Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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| VERIZON FLORIDA LLC,<br><br>Complainant,<br><br>v.<br><br>FLORIDA POWER AND LIGHT COMPANY,<br><br>Respondent. | * | File No.: EB-14-MD-003 |



**RESPONDENT FLORIDA POWER AND LIGHT COMPANY'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO ESTABLISH CASE SCHEDULE**

Respondent Florida Power and Light Company ("FPL"), by and through its attorneys, respectfully submits this Reply in Support of Motion to Establish Case Schedule. In support hereof, FPL states as follows.

1. FPL filed a Motion for Leave and Motion to Establish Case Schedule on December 4, 2014. Verizon Florida LLC ("Verizon") filed its Opposition to FPL's Motion for Leave to File on December 11, 2014 (the "Opposition").

2. FPL's Motion for Leave requested authorization for FPL to file a Motion to Establish Case Schedule which, in turn, requested that the Bureau issue an order: (i) confirming that it will issue a decision on the merits in this matter on or before February 2, 2015 or, in the alternative, staying this matter or dismissing it without prejudice so that the parties can pursue an orderly resolution to their state law disputes before the Circuit Court for Miami-Dade, Florida (the "Florida Court"); and, (ii) declaring that it is an unjust and unreasonable term and condition of attachment for Verizon Florida LLC ("Verizon") not to remit to FPL within ten (10) days of

the FCC's order all fees owed to date under the parties' joint use agreement as invoiced by FPL pursuant to the terms of that agreement consistent with the FCC's previously announced position, subject to any adjustment required by any order deciding the merits of this proceeding or the Florida Court proceeding.

3. Verizon's Opposition purports to respond not to FPL's Motion to Establish Case Schedule but to FPL's Motion for Leave to File.[1] In fact, the Opposition addresses the substance of FPL's Motion to Establish Case Schedule and indeed opposes a prompt resolution of this matter. The Opposition asserts arguments regarding alleged actions taken by the parties and Verizon's spin on the timing of the processes before the Florida Court and this Commission. FPL submits this Reply to dispel three myths perpetuated by Verizon in its Opposition.

4. *Myth Number One:* "Verizon continues to support the expeditious resolution of this matter . . . ."[2] Verizon in fact has endeavored to delay resolution of the parties' dispute at every turn and in every way. Verizon did not even seek to involve the Commission in the parties' dispute until it filed its Complaint in this proceeding on January 31, 2014,[3] approximately two and one-half years after the parties commenced efforts to negotiate a resolution and nearly one year after FPL was forced to file suit against Verizon in the Florida Court on April 23, 2013 and only after the state court essentially required Verizon to proceed before the FCC.

5. That, of course, is why Verizon has no compunction about saying only two paragraphs later in its Opposition: "Nonetheless, the Commission should take the time it requires to reach the right result."[4] Adding irony to injury, Verizon supports its Opposition with

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[1] Opposition at 1.
[2] *Id.* at 2.
[3] Pole Attachment Complaint, File No. EB-14-MD-003 (filed January 31, 2014) ("FCC Complaint").
[4] Opposition at 3.

the unintentionally revealing conclusion that FPL has "already fully briefed the issues . . . eight months ago." Verizon knows full well the challenges the Enforcement Bureau faces in working through the Commission's docket and processes to issue a decision in this matter in the reasonably foreseeable future. If Verizon sincerely wanted an expeditious resolution of this matter, instead of opposing FPL's motions it would *join in the motions* and argue that the matter has been fully briefed for nearly eight months and is ripe for a decision, one which both parties and the Florida Court await. Instead, Verizon disingenuously asks the Enforcement Bureau to "hurry up, but take your time."[5]

6. *Myth Number Two:* FPL has caused delay by "abandoning the FCC mediation process" and extending an "invitation to engage in futile motions practice."[6] FPL has neither caused delay nor does it desire any delay. First, the FCC mediation process occurred over the period from June 2012 to April 2013. It was only after nearly ten months of efforts at a mediated settlement (largely with lackluster inconsistent participation from Verizon), nearly a year without a current joint use agreement and in the face of Verizon's continued withholding of the majority of the joint use fees owed that FPL filed suit—hardly an "abandonment" of any mediation efforts. Indeed, FPL would not be seeking the relief it presently requests had Verizon not implemented its three part strategy of terminating the joint use agreement, withholding the vast majority of fees owed FPL and putting the parties' path towards resolution in limbo.

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[5] Verizon similarly disingenuously cites to a prior Enforcement Bureau order denying a motion for leave for the proposition that FPL's motion for leave should be denied. Opposition at 1 (citing Letter Ruling dated February 13, 2014 in *Frontier Comm's v. Duke Energy Carolinas, Inc.*, EB-14-MD-001, attached as Exhibit A). The Letter Ruling does not support Verizon's contention. Instead, it denied motion for leave to file a motion to stay a pole attachment proceeding: (1) filed prior to Duke Energy's substantive Response; (2) seeking to stay the proceeding in favor of arbitration and (3) seeking extensions of filing deadlines. The Enforcement Bureau reasoned that a motion to dismiss was unnecessary because the arbitration arguments could be made in Duke's response and that no extensions were warranted. Here, in contrast, as Verizon has admitted, FPL seeks to address an event and attendant repercussions identified as a "**change since FPL filed its Response** [-] the stay entered in the state court litigation." Opposition at 1 (emphasis added).

[6] *Id.* at 3.

7. In addition, acting on FPL's Motion to Establish Case Schedule will do anything but delay this matter. Rather, it will give the parties, the Florida Court and the Enforcement Bureau itself a clear and defined timeframe in which this matter will be resolved. Indeed, adjudicatory bodies do this exact thing all of the time, providing a firm and orderly schedule pursuant to which a matter will be resolved. Verizon itself benefited from the discipline provided by this approach when the impending trial date in its dispute with Tampa Electric Company prompted the parties to reach, upon information and belief, a mutually satisfactory settlement and avert the risks of a trial. *See* Docket of *Tampa Elec. Co vs. Verizon Florida LLC*, Case No. 12-CA-016349 (Hillsborough Fla. Cir. Ct. 2012) (http://www.hillsclerk.com/publicweb/search_court_records.aspx last visited December 29, 2014). The contrasts with the Tampa Electric case, however, are that there Verizon never sought to bring either the case or specific issues to the Commission and Verizon faced a looming trial. Here, on the other hand, Verizon has used unctuous litigation tactics to forestall the Florida Court case indefinitely while arguing to the Enforcement Bureau that there is no need to establish a decision horizon.

8. *Myth Number Three:* The Enforcement Bureau's decision "is critical to all of the issues before the court and . . . will provide needed guidance to the industry on issues of far-reaching importance."[7] Verizon grossly overstates the matter. First, the issues before the Florida Court are quintessential issues of state law breach of contract. The Florida Court can and must decide whether a contract existed, whether it was breached, whether FPL was harmed and whether and how Verizon must remedy the harm. The most the Commission might decide, without running afoul of settled Constitutional, preemption and rulemaking jurisprudence, is what the unit measurement of damages owed by Verizon; *i.e.*, the attachment rate per pole, might

[7] Opposition at 2-3.

be prospectively. Even should the Commission attempt to make law retroactively, again its decision would focus on the unit measurement of damages, while the Florida Court would need to determine every other issue.

9. Finally, Verizon continues to try and paint this matter as bigger than it actually is. It is a contract dispute between two sophisticated parties with sufficient resources to identify and protect their own interests. It is not a national policy-making referendum of general applicability to all joint use parties. As the Commission itself stated: "We therefore decline at this time to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a **case-by-case** basis."[8] The Commission went on to emphasize: "The Commission will review complaints regarding agreements between incumbent LECs and other utilities entered into following the adoption of this Order based on the totality of those agreements."[9] This then is a fact-specific contract dispute with specific facts applicable to specific parties and a specific set of circumstances. As much as Verizon would like to permanently derail this proceeding into one where both the Florida Court and the Enforcement Bureau are immobilized by alleged far-reaching policy implications, the case can and should be resolved as simply and promptly as the case between Verizon and Tampa Electric

[8] *Pole Attachment Order*, ¶ 214 (emphasis added).
[9] *Id.*, ¶ 216.

WHEREFORE, FPL respectfully requests that the Bureau expeditiously grant its Motion for Leave to File Motion to Establish Case Schedule and address the substantive issues of how to resolve this matter expeditiously.

Respectfully submitted,

CZ/RJG

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## CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2014, I caused a copy of the foregoing Respondent's Reply in Support of Motion for Leave to File to be served on the following by hand delivery, U.S. mail or electronic mail (as indicated):

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Exhibit A

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February 13, 2014

Copies sent by U.S. Mail and E-mail

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| Frontier Communications of the Carolinas LLC, | ) | |
| Complainant, | ) | |
| v. | ) | File No. EB-14-MD-001 |
| Duke Energy Carolinas, Inc., | ) | |
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Counsel for Respondent

Dear Counsel:

On February 7, 2014, Duke Energy Carolinas, LLC (Duke), filed a Motion for Authorization to file a Motion to Stay Pole Attachment Complaint Proceeding Pending Arbitration (Motion for Authorization). The Motion for Authorization requests that (1) the Commission permit Duke to file a Motion to Stay the instant pole attachment proceeding pending the completion of arbitration; (2) if the Commission denies the Motion for Authorization, the Commission extend the date by which Duke must file its Response to Frontier's pole attachment complaint for a period of 21 days from the date of the denial and extend the date by which Frontier must file its Reply for a period of 20 days thereafter; and (3) the Commission deem the parties Response and Reply deadlines to be "service" deadlines, with filing to be perfected as soon thereafter as practicable. On February 12, 2014, Frontier Communications of the Carolinas, LLC (Frontier) filed a Response to the Motion for Authorization, which opposed Duke's first and second requests but not its third request (pertaining to "service" deadlines).

Having reviewed and considered Duke's Motion for Authorization and Frontier's Response thereto, we deny the Motion. First, we believe separate motions practice about the arbitration clause issue is unnecessary. Duke may advance its arguments regarding the arbitration provisions in the parties' joint use agreements as part of its Response, and Frontier may respond to those arguments in its Reply. *Cf. In the Matter of Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers*, Order on Reconsideration, 16 FCC Rcd 5681, 5696, para. 34 (2001) (finding motions to dismiss in formal complaint proceedings to be "unnecessary" because the "Commission's rules are designed so that a defendant's answer is a comprehensive pleading containing complete factual and legal analysis, including a thorough explanation of every ground for dismissing or denying the complaint"). Second, we see no need to extend the deadlines for Duke's Response or Frontier's Reply. Duke has been afforded 30 days to prepare its Response, as set forth in section 1.1407(a) of the Commission's rules, 47 C.F.R. § 1.1407(a), and it seemingly already has prepared its arbitration clause arguments. *See* Motion for Authorization, Appendix A (Motion to Stay Pole Attachment Complaint Proceeding Pending Arbitration). Finally, Duke has offered no justification for its request that we modify rule 1.1407(a)'s directive that the Respondent in a pole attachment proceeding "shall have 30 days from the date the complaint was filed within which to *file* a response." 47 C.F.R. § 1.1407(a) (emphasis added). If Duke wishes to seek an extension of its Response filing deadline, it must offer a "justification . . . pursuant to § 1.46" of the Commission's rules. *See* 47 C.F.R. § 1.1407(a) (citing 47 C.F.R. § 1.46).

We issue this letter ruling under Sections 4(i), 4(j), and 224 of the Act, 47 U.S.C. §§ 154(i), 154(j), 224, Sections 1.1401-1.1424 of the Commission's rules, 47 C.F.R. §§ 1.1401-1.1424, and the authority delegated in Sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311.

FEDERAL COMMUNICATIONS COMMISSION

Lisa B. Griffin /AJD

Lisa B. Griffin, Deputy Division Chief