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

AT&T'S SUPPLEMENTAL BRIEF REGARDING 28 U.S.C § 1658

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The four-year statute of limitations of 28 U.S.C. § 1658(a) does not limit the remedy that should issue in this proceeding.[1] The Commission did not incorporate Section 1658(a) or any other one-size-fits-all statute of limitations into its remedies rule, but decided to look to a case-specific "applicable statute of limitations" when setting the effective date for the "just and reasonable" rates it establishes in pole attachment complaint proceedings.[2] The Commission's decision was reasonable[3] and consistent with a long line of precedent under which State contract law determines the applicable statute of limitations.[4] Section 1658, on the other hand, is neither applicable in the enforcement context nor capable of limiting the Commission's broad authority to "take such action as it deems appropriate and necessary" to ensure a just and reasonable rate for AT&T's use of FPL's poles.[5] The Commission should set that just and reasonable rate as of the 2014 rental year, consistent with Florida's five-year statute of limitations for contract actions, and require FPL to refund amounts it has collected in excess of the amount permitted by law.[6]

Earlier this year, the Commission held that "[t]he text, context, purpose, and history of Section 1658(a) make clear that it governs court actions, *not agency proceedings* ...."[7] By its

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[1] *See* 28 U.S.C. § 1658(a) ("Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues.").

[2] 47 C.F.R. § 1.1407(a)(3).

[3] *AEP v. FCC*, 708 F.3d 183, 190 (D.C. Cir.), *cert. denied*, 571 U.S. 940 (2013).

[4] *See Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018) (citing cases).

[5] 47 U.S.C. § 224(b)(1).

[6] *See* Amended Pole Attachment Complaint ¶¶ 32-33 (July 12, 2019); AT&T's Reply to FPL's Answer ¶¶ 32-33 (Nov. 6, 2019); AT&T's Legal Analysis, Part II.E.2 (Nov. 6, 2019).

[7] *In the Matter of Sandwich Isles Comm'ns, Inc.*, WC Dkt. No. 10-90, 2019 WL 105385, at *39 (FCC Jan. 3, 2019) (emphasis added).

plain terms, Section 1658(a) applies to a "cause of action"—meaning a "situation that entitles one person to obtain a remedy *in court*"—brought in "a civil action," *i.e.*, a "judicial proceeding."[8] Section 1658(a) was enacted as part of the Judicial Improvements Act of 1990 and was designed to "improve the efficiency and fairness of *federal court* operations."[9] And so, as the Commission noted in its recent *Sandwich Isles* decision, it is "unaware of any instance in which Section 1658(a) has been applied to cut off administrative proceedings."[10]

The Enforcement Bureau should not break new ground here. This proceeding, like the proceeding in *Sandwich Isles*, is fundamentally different from a civil judicial action subject to Section 1658(a) because here, as in *Sandwich Isles*, the Commission will "exercis[e] its specific statutory obligation" to ensure compliance with federal law.[11] A pole attachment complaint proceeding is not a purely private "civil action" like those subject to Section 1658(a); indeed, courts have uniformly held that parties do *not* have a private right of action to seek "just and reasonable" pole attachment rates in court.[12] Instead, a pole attachment complaint is the vehicle the Commission uses to exercise its statutory obligation to "regulate the rates, terms, and conditions for pole attachments" to ensure they are "just and reasonable."[13] And, as typical in this administrative enforcement context, the Commission determines "remedies" to redress

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[8] *Id.* (citations omitted); *see also* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.").

[9] H.R. Rep. 101-734, 15, 1990 U.S.C.C.A.N. 6860, 6861 (emphasis added).

[10] *Sandwich Isles*, 2019 WL 105385, at *40. The only U.S. Court of Appeals to consider the issue agreed that Section 1658(a) is limited to "certain claims *in federal court*." *See United States v. Searcy*, 880 F.3d 116, 120 (4th Cir. 2018) (emphasis added).

[11] *Sandwich Isles*, 2019 WL 105385, at *2.

[12] *See Kan. City Power & Light Co. v. Am. Fiber Sys., Inc.*, 2003 WL 22757927 (D. Kan. Nov. 5, 2003); *Va. Elec. & Power Co. v. Comcast of Va.*, 2010 WL 916953 (E.D. Va. Mar. 8, 2010).

[13] 47 U.S.C. § 224(b)(1).

unlawful conduct, rather than damages to be awarded.[14] Thus, as in *Sandwich Isles*, Section 1658(a) does not restrict the Commission's remedial authority.[15]

Section 1658(a) also cannot limit the remedy here because the Commission's duty to ensure "just and reasonable" rates dates back to 1978. Section 1658(a) "applies only to claims arising under statutes enacted after December 1, 1990," and not to "pre-existing causes of action."[16] Because federal law has required "just and reasonable" pole attachment rates since 1978, Section 1658(a) does not apply. And though the pole attachment statute was amended after 1990, Section 1658(a) still does not apply because the amendment simply supplemented the entities that may ask the Commission to enforce the same pre-existing requirement.[17] Indeed, to differentiate between the remedy available to entities identified in the pole attachment statute before 1990 (*i.e.*, cable companies) and those added later (*i.e.*, providers of telecommunications services) would produce arbitrary and absurd results—providing different rates at different times to competitors attached to the same poles. Such a result flies in the face of the Commission's policy that "similarly situated attachers should pay similar pole attachment rates for comparable access."[18] The Commission can avoid that result by treating the same State statute of limitations as the "applicable statute of limitations" for all attachers to the same utility's poles and subject to the same State law.

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[14] 47 C.F.R. § 1.1407.

[15] *See AEP*, 708 F.3d at 190 ("Under this broad [remedial] authorization, it is hard to see any legal objection to the Commission's selection of any reasonable period for accrual of compensation for overcharges or other violations of the statute or rules.").

[16] *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 380-81 (2004).

[17] *See AEP*, 708 F.3d at 186 ("[T]he 1996 Act amended § 224 to define a 'pole attachment' as 'any attachment by a cable television system or provider of telecommunications service to a pole ....' The 1978 Act had identified only cable television systems ....") (citation omitted).

[18] *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7767 (¶ 123) (2018).

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2019, I caused a copy of the foregoing AT&T's Supplemental Brief Regarding 28 U.S.C. § 1658 to be served on the following (service method indicated):

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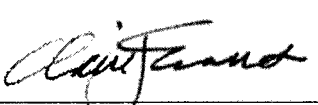

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