that helpful. The order can also be found under *In the Matter of Implementation of Section 224 of the Act*, 26 FCC Rcd 5240 (2011) ("Pole Attachment Order or Order").

The Court need not reach the issue of the availability of an administrative remedy at the FCC in order to grant FPL's motion. It is worth noting that Verizon agrees that the remedy exists and, in fact, trumpets the expertise of that agency as to the concept of "just and reasonable" rates. Verizon has never pursued that obvious option and, perhaps more tellingly, has never deigned to explain that failure.

ARGUMENT

A complaint, or here, a counterclaim, is properly dismissed where it appears from a reading of the counterclaim that the counter-plaintiff would not be entitled to relief even if it proved each and every allegation. *Thompkins v. Metropolitan Dade Cnty.*, 345 So. 2d 1090, 1091 (Fla. 3d DCA 1977). For purposes of evaluating a motion to dismiss, the allegations of the counterclaim are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the counter-plaintiff. *Ralph v. City of Daytona Beach*, 471 So. 2d 1, 2 (Fla. 1983).

Verizon has alleged no set of facts and demonstrated no reasonable inference that might, even if proved, entitle it to the extraordinary relief it seeks in the form of a declaratory judgment. Verizon points to no factual allegation or legal authority that overcomes the Court's unequivocal obligation to enforce the pole attachment rate expressed in the contract. Nor does Verizon allege the existence of contractual ambiguities or the need for contractual interpretation. It does, however, acknowledge the existence of an available administrative remedy. Thus, even if Verizon proved each and every allegation in its Counterclaim, the declaratory judgment claim must be dismissed as a matter of law.

I. Verizon does not Dispute that the Court Must Enforce the Contract Rate

A. *Verizon's Declaratory Judgment Would Serve No Useful Purpose*

Verizon's Counterclaim for declaratory judgment invites this Court to establish that $8.52 is a "just and reasonable" pole attachment rate. It remains undisputed, however, that $8.52 is not the contractual rate Verizon agreed to pay in exchange for the right to attach to FPL's poles. Countercl. ¶¶ 20, 22.[2] It is, in fact, less than one fourth of the rate calculated pursuant to the parties' Joint Use Agreement. Countercl. ¶¶ 20, 22. This fact alone is dispositive. All other allegations contained in Verizon's Counterclaim are wholly irrelevant. The Court must as a matter of law enforce the contract rate and only the contract rate. *Stack v. State Farm Mut. Auto. Ins. Co.*, 507 So. 2d 617, 619 (Fla. 3d DCA 1987). Verizon never disputes this bedrock contract principle.

Having established that the Court must enforce the contract as written, it logically follows that a declaration that $8.52 per pole – or any other rate to which the parties did not agree – is "just and reasonable" serves no useful purpose. It amounts to nothing more than an impermissible advisory opinion that strays well beyond the Court's constitutional powers. *Coalition for Adequacy and Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400, 404 (Fla. 1996) (a bona fide declaratory judgment must do more than give legal advice "in order to maintain the status of the proceedings as being judicial in nature and therefore within the constitutional powers of the courts."); *see B.J. Mountain v. Nat'l Airlines, Inc.*, 75 So. 2d 574 (Fla. 1954) ("[T]he declaratory decree statute cannot be used in a case wherein the decree prayed for would serve no useful purpose"); *see also Ready v. Safeway Rock Co.*, 24 So. 2d 808, 811 (Fla. 1946)

---

[2] Oddly, Verizon criticizes FPL for not attaching the Joint Use Agreement to FPL's complaint. FPL explained that it did not attach the contract because it is confidential. *See* Compl. ¶ 1. The point of this criticism, if there was one, is substantially diminished by the fact that Verizon noted that the Joint Use Agreement was not attached to its Counterclaim either because it "contain[s] confidential information." Countercl. ¶ 13.

("The differences[sic] between a declaratory judgment and a purely advisory opinion is that the former is a binding adjudication of the rights of the parties, even when unaccompanied by the issuance of process to enforce such rights."). Thus, even assuming, as is required for these purposes, that Verizon can demonstrate the accuracy of its unofficial calculations, it is not entitled to the requested declaration, and its Counterclaim must be dismissed.

B. *The Pole Attachment Order Does Not Designate State Courts as Alternate Tribunals*

Verizon's representation that the Pole Attachment Order provided detailed guidance to ensure that ILECs' rights are recognized in "state proceedings,"[3] is intentionally sly. To support its Counterclaim, Verizon clearly implies that the Pole Attachment Order authorizes state court review of pole attachment rate disputes. *See* Verizon Opp. to Mot. to Dismiss Countercl., at p. 8. It does no such thing. A cursory review of paragraph 220 of the Pole Attachment Order – the sole support summarized, but not quoted, by Verizon – reveals that Verizon's assertion is entirely fictional. That paragraph states, in its entirety:

> 220. *Other Fora for Dispute Resolution.* Some electric utilities and other commenters have observed that certain state **commissions** might provide a forum for resolving incumbent LEC-electric utility pole attachment disputes. We do not preclude parties from electing to pursue complaints before state **commissions,** rather than before the Commission. Section 224 ensures incumbent LECs of appropriate Commission oversight of their pole attachments, however, and we therefore do not require incumbent LECs to pursue relief in state fora before filing a complaint with the Commission.

(bold added). The FCC's designation of alternate fora does not include state courts. Rather, it is limited to those certain state commissions that have chosen to assume jurisdiction over utility pole attachment disputes of this nature.[4] Florida is not one of those states. *See* Exhibit "2".[5]

---

[3] Verizon Opp. to Mot. to Dismiss Countercl. at pp. 4 and 8.

[4] State utility commissions customarily oversee and regulate the activities of utilities within their jurisdiction. State courts do not.

Verizon's counsel emphatically acknowledged this limited designation of alternate fora in great detail during the September 26, 2013 oral argument. In short, nothing in the Pole Attachment Order grants the Court license to rewrite the parties' joint use agreement.

Nor does the FCC provide the "detailed guidance" upon which Verizon wishfully relies. In the Pole Attachment Order, the FCC expressly declined to establish comprehensive rules for evaluating pole attachment rate complaints. Pole Attachment Order ¶ 214. The FCC instead set forth generic guidelines, which, it unambiguously emphasized, would be applied on a case-by-case basis. Pole Attachment Order ¶ 214. To date, not even the FCC has had occasion to interpret its own order.

II. Verizon Acknowledges the Availability of an Administrative Remedy

Except in the most extraordinary cases, a plaintiff must exhaust its administrative remedies before a court may assume jurisdiction to render declaratory relief. *Sheldon v. Powell*, 128 So. 2d 258, 262 (Fla. 1930); *Fla. Pub. Emps. Council 79 v. Dep't of Children and Families*, 745 So. 2d 487, 491 (Fla. 1st DCA 1999); *State, Dep't of Envtl. Regulation v. Falls Chase Special Taxing Dist.*, 424 So.2d 787, 794 (Fla. 1st DCA 1982). Verizon does not dispute this doctrine. To establish extraordinary circumstances, the declaratory plaintiff must demonstrate that no adequate administrative remedy remains available or that seeking administrative relief would be futile. *Fla. Pub. Emps. Council 79*, 745 So. 2d at 491. Verizon did not (and cannot) argue, let alone demonstrate, that no administrative remedy is available or that seeking administrative redress would be futile.

To the contrary, time and again, Verizon confirms that the Pole Attachment Order established a process to address complaints filed by carriers such as Verizon which claim the

---

[5] Exhibit "2" is the FCC's Public Notice, DA 10-893 (rel. May 19, 2010) (titled "States That Have Certified That They Regulate Pole Attachments") (Florida not listed).

inability to obtain just and reasonable pole attachment rates. *See e.g.*, Verizon's Mot. to Dismiss Compl. at pp. 1-2 and 4-6.[6] Since at least June 2013, Verizon has repeatedly and ardently argued that the issues it disputes "can best be resolved by the FCC[] . . . ." Verizon's Mot. to Dismiss Compl. at p. 1-2 and 9-13; Verizon Opp. to Mot. to Dismiss Countercl. at pp. 1, 5; Countercl. at pp. 11-12. Calculatedly eschewing a manifestly available administrative remedy does not render it futile.

Verizon does not argue that the FCC's remedy is unavailable or inadequate. Verizon instead argues that the Court should entertain its declaratory judgment claim because filing an FCC complaint is "not mandatory." According to Verizon, the FCC does not require carriers such as Verizon to file complaints for rate relief because, in short, parties could privately negotiate a settlement or seek relief in state proceedings. While this may be true in part – there are no state proceedings available in Florida – it has no relevance to this issue. Neither argument salvages Verizon's futile claim. As a matter of law, an administrative remedy need only be *available*, not mandatory. *City of Gainesville v. Republic Inv. Corp.*, 480 So. 2d 1344, 1348 (Fla. 1st DCA 1985) (reversing trial court's declaratory decree on ground that administrative remedies should be exhausted, even if alternate remedies are available). On this legal basis alone, the Court must dismiss Verizon's declaratory judgment claim.

As a practical matter, too, Verizon's defense is quite curious. Parties always are free to negotiate privately in lieu of seeking relief from a tribunal. This truism does not render an administrative remedy unavailable. Indeed, Verizon has acknowledged that FPL and Verizon pursued private negotiations before this action commenced. *See, e.g.*, Countercl. ¶¶ 16, 18, 19, 20. The fact that Verizon filed a Counterclaim conclusively demonstrates that those negotiations

[6] Citations to Verizon's Motion to Dismiss FPL's Complaint are to the Memorandum filed by Verizon on July 29, 2013.

failed to resolve the various disputes. Ironically – not to say absurdly - Verizon points to the availability of private negotiations as a basis to urge the Court to entertain the counterclaim it instituted against FPL.

Not all pole attachment rate disputes must result in an FCC complaint. Here, however, an FCC complaint is Verizon's sole legitimate avenue for redress, if it believes the contract rate is unfair and unreasonable: private negotiations failed, the Florida Public Service Commission has not chosen to assert jurisdiction over pole attachment rate disputes, and this Court is obliged to enforce the contract rate.

III. FPL does not Seek the Court's Application of the Pole Attachment Order to the Facts of this Case

A. *FPL's Motion To Dismiss does not Require the Court To Apply the Pole Attachment Order*

Contrary to Verizon's assertion, FPL's Motion to Dismiss does not ask the Court to apply the FCC's Pole Attachment Order to reach a factual determination that differs from Verizon's allegations. In fact, FPL does not ask this Court to make any determination of fact whatsoever. For purposes of this motion, FPL assumes, as it must, that Verizon's factual allegations are true. Those facts are wholly irrelevant. As explained above, even if the Court were inclined to expend resources applying the Pole Attachment Order to the facts of this case, a factual determination regarding reasonableness of the joint use rate is legally insignificant.

B. *FPL's Breach of Contract Claim does not Involve Application of the Pole Attachment Order*

Verizon also claims that fact-specific questions about whether and when Verizon is entitled to rate relief[7] "are before this Court" because the Court will decide FPL's breach of

[7] By its own admission, Verizon recognizes that it was not entitled to unilaterally calculate a lower rate, and certainly had no right to stop paying the contract rate.

contract claim. Absolutely nothing about the Court's decision to preside over FPL's breach of contract complaint remotely implicates an FCC-like, full-scale rate case.[8]

FPL's Complaint asks the Court, plainly and simply, to enforce the express terms of the Joint Use Agreement. Verizon admits that it entered the Joint Use Agreement in 1975, amended in 1978, and it acknowledges having facilities attached to FPL's poles during 2011 and 2012. Countercl. ¶¶ 13, 20, 22 and 23; Verizon Answer ¶ 23. Verizon does not allege the existence of any ambiguities. Nor does it allege fraudulent inducement. Thus, as prescribed by Florida law, the Court's inquiry consists of (i) whether Verizon's failure to pay the 2011 and 2012 invoices constitutes a breach of that Joint Use Agreement, and (ii) the amount of FPL's damages. *Friedman v. New York Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008).

The scope of the Court's inquiry will not include whether the rate formula to which the parties freely agreed is reasonable. The Court will not consider the relative bargaining positions between Verizon and FPL. Nor will the Court consider the rates that other entities agreed to pay. Whether Verizon is comparably situated to other entities, too, lies outside the relevant field of inquiry. Simply put, FPL's breach of contract claim differs vastly, in nature, scope and magnitude, from a pole attachment rate complaint, where all of these factors are considered.[9]

Verizon conveniently ignores the one area where the Court's breach of contract inquiry aligns with the FCC Pole Attachment Order: deference to the agreement freely negotiated by the

---

[8] Verizon cites two cases for the proposition that courts must "recogniz[e] the role of statutory and regulatory standards in contract cases." *Local No. 234 v. Henley & Beckwith, Inc.*, 66 So. 2d 818, 821 (Fla. 1953); *Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th DCA 2001). Those cases establish only that a contract can be contrary to public policy and unenforceable. Neither case holds that a court can rewrite a contract into which parties freely entered. Moreover, Verizon's counterclaim does not intimate that the contract is unenforceable. To the contrary, Verizon intends to keep its facilities on FPL's poles and continue to reap the benefits of the contract.

[9] FPL's Motion to Dismiss is not "at odds" with the position it took on Verizon's Earlier Motion To Dismiss. According to Verizon, FPL previously assured the Court that [the Court] had the authority and ability to decide all issues in this case – including those raised by the Pole Attachment Order. (Verizon Opp. to Mot. to Dismiss Countercl. at p. 4, citing FPL's Opp. to Mot. to Dismiss Compl. at 1 (Aug. 13, 2013)). FPL never argued that the Court should decide those issues. The page cited by Verizon makes no such representation. Rather, FPL explained the Court would have no occasion to apply the Pole Attachment Order to the limited issues involved in FPL's simple and straight forward breach of contract claim.

parties. Under Florida law, clear and unambiguous contracts should be construed as written, and the court can give them no other meaning. *Medical Center Health Plan v. Brick*, 572 So. 2d 548, 551 (Fla. 1st DCA 1990). The Court is bound to enforce the terms of a contract fully and properly negotiated thirty-eight years ago. *Bayshore Royal Co. v. Doran Jason Co. of Tampa, Inc.*, 480 So. 2d 651, 653 (Fla. 2d DCA 1985). The Pole Attachment Order similarly pays respect to existing contracts. The FCC distinguishes between "existing" and "new" agreements, noting that "long-standing agreements," such as the four-decades-old contract between FPL and Verizon, generally consist of a negotiated resolution between relatively equal parties. Pole Attachment Order ¶ 216. The FCC thus expressed understandable skepticism about revisiting the terms of such agreements and indicated that such agreements are unlikely to be deemed unreasonable. Pole Attachment Order ¶ 216.

CONCLUSION

Verizon fails to cite a single factual allegation or point to any law that authorizes this Court to rewrite a contract to which two sophisticated parties freely agreed and have operated under for almost 40 years. Simply put, the Court must enforce and Verizon must pay the rate set forth in the parties' Joint Use Agreement. If Verizon believes that rate to be unjust and unreasonable, it has the right to file a complaint with the FCC. It has not done so. Verizon's Counterclaim must be dismissed.

SQUIRE SANDERS (US) LLP
Suite 4100
200 South Biscayne Boulevard
Miami, Florida 33131-2398
Telephone: 305-577-2835
Fax: 305-577-7001

By: *s/ Alvin B. Davis*
Alvin B. Davis
Florida Bar No. 218073
alvin.davis@squiresanders.com

Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408
Maria Moncada, Esq.
Florida Bar No. 773301
Telephone No. 561-304-5795
Maria.moncada@fpl.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished via e-mail to Lewis F. Collins, Jr., (lcollins@butlerpappas.com), Butler Pappas Weihmuller Katz Craig, LLP, Suite 500, 777 S. Harbour Island Boulevard, Tampa, Florida 33602 and Christopher Huther (chuther@wileyrein.com), Wiley Rein LLP, 1776 K. Street NW, Washington, D.C. 20006, on this 17th day of January 2014.

s/ Alvin B. Davis
Alvin B. Davis

Exhibit 21

REDACTED - FOR PUBLIC INSPECTION

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FLORIDA POWER & LIGHT CO.

Plaintiffs,

vs.

VERIZON FLORIDA, LLC

Defendants

_____/

Complex Business Litigation Division
Case No.13-14808 CA-40

ORDER ON MOTION TO DISMISS COUNTERCLAIM

THIS MATTER came before the Court on FPL'S Motion to Dismiss the Counterclaim, and the Court having reviewed the file, the motion, memoranda, and being otherwise fully advised in the premises, it is

ORDERED and **ADJUDGED** the motion is **GRANTED**. Counter-plaintiff fails to state a cause of action for Declaratory Relief and has failed to exhaust its administrative remedies[1] via a determination by the FCC as to whether the contract rate is unfair and unreasonable and as such, the counterclaim on these grounds is not ripe.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 01/22/14.

JOHN W. THORNTON
CIRCUIT COURT JUDGE

No Further Judicial Action Required on THIS MOTION

[1] *See City of Gainesville v. Republic Inc. Corp.*, 480 So. 2d 1344, 1388 (Fla. 1st DCA 1985).

CLERK TO RECLOSE CASE IF POST JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed and stamped original Order sent to court file by Judge Thornton's staff.

cc: Counsel / Parties of record
adavis@ssd.com;lcollins@butlerpappas.com;wschoel@butlerpappas.com