Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 19-187 Bureau ID No. EB-19-MD-006

REDACTED

AT&T'S RESPONSES TO FLORIDA POWER AND LIGHT COMPANY'S FIRST SET OF INTERROGATORIES

Complainant BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T") respectfully submits the following responses to the First Set of Interrogatories filed by Defendant Florida Power and Light Company ("FPL").

GENERAL OBJECTIONS

In addition to the specific objections enumerated below, AT&T objects to FPL's Interrogatories as follows:

1. AT&T objects to FPL's instruction to "deliver its responses via electronic mail to FPL's counsel within twenty (20) calendar days" because AT&T's November 13, 2019 response deadline was set by letter order of the Federal Communications Commission's Enforcement Bureau. *See* Letter from L. Griffin to C. Huther and C. Zdebski (Oct. 7, 2019).

2. AT&T objects to the Interrogatories because FPL has not provided any explanation as to why "the information sought in each interrogatory is both necessary to the

resolution of the dispute and not available from any other source." 47 C.F.R. § 1.730(b). The Interrogatories are therefore facially deficient under the Commission's rules.

3. AT&T objects to FPL's definition of "you," "your," and "AT&T" because it is overbroad, unduly expansive and burdensome, and seeks to impose obligations to provide information that has no relevance to the material facts in dispute in this proceeding. FPL's definition of "you," "your," and "AT&T" is not limited to BellSouth Telecommunications, LLC d/b/a AT&T Florida, but broadly includes all "persons working for or on behalf of any" "affiliated company or business" which is not party to this dispute. AT&T will not provide non-confidential and non-privileged information beyond that involving AT&T's joint use relationship with FPL.

4. AT&T objects to FPL's definition of "1975 JUA" because it is vague, ambiguous, and seeks "information that is beyond the scope of permissible inquiry related to the material facts in dispute in the proceeding." *Id.* § 1.730(a). FPL has defined the "1975 JUA" as "the January 1, 1975 Joint Use Agreement entered between FPL and AT&T's predecessor-in-interest, Southern Bell" without reference to any subsequent amendment. A determination of the "just and reasonable" rate for AT&T's use of FPL's poles during the rental years at issue in AT&T's Pole Attachment Complaint, however, must be determined based on the Joint Use Agreement, as amended in 2007 and terminated effective September 2019 ("JUA").

5. AT&T objects to the Interrogatories to the extent that they are "employed for the purpose of delay, harassment, or obtaining information that is beyond the scope of permissible inquiry related to the material facts in dispute in the proceeding." *Id.* § 1.730(a). For example, in a dispute about the "just and reasonable" rate for AT&T's use of FPL's poles beginning with the 2014 rental year, FPL has sought detailed information dating back 44 years, some of which

involves hypothetical scenarios that are premised on FPL's mischaracterization of the JUA. FPL has also asked for extensive information dating back to 2009, including information about "each joint use pole replaced by AT&T" irrespective of whether the pole was jointly used by AT&T and FPL. Such information is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the rental rate that is "just and reasonable" under the Pole Attachment Act for AT&T's use of FPL's poles beginning with the 2014 rental year.

6. AT&T objects to the Interrogatories to the extent that they seek information that is not within AT&T's possession, custody, or control or information that is not within AT&T's present knowledge.

7. AT&T objects to the Interrogatories to the extent that they call for information that is already within FPL's possession, custody, or control.

8. AT&T objects to the Interrogatories to the extent that they seek discovery of legal conclusions, contentions, or information that is publicly available.

9. AT&T objects to the Interrogatories to the extent that they are vague, ambiguous, overbroad, unduly burdensome, oppressive, unreasonably cumulative, or duplicative.

10. AT&T objects to the Interrogatories to the extent that the burden or expense of answering the Interrogatory would outweigh any benefit of the answer.

11. AT&T objects to the Interrogatories to the extent that they seek information that is protected from discovery by the attorney-client privilege, the work-product doctrine, or any other applicable privilege. Nothing contained in AT&T's objections is intended to, or in any way shall be deemed, a waiver of such available privilege or doctrine. AT&T will not provide privileged or otherwise protected information.

12. AT&T objects to the Interrogatories to the extent that they seek disclosure of confidential or proprietary information prior to the parties' execution of a mutually agreeable confidentiality agreement.

13. AT&T objects to the Interrogatories to the extent that they seek to impose requirements or obligations on AT&T in addition to or different from those imposed by the Commission's rules. In responding to the Interrogatories, AT&T will respond as required under the Commission's rules.

14. AT&T reserves the right to change or modify any objection should it become aware of additional facts or circumstances following the service of these objections.

15. The foregoing general objections are hereby incorporated into each specific objection listed below, and each specific objection is made subject to and without waiver of the foregoing general objections.

SPECIFIC OBJECTIONS TO INTERROGATORIES

Interrogatory No. 1:

Identify each instance during the last ten years when AT&T replaced a joint use pole because the pole had suffered damage as a result of AT&T's facilities being attached at either the lowest point on the pole or in the space designated for AT&T under the 1975 JUA.

Objections:

AT&T objects to this Interrogatory to the extent it suggests that AT&T is not competitively disadvantaged by its location on a joint use pole if the damage to its facilities does not also require a replacement of the joint use pole. AT&T also objects to this Interrogatory as vague, ambiguous, overly broad, and unduly burdensome. AT&T further objects to the Interrogatory because it seeks information that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" rate that is required by 47

U.S.C. § 224(b) and the Commission's Orders and regulations for AT&T's use of FPL's poles during the rental years at issue in AT&T's Pole Attachment Complaint.

Response:

Subject to and without waiver of these objections and the foregoing general objections, AT&T states that it cannot generate and does not maintain records in the normal course of business that identify which joint use poles in the parties' overlapping service area were replaced by AT&T because the pole suffered damage as a result of AT&T's facilities being attached at either the lowest point on the pole or in the space designated for AT&T under the 1975 JUA. Information about the damage AT&T has experienced because of the location of its facilities, including damage to its facilities that has not required replacement of the pole, is included in AT&T's Pole Attachment Complaint, Reply Legal Analysis, Reply to FPL's Answer, and supporting Affidavits.

Interrogatory No. 2:

Fully describe the factual basis and expense for each cost or disadvantage AT&T claims to bear as a result of being a joint use pole owner under the 1975 JUA and explain whether such cost is accounted for in AT&T's rates to FPL and third party attachers.

Objections:

AT&T objects to this Interrogatory because the phrase "expense for each cost or disadvantage" is vague and ambiguous. AT&T also objects to this Interrogatory to the extent it seeks legal conclusions or information already provided by AT&T in its Pole Attachment Complaint and supporting Affidavits and Exhibits or seeks to transfer to AT&T the burden that the Commission placed on FPL to prove by "clear and convincing evidence that the incumbent LEC receives net benefits under its pole attachment agreement with the utility that materially

advantage the incumbent LEC over other telecommunications attachers" in order to rebut the new telecom rate presumption.[1] AT&T further objects to this Interrogatory to the extent it seeks information that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" rate that is required by 47 U.S.C. § 224(b) and the Commission's Orders and regulations for AT&T's use of FPL's poles during the rental years at issue in AT&T's Pole Attachment Complaint.

Response:

Subject to and without waiver of these objections and the foregoing general objections, AT&T states that the only relevant costs or disadvantages are those that competitively disadvantage AT&T as compared to its cable and CLEC competitors. FPL did not account for any competitive disadvantages in its Answer to AT&T's Pole Attachment Complaint, and so did not rebut the new telecom rate presumption with "clear and convincing evidence that the incumbent LEC receives net benefits under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers."[2]

Although it is not AT&T's burden to prove or quantify the cost of AT&T's competitive disadvantages under the JUA, AT&T included significant evidence about several in its Pole Attachment Complaint, Reply Legal Analysis, Reply to FPL's Answer, and their supporting Affidavits and Exhibits. For example, AT&T explained that it is competitively disadvantaged under the JUA because AT&T has paid FPL rental rates that are up to [redacted] times the rates FPL charged AT&T's competitors for use of wood distribution poles, up to [redacted] times the rates FPL charged AT&T's competitors for use of concrete distribution poles, and [redacted] times the rates FPL

[1] *See In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7768 (¶ 123) (2018).

[2] *See id.*

charged AT&T's competitors for use of transmission poles. AT&T also explained that AT&T is competitively disadvantaged because the JUA includes reciprocal terms (meaning that AT&T must provide the same term to FPL), because the JUA does not provide AT&T access to FPL's poles that is equivalent to the guaranteed access provided AT&T's competitors under 47 U.S.C. § 224(f), because the space allocated to AT&T on FPL's poles is at a location that subjects AT&T to higher costs than its competitors, because AT&T is charged for the exclusive use of 4 feet of space on FPL's poles that AT&T does not need or occupy and that FPL does not reserve for or provide to AT&T, and because AT&T is competitively disadvantaged by other terms of the JUA, such as the requirement to pay back rent at exceptionally high rental rates for any new attachments to FPL's poles identified in a survey. AT&T does not account for these competitive disadvantages in the rates AT&T charges FPL and third party attachers.

AT&T also explained in its Pole Attachment Complaint, Reply Legal Analysis, Reply to FPL's Answer, and their supporting Affidavits and Exhibits that it is competitively disadvantaged because the JUA imposes pole ownership costs on AT&T when license agreements include no similar pole ownership obligation. That this is a competitive disadvantage is apparent in the difference in pole costs allocated to a pole owner and to attaching entities under the Commission's new telecom rental rate formula. If AT&T and its competitors paid the same fully compensatory new telecom rate to attach to FPL's poles, AT&T would bear greater costs than its competitors with respect to AT&T's poles. By statute, the new telecom rate formula apportions two-thirds of the cost of the unusable space on a pole owner's poles to the attaching entities,[3] which means that the "pole owner is automatically liable" for a "one-third

[3] *See* 47 U.S.C. § 224(e)(2) ("A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals *two-thirds* of the costs of providing space other than the usable space that would be

share" of the cost of the unusable space (plus its apportionment, as an attaching entity, of the remainder of the unusable space).[4] Thus, AT&T as pole owner would always bear a greater proportion of the unusable space on AT&T's poles than its competitors.

Interrogatory No. 3:

For each cost or disadvantage identified in response to interrogatory number 2, fully explain how such cost or disadvantage neutralizes any benefit to AT&T under the 1975 JUA, as claimed in the Complaint, given that FPL owns approximately 66% of the joint use poles and AT&T owns approximately 34% of the joint use poles.

Objections:

AT&T objects to this Interrogatory because the phrase "neutralizes any benefit to AT&T under the 1975 JUA" is vague and ambiguous. AT&T also objects to this Interrogatory to the extent it seeks legal conclusions or information already provided by AT&T in its Pole Attachment Complaint and supporting Affidavits and Exhibits. AT&T further objects to this Interrogatory to the extent it seeks information about "any benefit to AT&T" under the JUA—as opposed to any competitive benefit—because it is overly broad and seeks information that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" rate that is required by 47 U.S.C. § 224(b) and the Commission's Orders and regulations for AT&T's use of FPL's poles during the rental years at issue in AT&T's Pole Attachment Complaint. AT&T also objects to this Interrogatory to the extent it incorrectly

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allocated to such entity under an equal apportionment of such costs among all attaching entities. (emphasis added); *see also* 47 C.F.R. § 1.1409(a).

[4] *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (¶ 53) (1998).

assumes that the JUA provides AT&T a competitive benefit and incorrectly states the pole ownership percentages of the parties. According to FPL's most recent pole attachment rental invoice, FPL owns 425,704 (67%) and AT&T owns 213,210 (33%) of 638,914 poles jointly used by the parties. *See* Complaint Ex. 2 at ATT00147.

Response:

Subject to and without waiver of these objections and the foregoing general objections, AT&T states that, in order to rebut the new telecom rate presumption, FPL must provide "clear and convincing evidence that [AT&T] receives *net benefits* under its pole attachment agreement with [FPL] that materially advantage [AT&T] over other telecommunications attachers."[5] This means that, if the competitive disadvantages to AT&T under the JUA have equal or greater value than any competitive advantages to AT&T under the JUA, there is no net material benefit. This may occur even though FPL owns two-thirds of the joint use poles. For example, if the JUA imposes a cost on AT&T that is not imposed on AT&T's competitors under FPL's license agreements, there is a competitive disadvantage to AT&T with no offsetting competitive advantage, and thus no net material benefit. Similarly, if a JUA term is reciprocal—meaning that AT&T must provide the same term to FPL—the reciprocal terms may cancel out each other even when accounting for the pole ownership disparity if the alleged benefit exists for all jointly used poles or is otherwise not dependent on pole ownership numbers. AT&T further states that it has explained its position on this issue at length in its Pole Attachment Complaint, Reply Legal Analysis, Reply to FPL's Answer, and their supporting Affidavits and Exhibits.

[5] *See Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125) (emphasis added).

Interrogatory No. 4:

Identify each joint use pole replaced by AT&T in the last ten years.

Objections:

AT&T objects to this Interrogatory as overly broad and unduly burdensome because it is not limited to poles that are jointly used by these parties or to the rental years at issue in AT&T's Pole Attachment Complaint. AT&T also objects to this Interrogatory to the extent it seeks information that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" rate that is required by 47 U.S.C. § 224(b) and the Commission's Orders and regulations for AT&T's use of FPL's poles during the rental years at issue in AT&T's Pole Attachment Complaint.

Response:

Subject to and without waiver of these objections and the foregoing general objections, AT&T states that it cannot generate and does not maintain records in the normal course of business that distinguish between the joint use poles and the non-joint use poles that were placed or replaced by AT&T during the relevant time period.

Interrogatory No. 5:

Identify each instance and all related documentation since 1975 regarding any effort or attempt by AT&T to renegotiate the 1975 JUA rates, terms or conditions and as to each attempt, identify specifically when each attempt occurred, the new rates, terms or conditions that were proposed by AT&T and the end result of such discussions.

Objections:

AT&T objects to this Interrogatory as overly broad and unduly burdensome because it seeks information dating back 44 years that is not relevant to, or likely to lead to the discovery of

admissible evidence regarding, the "just and reasonable" rate that is required by 47 U.S.C. § 224(b) and the Commission's Orders and regulations for AT&T's use of FPL's poles during the rental years at issue in AT&T's Pole Attachment Complaint. AT&T also objects to this Interrogatory to the extent it seeks legal conclusions or information already provided by AT&T in its Pole Attachment Complaint and supporting Affidavits and Exhibits. AT&T further objects to this Interrogatory to the extent it seeks confidential settlement communications and/or privileged information.

Response:

Subject to and without waiver of these objections and the foregoing general objections, AT&T states that with the exception of the negotiations that resulted in the June 1, 2007 Amendment to the JUA and negotiations or attempted negotiations that are subject to confidentiality or are reflected in confidential agreements, the AT&T representatives responsible for handling JUA negotiations during much of the time period requested are either no longer with AT&T or are deceased.

Interrogatory No. 6:

Identify all efforts made by AT&T in the last ten years with regard to joint use poles to survey the average pole height, average space used by FPL or AT&T or the average number of attachers on all poles subject to the 1975 JUA.

Objections:

AT&T objects to this Interrogatory because the distinction between "joint use poles" and "poles subject to the 1975 JUA" is vague and ambiguous. AT&T also objects to this Interrogatory because it seeks information that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" rate that is required by 47

U.S.C. § 224(b) and the Commission's Orders and regulations for AT&T's use of FPL's poles during the rental years at issue in AT&T's Pole Attachment Complaint.

Response:

Subject to and without waiver of these objections and the foregoing general objections, AT&T states that during the last ten years AT&T has contributed to the cost of surveys of poles jointly used by AT&T and FPL that were undertaken by or performed at the direction of FPL and that purported to capture information related to pole height and the number of some, but not all, entities attached to the pole.

Interrogatory No. 7:

Fully describe how AT&T, from 1975 to the present, would construct its own pole network and the cost of such network if AT&T did not have access to FPL's pole network under the 1975 JUA.

Objections:

AT&T objects to this Interrogatory because it calls for speculation and incorrectly assumes that AT&T has not "construct[ed] its own pole network." AT&T also objects to this Interrogatory as overly broad and unduly burdensome because it seeks information dating back 44 years that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" rate that is required by 47 U.S.C. § 224(b) and the Commission's Orders and regulations for AT&T's use of FPL's poles during the rental years at issue in AT&T's Pole Attachment Complaint.

Response:

Subject to and without waiver of these objections and the foregoing general objections, AT&T states that it is unable to give an accurate response to this speculative and counterfactual

interrogatory. However, AT&T presumes that in the hypothetical and counterfactual world posited by FPL, AT&T would have deployed its network in the same manner it has been doing from 1975 to present, although AT&T expects that it would have encountered significant regulatory resistance and may have had to pursue alternative methods of deployment beyond relying on aerial facilities affixed to duplicative pole lines. Given the speculative and counterfactual nature of the scenario posited by FPL, AT&T is unable to quantify the cost of such deployment.

Interrogatory No. 8:

Fully describe how AT&T, from 1975 to the present, would obtain access to private easements and public rights-of-way and the cost of such access if FPL did not procure such access for AT&T under the 1975 JUA.

Objections:

AT&T objects to this Interrogatory because it calls for speculation and incorrectly assumes that AT&T has not "obtain[ed] access to private easements and public rights-of-way." AT&T also objects to this Interrogatory as overly broad and unduly burdensome because it seeks information dating back 44 years that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" rate that is required by 47 U.S.C. § 224(b) and the Commission's Orders and regulations for AT&T's use of FPL's poles during the rental years at issue in AT&T's Pole Attachment Complaint. AT&T further objects to this Interrogatory to the extent it misstates the terms and conditions of the JUA with respect to obtaining access to easements and rights-of-way in connection with joint use poles.

Response:

Subject to and without waiver of these objections and the foregoing general objections, AT&T states that it is unable to give an accurate response to this speculative and counterfactual interrogatory. However, AT&T presumes that in the hypothetical and counterfactual world posited by FPL, AT&T it would have obtained access to private easements and public rights-of-way in the same manner it has been doing from 1975 to present, although AT&T expects that it would have encountered significant regulatory resistance and may have had to pursue alternative methods of deployment beyond relying on aerial facilities affixed to duplicative pole lines. Given the speculative and counterfactual nature of the scenario posited by FPL, AT&T is unable to quantify the cost of such access.

Interrogatory No. 9:

Fully describe and identify the costs of AT&T, from 1975 to the present, to indemnify FPL, provide surety bonds to cover FPL's cost of removing AT&T's attachments and obtain property insurance if the 1975 JUA did not relieve AT&T from any obligation or need to do such things.

Objections:

AT&T objects to this Interrogatory on the grounds that the term "costs of AT&T" is vague and ambiguous and because the Interrogatory calls for speculation and incorrectly assumes that AT&T does not have comparable responsibilities under the JUA. AT&T also objects to this Interrogatory as overly broad and unduly burdensome because it seeks information dating back 44 years that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" rate that is required by 47 U.S.C. § 224(b) and the Commission's Orders and regulations for AT&T's use of FPL's poles during the rental years at

issue in AT&T's Pole Attachment Complaint. AT&T further objects to this Interrogatory to the extent it misstates the terms and conditions of the JUA with respect to any applicable indemnification, surety bonds, or property insurance.

Response:

Subject to and without waiver of these objections and the foregoing general objections, AT&T states that it is unable to give an accurate response to this speculative and counterfactual interrogatory. However, AT&T presumes that in the hypothetical and counterfactual world posited by FPL, AT&T would have handled indemnification, surety bonds, and property insurance in the same manner it has been doing from 1975 to present. Given the speculative and counterfactual nature of the scenario posited by FPL, AT&T is unable to quantify the cost of such obligations.

Interrogatory No. 10:

Fully describe and identify how AT&T, from 1975 to the present, would prepare a permit application and obtain a permit for each attachment to an FPL pole, including the time, expense and resources to do so, if the 1975 JUA did not relieve AT&T from any obligation or need to obtain such permits.

Objections:

AT&T objects to this Interrogatory because it calls for speculation and incorrectly assumes that AT&T does not have comparable responsibilities under the JUA. AT&T also objects to this Interrogatory as overly broad and unduly burdensome because it seeks information dating back 44 years that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" rate that is required by 47 U.S.C. § 224(b) and the Commission's Orders and regulations for AT&T's use of FPL's poles during the rental years at

issue in AT&T's Pole Attachment Complaint. AT&T further objects to this Interrogatory to the extent it misstates the terms and conditions of the JUA with respect to any applicable permits or permit applications.

Response:

Subject to and without waiver of these objections and the foregoing general objections, AT&T states that it is unable to give an accurate response to this speculative and counterfactual interrogatory. However, AT&T presumes that in the hypothetical and counterfactual world posited by FPL, AT&T would have prepared permit applications in the same manner it has been doing from 1975 to present. AT&T is unable to quantify the cost of such obligations. That said, the cost, time, expenses, and resources would likely be *de minimus* because AT&T's engineers must already obtain the information that would likely appear on a permit application, so would need little additional time to transfer that information to the permit application form [redacted].

Respectfully submitted,

By: [signature]

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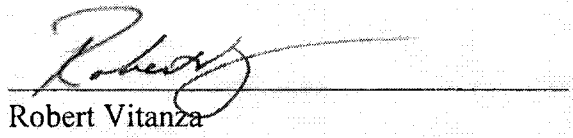
Dated: November 13, 2019

AFFIRMATION

I, Robert Vitanza, hereby affirm that the foregoing responses to Florida Power and Light Company's First Set of Interrogatories are true and correct to the best of my knowledge as Assistant Vice President – Legal Counsel for AT&T.



Robert Vitanza

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2019, I caused a copy of the foregoing AT&T's Responses to Florida Power and Light Company's First Set of Interrogatories to be served on the following (service method indicated):

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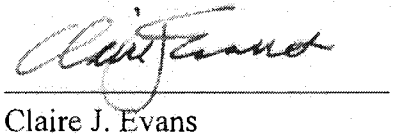

Claire J. Evans