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 REPLY REGARDING 28 U.S.C § 1658

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

The parties agree that the four-year statute of limitations of 28 U.S.C. § 1658(a) does not limit the Commission's authority to set just and reasonable rates and require refunds of past overpayments in this proceeding.[1] That was the sole issue for supplemental briefing, and it is undisputed. FPL did not limit its supplemental brief to this issue, however, and instead tried to buttress its prior argument that the Commission should interpret its remedies rule, 47 C.F.R. § 1.1407(a)(3), to set rates based on an inapplicable two-year statute of limitations in 47 U.S.C. § 415. FPL's new argument on this prior issue is untimely.[2] It is also meritless.

The primary problem with FPL's argument is that it conflates two different issues, specifically: (1) whether 28 U.S.C. § 1658(a) limits the Commission's broad statutory authority to "take such action as it deems appropriate and necessary" to ensure just and reasonable rates,[3] and (2) what effective date applies to the just and reasonable rates set by the Commission under its remedies rule, which uses a case-specific "applicable statute of limitations" to determine that date.[4] The parties agree that the first issue was resolved in *Sandwich Isles*, which found that Section 1658(a) only "governs court actions, not agency proceedings."[5] As the Commission explained, Section 1658(a) requires a "cause of action" brought in "a civil action," and so does not limit the Commission's authority to require compliance with federal law.[6]

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[1] FPL Supplemental Br. at 1-2.

[2] *See, e.g.*, 47 C.F.R. § 1.726(b) ("The answer shall advise the complainant and the Commission fully and completely of the nature of any defense ....").

[3] 47 U.S.C. § 224(b)(1).

[4] 47 C.F.R. § 1.1407(a)(3); *AEP v. FCC*, 708 F.3d 183, 190 (D.C. Cir.), *cert. denied*, 571 U.S. 940 (2013) (finding it "hard to see any legal objection to the [FCC]'s selection of any reasonable period for accrual of compensation for overcharges or other violations of the statute or rules").

[5] *In the Matter of Sandwich Isles Comm'ns*, 2019 WL 105385, at *39 (FCC 2019).

[6] *Id.*; FPL Supplemental Br. at 1-2; AT&T Supplemental Br. at 1-3.

FPL now tries to use this decision about the Commission's enforcement authority to resolve the second distinct issue about the meaning of the Commission's remedies rule. But the Commission did not consider, let alone interpret, its remedies rule in *Sandwich Isles*. And FPL's argument shows why the leap cannot be made. FPL argues that Florida's five-year contract statute of limitations cannot be used because it contains "cause of action" language similar to Section 1658(a).[7] But FPL then asks the Commission to use "a two-year period based on 47 U.S.C. § 415"—a statute that uses the same "cause of action" language.[8] The mere use of "cause of action" language, therefore, cannot resolve whether a statute of limitations is the "applicable statute of limitations" under the Commission's rules.

Other language in Section 415, however, establishes that FPL's preferred statute of limitations is *not* the "applicable statute of limitations" under the Commission's remedies rule.[9] By its plain terms, Section 415 applies exclusively to actions "by carriers for recovery of their lawful charges" and "against carriers for recovery of damages" and "overcharges."[10] This dispute is neither. Section 415 is also not the "applicable statute of limitations" under the remedies rule because, as FPL argues, it would "provide a uniform federal limitations policy" for pole attachment disputes.[11] The Commission instead opted for a case-specific approach consistent "with the way that claims for monetary recovery are generally treated under the

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[7] *See* FPL Supplemental Br. at 2-3 (quoting Fla. Stat. §§ 95.031 ("cause of action"), 95.11(2)(b) ("legal or equitable action on a contract ...").

[8] *See* 47 U.S.C. § 415(a)-(c) (applying to "cause of action" in "actions at law").

[9] *See* 47 C.F.R. § 1.1407(a)(3); *see also* 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).

[10] 47 U.S.C. § 415(a)-(c), (g).

[11] FPL Supplemental Br. at 3.

law."[12] And even if the Commission's remedy rule permitted a one-size-fits-all approach, Section 415—which bears no relation to this dispute—would certainly not apply in lieu of the four-year catch-all statute of limitations period of Section 1658(a).

But the Commission did not incorporate Section 1658(a), Section 415, or any other federal statute of limitations into its remedies rule. The Commission, therefore, should follow "'the general rule ... that a state limitations period for an analogous cause of action is borrowed and applied.'"[13] Just and reasonable rates for AT&T's use of FPL's poles should be set as of the 2014 rental year consistent with Florida's five-year statute of limitations for contract actions[14] and prior agreement in the industry,[15] and FPL should be ordered to refund all amounts it has collected from AT&T since then in violation of federal law.[16]

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[12] *See Pole Attachment Order*, 26 FCC Rcd at 5289-90 (¶¶ 110-12); *see also Pole Attachment Order NPRM*, 25 FCC Rcd at 11902 (¶ 88) ("Generally speaking, a plaintiff is entitled to recompense going back as far as the applicable statute of limitations allows. There does not appear to be a justification for treating pole attachment disputes differently.").

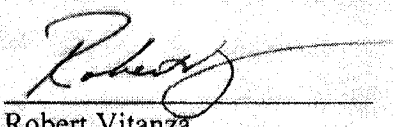
[13] *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018) (quoting *Cnty. of Oneida v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 240 (1985)); *see also Spiegler v. District of Columbia*, 866 F.2d 461, 463-64 (D.C. Cir. 1989). FPL argues that AT&T asked to apply different statutes of limitations to different pole owners in the same State, which "would run directly counter to the Commission's express policy preference of similar treatment for similarly situated entities." *See* FPL Supplemental Br. at 3 n.16. AT&T made no such request, nor is it clear that such a request could be made since Section 415 applies to claims for "damages" against carriers, and 47 C.F.R. § 1.1407 includes "remedies" the Commission may require to ensure "just and reasonable rates" that comply with federal law.

[14] Fla. Stat. § 95.11(2)(b); *see Hoang*, 910 F.3d at 1101 (where, as here, the federal claim involves a contract, state "contract law provisions the best analogy").

[15] *Verizon Va., LLC v. Va. Electr. & Power Co.*, 32 FCC Rcd 3750, 3764 (¶ 28 n.104) (EB 2017) ("Verizon contends that Section 8.01-246(2) of the Virginia Code provides the applicable statute of limitations in this case and that its Complaint was filed within the five-year limitations period specified therein.... Dominion does not dispute this contention.").

[16] 47 C.F.R. § 1.1407(a)(3).

Respectfully submitted,

By: 

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Dated: January 13, 2020

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, I caused a copy of the foregoing AT&T's Supplemental Reply Regarding 28 U.S.C. § 1658 to be served on the following (service method indicated):

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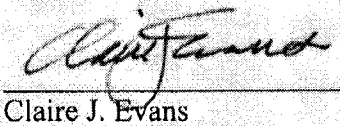

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