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CONFIDENTIALITY REQUEST

October 22, 2021

BY HAND

Marlene H. Dortch, Secretary
Federal Communications Commission
9050 Junction Drive
Annapolis Junction, MD 20701

Re: *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*,
Proceeding Number 20-276, Bureau ID Number EB-20-MD-003

Dear Ms. Dortch:

On behalf of BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T"), enclosed for filing is the confidential version of AT&T's Reply in Further Support of the Application for Review of the August 21, 2021 order entered in the above-referenced pole attachment complaint proceedings by AT&T against Duke Energy Florida, LLC ("Duke Florida"). The public version of the Reply is being filed electronically via the Commission's Electronic Comment Filing System, as required by Section 1.734(b) of the Commission's rules, 47 C.F.R. § 1.734(b).

Pursuant to Sections 0.459(a) and 1.731(a) of the Commission's rules,¹ AT&T requests confidential treatment of certain information concerning pole attachment rental rates, rental amounts, and rate calculation inputs, including information the Enforcement Bureau treated as confidential in the order under review.² This information is marked with a red box in the Reply (the "Marked AT&T Confidential Information").³ AT&T also requests confidential treatment of additional information in the Reply that the Enforcement Bureau and/or Duke Florida designated as confidential in filings in the above-referenced proceedings (the "Additional Marked Information").⁴ Although the Additional Marked Information is not AT&T's confidential information, AT&T requests that it be maintained in confidence in accordance with its treatment in the prior pleadings.

The Marked AT&T Confidential Information should be withheld from public inspection under Subsection 0.457(d) of the Rules and FOIA Exemption 4, which protect "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from public inspection.⁵ Where information "relates to business or trade, it is 'commercial' as that

¹ 47 C.F.R. §§ 0.459(a), 1.731(a).

² See Memorandum Opinion and Order, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (EB Aug. 27, 2021).

³ See Reply at 5.

⁴ See *id.* at 1, 3, 4, 5.

⁵ 5 U.S.C. § 552(b)(4); 47 C.F.R. 0.457(d).

term is used in Exemption 4.”⁶ Recently, the Supreme Court held Exception 4 “[a]t least” applies to “commercial or financial information [that] is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy,” although the Court did not “reach the issue of whether government assurances of privacy were necessary.”⁷ The Marked AT&T Confidential Information falls well within this standard.⁸ It is confidential commercial information that AT&T treats as confidential and it is being submitted with the understanding that it, like similar information submitted in previous complaint proceedings, will be provided confidential treatment.

In accordance with Section 0.459, this request is supported by the following:

- (1) Identification of the specific information for which confidential treatment is sought: Confidential treatment is sought for information concerning pole attachment rental rates, rental amounts, and rate calculation inputs, including information that, if paired with public information, would disclose the rates. The specific information is marked with red boxes in the Reply and is referred to in this request as the “Marked AT&T Confidential Information.”
- (2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission: The Marked AT&T Confidential Information is being submitted in connection with AT&T’s Reply in the above-referenced Pole Attachment Complaint proceedings, in which AT&T seeks just and reasonable terms, conditions, and practices for use of Duke Florida’s utility poles.
- (3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged: The Marked AT&T Confidential information is commercial information protected by Section 0.457(d). The Commission has broadly defined commercial information, stating that “[c]ommercial’ is broader than information regarding basic commercial operations, such as sales and profits; it includes information about work performed for the purpose of conducting a business’s commercial operations.”⁹ The Marked AT&T Confidential Information falls within this definition because it concerns rates and rental amounts for AT&T’s use of Duke Florida’s poles. The Commission shielded much of the Marked AT&T Confidential Information in the orders under review and has provided confidential treatment to information similar to all of the Marked AT&T Confidential Information in other cases, recognizing that the rates, terms, and conditions

⁶ *In the Matter of Michael J. Marcus on Request for Inspection of Records*, 27 FCC Rcd 11558, 11562 (¶ 10) (2012) (citing *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) and *Baker & Hostetler LLP v. U.S. Dep’t of Commerce*, 473 F.3d 312, 319-20 (D.C. Cir. 2006)).

⁷ Order on Reconsideration, *In the Matter of Am. Broadband & Telecommunications Co.*, 35 FCC Rcd 3672, 3764-65 (¶ 7 & n.22) (2020) (“*Am. Broadband Order*”) (quoting *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363, 2366 (2019)).

⁸ As the Commission recently recognized, the Supreme Court overruled longstanding lower court precedent requiring a showing of substantial competitive harm to qualify for FOIA Exception 4. See *id.* (citing *Food Mktg. Inst.*, 139 S. Ct. at 2364-65). Section 0.459(b) of the Commission’s rules, however, still requires a showing of substantial competitive harm. While the showing cannot be required to qualify for confidential treatment, this request nonetheless addresses all requirements of Section 0.459(b).

⁹ Memorandum Opinion and Order, *Southern Company Request for Waiver of Section 90.629 of the Commission’s Rules*, 14 FCC Rcd 1851, 1860 (1998) (citing *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)).

of an attacher's agreements in a pole attachment proceeding constitute "sensitive commercial information" that, if released, would competitively disadvantage that attacher.¹⁰

- (4) Explanation of the degree to which the information concerns a service that is subject to competition: The Marked AT&T Confidential Information relates to the rates, terms, and conditions for use of Duke Florida's poles to provide telecommunications and other services in a highly competitive market.
- (5) Explanation of how disclosure of the information could result in substantial competitive harm: AT&T could suffer substantial competitive harm if the Marked AT&T Confidential Information is disclosed to competitors and electric utilities that could use the information to AT&T's disadvantage.
- (6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure: AT&T does not release the Marked AT&T Confidential Information to the public in the normal course of business and does not widely distribute the information internally.
- (7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties: AT&T has not released the Marked AT&T Confidential Information to the public and seeks to maintain the confidentiality of the Marked AT&T Confidential Information and similar information exchanged with electric utilities.
- (8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure: AT&T respectfully requests that the Commission provide confidential treatment to the Marked AT&T Confidential Information and withhold such information from public inspection indefinitely. AT&T would not, in the normal course of business, provide the Marked AT&T Confidential Information to the public at any time.
- (9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted: Public disclosure of the Marked AT&T Confidential Information would not further the public interest. The Commission has authority to release "confidential information when, after balancing the factors favoring disclosure and non-disclosure, [the Commission] find[s] it in the public interest to do so,"¹¹ but this balance strongly favors non-disclosure here. Release of the information "would not serve the FOIA's core purpose," which is "to allow the public to learn about the operations of the government."¹² Instead, disclosure would "contribute primarily to an understanding of the operations and activities of [private

¹⁰ *Marcus Cable Assocs. v. Tex. Util. Elec. Co.*, 12 FCC Rcd 10362 (¶¶ 36-37) (1997); see also *Verizon Md. LLC v. The Potomac Edison Co.*, 35 FCC Rcd 13607 (¶¶ 12, 13, 20, 33) (2020); *BellSouth Telecommunications, LLC d/b/a AT&T Fla. v. Fla. Power & Light Co.*, 35 FCC Rcd 5321, 5327 (¶ 13) (EB 2020).

¹¹ See *Am. Broadband Order*, 35 FCC Rcd at 3764 (¶ 6).

¹² *In the Matter of Nat'l Ass'n of Broadcasters U.S. Elecs., Inc.*, 24 FCC Rcd 12320, 12326-27 (¶¶ 13-15) (2009) (emphasis in original).

parties.”¹³ In addition, because “competitive harms [may] arise from the disclosure to a company’s competitors of proprietary information,” the information should be maintained in confidence.¹⁴

For the foregoing reasons, AT&T requests that the Commission give confidential treatment to the Marked AT&T Confidential Information and withhold it from public inspection.

Best regards,



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d/b/a AT&T Florida

¹³ *Id.* at 12327 (¶ 15) (emphasis added).

¹⁴ *Am. Broadband Order*, 35 FCC Rcd at 3766 (¶ 11).