PUBLIC VERSION

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. 20-214 Bureau ID No. EB-20-MD-002 REDACTED

AT&T'S REPLY TO FPL'S ANSWER

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA

By Counsel:

Robert Vitanza
Gary Phillips
David Lawson
AT&T SERVICES, INC.
1120 20th Street NW, Suite 1000
Washington, DC 20036
(214) 757-3357

Christopher S. Huther
Claire J. Evans
Frank Scaduto
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevans@wiley.law
fscaduto@wiley.law

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* Certain information in this Reply has been designated confidential pursuant to 47 C.F.R. § 1.731. The designated information is marked with a text box in the confidential version of these pleadings and is redacted in the public version.

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Set forth below are the specific replies of BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T") to the numbered paragraphs set forth in the Answer of Florida Power and Light Company ("FPL"). Any claims not specifically addressed are denied for reasons detailed in AT&T's Pole Attachment Complaint ("Complaint"), Reply Legal Analysis, and supporting affidavits and exhibits.[1]

I. PARTIES AND JURISDICTION

1. FPL admits the allegations of paragraph 1, so no response is required.

2. FPL admits the allegations of paragraph 2, so no response is required.

3. FPL's response to paragraph 3 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies that the Commission lacks jurisdiction over this dispute for any of the 5 reasons FPL alleges. *First*, the FCC's statutory

[1] Unless otherwise indicated, references to AT&T's Complaint and Reply Legal Analysis also refer to those documents' supporting affidavits and exhibits.

authority to regulate the rates, terms, and conditions of incumbent local exchange carrier ("ILEC") pole attachments was settled in the 2011 *Pole Attachment Order*, which was affirmed on appeal.[2] *Second*, FPL's argument that the Commission's "assertion of authority" to set just and reasonable terms and conditions for a 1975 JUA is "ultra vires [and] impermissibly retroactive" was rejected in FPL's last two pole attachment complaint proceedings[3] and remains meritless for reasons stated in Sections II.A and II.E of AT&T's Reply Legal Analysis and AT&T's denials of FPL's Affirmative Defenses. *Third*, granting the just and reasonable pole attachment terms and conditions AT&T requests would *not* be contrary to the constitutional prohibition against impairment of contracts because Congress requires that joint use agreements contain just and reasonable terms and conditions.[4] *Fourth*, the Florida Public Service Commission ("Florida PSC") does not have authority to set the terms and conditions for AT&T's use of FPL's poles because Florida has not reverse-preempted the Commission's regulation of

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[2] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) ("*Pole Attachment Order*"), *aff'd*, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013).

[3] *Verizon Fla. v. Fla. Power and Light Co., Memorandum Opinion and Order*, 30 FCC Rcd 1140, 1145-47 (¶¶ 17-19) (EB 2015) ("*2015 FPL Order*"); *see also BellSouth Telecommunications, LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, 35 FCC Rcd 5321 (EB 2020) ("*2020 FPL Order*"); *see also* Memorandum Opinion and Order at 22 (¶¶ 47-48), *Verizon Md. LLC v. The Potomac Edison Company*, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (Nov. 23, 2020) ("*Potomac Edison Order*").

[4] *See In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7731 (¶ 50) (2018) ("*Third Report and Order*") ("As the Supreme Court has made clear, "[i]f the regulatory statute is otherwise within the powers of Congress . . . its application may not be defeated by private contractual provisions."); *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996*, 13 FCC Rcd 23874, 23888 (¶ 28) (1998) (rejecting impairment of contracts argument because "Congress can change contractual relationships between private parties through the exercise of its constitutional powers").

pole attachments pursuant to 47 U.S.C. § 224(c).[5] *Fifth*, AT&T fully complied with Commission rules when AT&T, in good faith, notified FPL in writing of the allegations that form the basis of this dispute and sought to settle this dispute through face-to-face executive-level meetings, non-binding mediations, and a comprehensive settlement offer, as detailed in AT&T's Complaint, Section II.E of AT&T's Reply Legal Analysis, and AT&T's denials of FPL's Affirmative Defenses.[6]

4. FPL's response to paragraph 4 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies that Florida has jurisdiction to regulate the terms and conditions of AT&T's use of FPL's poles because Florida has not reverse-preempted the Commission's authority pursuant to 47 U.S.C. § 224(c). AT&T states that FPL's claim that it may "seek the intervention of the Florida [PSC], if necessary" is speculative and requires no response, but if a response is required, AT&T denies that there is any lawful basis for the Florida PSC to intervene in this dispute. AT&T denies that the FCC's enforcement of AT&T's federal statutory right to "just and reasonable" terms and conditions could result in "a massive shift of the cost of the jointly used network to FPL's electric customers" because (1) if the Commission grants Count I, FPL's demand that AT&T remove its facilities from FPL's poles will be enjoined and AT&T will remain on FPL's poles at fully compensatory "just and reasonable" rates set by the Commission and (2) if the Commission grants Count II, FPL's demand that AT&T incur FPL's pole removal and disposal costs and pay FPL for its useless

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[5] *See States That Have Certified That They Regulate Pole Attachments*, No. DA20-302, 2020 WL 1434415 (Mar. 19, 2020).

[6] *See also, e.g.*, Compl. Ex. A at ATT00004-12 (Miller Aff. ¶¶ 6-25); Compl. Ex. B at ATT00024-27 (Peters Aff. ¶¶ 23-28); Compl. Ex. 33 at ATT00526 (Joint Status Report); Reply Ex. A at ATT00571-574 (Peters Reply Aff. ¶¶ 3-9); Reply Ex. B at ATT00606-610 (Miller Reply Aff. ¶¶ 2-11); Reply Ex. C at ATT0016-17 (York Reply Aff. ¶¶ 3-4); Reply Ex. E at ATT00644-652 (Rhinehart Reply Aff. ¶¶ 4-17).

assets will be enjoined and FPL will recover its pole removal and disposal costs in the manner contemplated by State law, as FPL admits.[7]

AT&T denies that this Complaint "involves straightforward breach of contract issues" because the Complaint instead challenges pole attachment terms, conditions, and practices as unjust and unreasonable under federal law. AT&T states that FPL's allegation that this case involves "AT&T's contractual access rights to FPL's poles" is ambiguous, and so denies it. AT&T further states that this case does not seek "access rights" under 47 U.S.C. § 224(f), but instead challenges default and pole abandonment terms, conditions, and practices that are unjust and unreasonable under 47 U.S.C. § 224(b), which is an issue squarely within the Commission's jurisdiction.[8] AT&T denies the next-to-last sentence of FPL's response to paragraph 4 because the Commission has jurisdiction for reasons detailed in Section II of AT&T's Complaint and Section II.A of AT&T's Reply Legal Analysis. AT&T further states that terms and conditions in "long-standing agreements" that are unjust and unreasonable cannot be left intact consistent with 47 U.S.C. § 224(b) and that the Enforcement Bureau has already held that the parties' JUA is subject to review under 47 U.S.C. § 224(b).[9] The last sentence of FPL's Answer to paragraph 4 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

5. AT&T denies the first sentence of FPL's response to paragraph 5 because this Complaint does *not* rely upon facts that *all* existed and were known to AT&T at the time it filed

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[7] *See* Answer Br. at 72 ("Florida has a cost recovery process to compensate FPL for any expenses incurred as part of its storm hardening efforts.").

[8] *See Pole Attachment Order*, 26 FCC Rcd at 5241 (¶ 202) ("Although incumbent LECs have no right of access to utilities' poles pursuant to section 224(f)(1) of the Act, we now conclude that where incumbent LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1).").

[9] *2020 FPL Order*, 35 FCC Rcd at 5326-27 (¶¶ 11-12).

its July 1, 2019 Complaint against FPL alleging unjust and unreasonable rates ("*Complaint I*"). Instead, this Complaint includes critical post-*Complaint I* facts that were unknowable when *Complaint I* was filed, such as (1) the fact that FPL would press ahead with its demand that AT&T remove facilities from FPL's poles despite receiving full payment of FPL's unlawfully high rental invoices on July 1, 2019 and despite the Enforcement Bureau's May 20, 2020 interim decision declaring the invoiced rates unlawful[10] and (2) the fact that the parties would not be able to settle the pole abandonment dispute using the mandatory pre-complaint dispute resolution process that is a condition precedent to litigation, which did not conclude until July 4, 2020—60 days after a May 5, 2020 mediation.[11] AT&T also denies that *Complaint I* involves the "same series of transactions" as this Complaint. *Complaint I* challenges FPL's unjust and unreasonable rates while this Complaint challenges unjust and unreasonable non-rate terms and conditions and FPL's related practices. AT&T also denies that this Complaint involves *all* the same facts as the parties' stayed litigation in the U.S. District Court for the Southern District of Florida (the "*FPL Civil Proceedings*"). This Complaint challenges default and pole abandonment terms, conditions, and practices as unjust and unreasonable under federal law, while the *FPL Civil Proceedings* involve state law claims related to the JUA's rental rate and default provisions that could be eliminated, narrowed, or clarified by a decision on Count I in this case.[12] AT&T further states that, while the *FPL Civil Proceedings* originally included a state law claim related to the

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[10] *See id.* at 5321, 5325 (¶¶ 1, 9); *see also, e.g.*, Reply Ex. A at ATT00572 (Peters Reply Aff. ¶ 5); Reply Ex. B at ATT00606-07, ATT00612-13 (Miller Reply Aff. ¶ 3 & Ex. M-1).

[11] *See* Compl. Ex. 31 at ATT00517 (Opinion, *FPL v. AT&T*) (dismissing Count V of FPL's Complaint, the pole abandonment count, on ripeness grounds); *see also, e.g.*, Compl. Ex. A at ATT00011 (Miller Aff. ¶ 24); Compl. Ex. 1 at ATT00057 (JUA, § 13A.2).

[12] *See, e.g.*, Compl. Ex. 31 at ATT000517-519 (Opinion, *FPL v. AT&T*) (staying Counts I-IV of FPL's Complaint under the doctrine of primary jurisdiction).

JUA's pole abandonment provision, the claim was dismissed without prejudice on March 12, 2020,[13] and would be eliminated (or at least narrowed or clarified) by a decision on Count II in this case.[14]

AT&T denies the second and third sentences of FPL's response to paragraph 5 because they misrepresent the allegations of paragraph 5, which state that a "separate action has not *otherwise* been filed with the Commission, any court, or other government agency based on the same claim or the same set of facts, in whole or in part."[15] AT&T had already identified the parties' pending pole attachment rate complaint and the litigation in the U.S. District Court for the Southern District of Florida, which was stayed under the doctrine of primary jurisdiction.[16]

With respect to the first sentence of the second paragraph of FPL's response to paragraph 5, AT&T admits that FPL filed a complaint against AT&T in Florida state court at 12:30 am on July 1, 2019, which alleged non-payment of FPL's disputed invoices for 2017 and 2018 rent and sought declaratory relief related to the JUA's pole abandonment provision,[17] and states that FPL served the complaint on AT&T on July 2, 2019, a day after FPL received payment in full of the disputed 2017 and 2018 rent that it sought in its complaint.[18] With respect to the second sentence, AT&T admits that AT&T removed the action to U.S. District Court for the Southern District of Florida on July 22, 2019 and states that, on March 12, 2020, Counts I-IV of the complaint (related to the alleged non-payment of FPL's disputed 2017 and 2018 invoices and

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[13] *See id.* at ATT00517 (Opinion, *FPL v. AT&T*).

[14] *See, e.g.*, *Reiter v. Cooper*, 507 U.S. 258, 268 (1993).

[15] Compl. ¶ 5 (emphasis added).

[16] *Id.*

[17] Compl. Ex. 28 at ATT00478-493 (Complaint).

[18] Compl. Ex. A at ATT00009-10 (Miller Aff. ¶¶ 18-21); Compl. Ex. 29 at ATT00495 (Service of Process).

FPL's default allegations) were stayed in deference to the FCC under the doctrine of primary jurisdiction, Count V of the complaint (related to the pole abandonment provision) was dismissed without prejudice, and the case was administratively closed.[19] With respect to the third sentence, AT&T states that FPL's complaint speaks for itself, denies that the complaint has merit, and denies that AT&T "fail[ed] to continue its contractually-obligated payments" under the JUA because the JUA requires compliance with federal law[20] and FPL invoiced rental rates that did not comply with federal law.[21]

With respect to the fourth sentence of the second paragraph of FPL's response to paragraph 5, AT&T states that FPL's complaint speaks for itself, denies that FPL is entitled to any of the relief it seeks in the *FPL Civil Proceedings*, and denies that FPL's complaint currently seeks "a declaration stating that AT&T owns the 5,320 poles on which AT&T's equipment remained attached after receiving notice of abandonment of said poles from FPL" because Count V of FPL's Complaint (related to the pole abandonment provision) was dismissed without prejudice on March 12, 2020.[22] AT&T denies the last sentence of the second paragraph of FPL's response to paragraph 5 because the *FPL Civil Proceedings* are not currently pending because the litigation in Florida was stayed on March 12, 2020 and the case was administratively closed.[23]

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[19] Compl. Ex. 31 at ATT00510-20 (Opinion, *FPL v. AT&T* (Mar. 12, 2020)).

[20] Compl. Ex. 1 at ATT00039 (JUA, Art. VI).

[21] *FPL 2020 Order*, 35 FCC Rcd at 5321 (¶ 1).

[22] *See* Compl. Ex. 31 at ATT00517, 520 (Opinion, *FPL v. AT&T* (Mar. 12, 2020)) (dismissing Count V without prejudice).

[23] *Id.* at ATT00520.

With respect to the third paragraph of FPL's Answer to paragraph 5, AT&T admits that electric utilities sought review of the new telecom rate presumption adopted in the Commission's *Third Report and Order* in a petition for reconsideration at the FCC, but denies that the new telecom rate presumption is "the very rule upon which a portion" of this Complaint is based because this case challenges default and pole abandonment terms, conditions, and practices as unjust and unreasonable, while the new telecom rate presumption sets the pole attachment rates that are presumptively just and reasonable. AT&T also denies that the relevant question under Rule 1.722(h) is whether there is any "overlap with any issue" in a Commission proceeding[24] and states that the pending petition for reconsideration of the new telecom rate presumption cannot impact AT&T's statutory right to default and pole abandonment terms, conditions, and practices that are just and reasonable.

6. In the first sentence of FPL's response to paragraph 6, FPL admits "that the parties engaged in written communications" and "held face-to-face meetings regarding certain matters raised" in this Complaint, so no response is required. AT&T denies that the communications and meetings only covered "certain matters" raised in AT&T's Complaint because AT&T instead sought to discuss and settle each issue through each step of the JUA's mandatory pre-complaint negotiation process and in additional discussions.[25] AT&T further

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[24] *See* 47 C.F.R. § 1.722(h) ("A formal complaint shall contain … [a] statement explaining whether a separate action has been filed with the Commission, any court, or other government agency that is based on the same claim or same set of facts, in whole or in part, or whether the complaint seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment rulemaking proceeding that is concurrently before the Commission.").

[25] *See, e.g.*, Compl. Ex. A at ATT00004-12 (Miller Aff. ¶¶ 6-25); Compl. Ex. B at ATT00024-27 (Peters Aff. ¶¶ 23-28); Compl. Ex. 33 at ATT00526 (Joint Status Report); Reply Ex. A at ATT00571-574 (Peters Reply Aff. ¶¶ 3-9); Reply Ex. B at ATT00606-610 (Miller Reply Aff. ¶¶ 2-11); Reply Ex. C at ATT0016-17 (York Reply Aff. ¶¶ 3-4); Reply Ex. E at ATT00644-652 (Rhinehart Reply Aff. ¶¶ 4-17).

states that, some communications and meetings only covered "certain matters" because FPL refused to discuss a settlement of issues covered by AT&T's Complaint.[26] The second sentence of FPL's response to paragraph 6 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T states, however, that AT&T "notified [FPL] in writing of the allegations that form the basis of the [C]omplaint," "invited a response within a reasonable period of time," and "in good faith, discussed or attempted to discuss the possibility of settlement with [FPL]" for reasons detailed in AT&T's Complaint, Section II.E of AT&T's Reply Legal Analysis, and AT&T's denials of FPL's affirmative defenses.[27]

II. FPL HAS DENIED AT&T JUST AND REASONABLE TERMS AND CONDITIONS FOR ITS ATTACHMENTS TO OVER 425,000 POLES.

7. AT&T denies the first sentence of FPL's response to paragraph 7 because the Enforcement Bureau found that the pole attachment rates FPL charged AT&T are unjust and unreasonable in violation of federal law.[28] With respect to the second sentence of FPL's response to paragraph 7, AT&T admits subpart (1) because FPL and AT&T are parties to a JUA dated January 1, 1975. With respect to subpart (2), AT&T admits the JUA was amended on June 1, 2007 and admits the June 1, 2007 amendment includes certain storm related protocols and a dispute resolution process, but denies that the June 1, 2007 amendment was the most recent

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[26] *See, e.g.*, Compl. Ex. 32 at ATT00522 (Email from M. Moncada, FPL, to H. Gurland, Counsel for AT&T (Apr. 20, 2020)); Compl. Ex. 33 at ATT00526-27 (Joint Status Report) (describing FPL's settlement proposal); Compl. Ex. A at ATT00011 (Miller Aff. ¶ 25); Reply Ex. A at ATT00571-72 (Peters Reply Aff. ¶¶ 4-5); Reply Ex. B at ATT00606-607, ATT00612-613 (Miller Reply Aff. ¶ 3 & Ex. M-1).

[27] 47 C.F.R. § 1.722(g); *see also, e.g.*, Compl. Ex. A at ATT00011-12 (Miller Aff. ¶ 25); Reply Ex. A at ATT00571-574 (Peters Reply Aff. ¶¶ 3-9); Reply Ex. B at ATT00606-607 (Miller Reply Aff. ¶¶ 2-4); *Nev. State Cable Tel. Ass'n v. Nev. Bell*, 13 FCC Rcd 16774 (¶¶ 4-6) (1998) ("The parties are not required to engage in extended negotiations where the parties apparently are far apart in their analysis of the issues.").

[28] *FPL 2020 Order*, 35 FCC Rcd at 5321 (¶ 1).

amendment of the JUA because [redacted].[29] With respect to subpart (3), AT&T admits FPL terminated the JUA under Article XVI as to the further granting of joint use, effective September 26, 2019,[30] but AT&T denies the termination occurred after FPL "receiv[ed] no payment at all" for 2017 and 2018 pole attachment rent because FPL received payment in full of its unlawful 2017 and 2018 invoices almost 3 months earlier on July 1, 2019.[31] AT&T also denies that FPL's termination of the JUA under Article XVI occurred after AT&T committed a default of a JUA "obligation to maintain and repair joint use poles" or "timely transfer its facilities to new FPL storm-hardened poles" because AT&T did not default in its pole maintenance or transfer obligations under the JUA.[32] AT&T further states that the JUA cannot be terminated for default under Article XII, and that a party's right "to attach to the poles involved the default" cannot be terminated under Article XII if the default relates to "the performance of any work" under the JUA.[33]

AT&T denies the third sentence of FPL's response to paragraph 7 because the Enforcement Bureau found that the pole attachment rates FPL charged AT&T are unjust and unreasonable in violation of federal law[34] and the JUA expressly requires compliance with federal law.[35] The fourth sentence of FPL's response to paragraph 7 is a general denial

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[29] Compl. Ex. 1 at ATT00060-63 (JUA, [redacted]

[30] Compl. Ex. 1 at ATT00048 (JUA, Art. XVI); Compl. Ex. 23 at ATT00466 (Notice of Termination (Mar. 25, 2019)).

[31] *FPL 2020 Order*, 35 FCC Rcd at 5325 (¶ 9); Compl. Ex. A at ATT00009 (Miller Aff. ¶¶ 18-20).

[32] Reply Ex. A at ATT00576-583 (Peters Reply Aff. ¶¶ 14-26); Reply Ex. D at ATT00621-628 (Ellzey Reply Aff. ¶¶ 4-18).

[33] Compl. Ex. 1 at ATT00044-45 (JUA, Art. XII).

[34] *FPL 2020 Order*, 35 FCC Rcd at 5321 (¶ 1).

[35] Compl. Ex. 1 at ATT00039 (JUA, Art. VI).

prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T further states that whether FPL "applied the provisions of the 1975 JUA in accordance with their express language and plain meaning" is irrelevant in this case, which is about whether the JUA's default and pole abandonment terms and conditions and FPL's practices are just and reasonable and denies that AT&T failed—let alone "complete[ly] fail[ed]"—to honor its obligations under the JUA.[36]

A. FPL's Use of the JUA's Default Provision To Demand Removal of AT&T's Facilities Is Unjust and Unreasonable.

8. The first half of the first sentence of FPL's response to paragraph 8 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second half of the first sentence of FPL's response because AT&T did not "willfully refuse[ ] to make any payment at all to FPL for extended periods of time" but instead sought to negotiate the lawful amount due and owing under federal law and the JUA using the mandatory pre-complaint dispute resolution process the parties agreed to follow for billing disputes.[37] AT&T also denies that AT&T "refused" to pay invoices for "monies owed under the 1975 JUA" because FPL invoiced AT&T for rental charges that were not "owed" under the JUA. FPL based those invoiced rental charges on pole attachment rates that were unjust and unreasonable in violation of federal law[38] and the JUA's compliance with federal law requirement.[39] Moreover, AT&T's overpayments for prior rental years were so far above the just and reasonable rates required by

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[36] *See, e.g.*, Reply Ex. A at ATT00576-583 (Peters Reply Aff. ¶¶ 14-26); Reply Ex. B at ATT00608 (Miller Reply Aff. ¶ 6); Reply Ex. D at ATT00621-628 (Ellzey Reply Aff. ¶¶ 4-18); Reply Ex. E at ATT00645-46 (Rhinehart Reply Aff. ¶¶ 5-6).

[37] *See, e.g.*, Compl. Ex. A at ATT00004-09, ATT00011-12 (Miller Aff. ¶¶ 6-17, 25); Reply Ex. B at ATT00607-08 (Miller Reply Aff. ¶¶ 5-6); Reply Ex. E at ATT00649 (Rhinehart Reply Aff. ¶ 12).

[38] *FPL 2020 Order*, 35 FCC Rcd at 5321 (¶ 1).

[39] Compl. Ex. 1 at ATT00039 (JUA, Art. VI).

federal law that AT&T did not "owe" any additional rent for 2017 and 2018.[40] AT&T denies that it "did not try to negotiate lawful rates" and that it "insisted improperly that it was entitled to a presumption that allowed it to pay an undisclosed rate" because AT&T repeatedly asked FPL to discuss the just and reasonable rates required by law and to provide data relevant to calculating rates under the Commission's regulations and orders, such as FPL's new telecom rates and rate calculations and its license agreements with AT&T's competitors.[41] FPL refused to provide the information needed to calculate rates under the Commission's new and preexisting rate formulas and "refused to lower AT&T's rate, maintaining throughout that the *Pole Attachment Order* imposes no such obligation."[42]

With respect to footnote 11, AT&T admits it paid FPL's 2017 and 2018 invoices in full, admits FPL received AT&T's payment on July 1, 2019, and admits AT&T "ask[ed] FPL to identify a lawful rate" because FPL has an obligation to comply with federal law. With respect to the first and second sentences of footnote 11, AT&T denies that AT&T's payment was

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[40] *See* Reply Ex. E at ATT00651-652 (Rhinehart Reply Aff. ¶¶ 15-16).

[41] *FPL 2020 Order*, 35 FCC Rcd at 5326 (¶ 11) ("Beginning in 2018, AT&T argued in correspondence with FPL that it was entitled to a lower rate under the *Pole Attachment Order* and engaged in the JUA Amendment's dispute resolution process, which included an executive-level meeting and a day of mediation."); *see also, e.g.*, Compl. Ex. A at ATT00004-09, ATT00011-12 (Miller Aff. ¶¶ 6-17, 25); Compl. Ex. 6 at ATT00081 (Email from K. Hitchcock, AT&T, to T. Kennedy, FPL (Aug. 21, 2018)); Compl. Ex. 7 at ATT00093-94 (Letter from K. Hitchcock, AT&T, to M. Jarro, FPL (Sept. 13, 2018)); Compl. Ex. 9 at ATT00099 (Email from D. Miller, AT&T, to M. Jarro, FPL (Dec. 6, 2018)); Answer Ex. A at FPL00077-78 (Jarro Decl., Ex. 10 (Email from D. Miller, AT&T, to D. Bromley, FPL (Dec. 14, 2018)); Reply Ex. A at ATT00572, ATT00574 (Peters Reply Aff. ¶¶ 5, 9); Reply Ex. ATT00646-47 (Rhinehart Reply Aff. ¶¶ 8-9).

[42] *FPL 2020 Order*, 35 FCC Rcd at 5326 (¶ 11); *see also, e.g.*, Compl. Ex. 6 at ATT00089 (Letter from M. Jarro, FPL, to AT&T (Aug. 31, 2018); Compl. Ex. 9 at ATT00101 (Email from M. Jarro, FPL, to D. Miller, AT&T (Dec. 4, 2018); Answer Ex. A at FPL00083 (Jarro Decl., Ex. 10 (Email from D. Bromley, FPL, to D. Miller, AT&T (Dec. 20, 2018)); Reply Ex. A at ATT00572, ATT00574 (Peters Reply Aff. ¶¶ 5, 9); Reply Ex. ATT00646-47 (Rhinehart Reply Aff. ¶¶ 8-9).

"delinquent" or "past due" because AT&T had no obligation to pay FPL's invoices, as they did not comply with federal law or the JUA (which expressly requires compliance with federal law),[43] the aggregate balance of AT&T's prior rental overpayments was so high that no additional amount was due,[44] and the JUA does not contain the payment due dates FPL unilaterally added to its invoices.[45] AT&T denies that "AT&T delivered payment … only *after* AT&T filed *Complaint I* on July 1, 2019," because AT&T sent the payment by FedEx on Friday, June 28, 2019 and confirmed that FPL received payment *before* AT&T filed *Complaint I* at the FCC.[46] AT&T denies that interest charges accrued on the 2017 and 2018 invoices because the invoiced amounts were not due under federal law or the JUA (which expressly requires compliance with federal law),[47] the aggregate balance of AT&T's prior overpayments already covered all amounts lawfully due,[48] and the JUA does not include an interest provision.[49] AT&T denies the third sentence of footnote 11 because AT&T did not "hold[ ] up all payments to FPL" or remain attached to FPL's poles "without making any payment" because, while AT&T sought to determine the amount that FPL should have invoiced for 2017 and 2018 rent, AT&T only withheld payment of the disputed rental invoices that were the subject of the parties' discussions. AT&T denies that it did not attempt to "deliver what it thought was due" to FPL because the

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[43] *See, e.g.*, *FPL 2020 Order*, 35 FCC Rcd at 5328 (¶ 13) ("AT&T is entitled to a lower rate."); Compl. Ex. 1 at ATT00029 (JUA, Art. VI).

[44] Reply Ex. E at ATT00651-652 (Rhinehart Reply Aff. ¶¶ 15-16).

[45] *See* Compl. Ex. 1 at ATT00029-63 (JUA); Compl. Ex. 2 at ATT00065-67 (Invoices).

[46] *See* Compl. Ex. A at ATT00009-10 (Miller Aff. ¶¶ 19-21).

[47] *See, e.g.*, *FPL 2020 Order*, 35 FCC Rcd at 5328 (¶ 13) ("AT&T is entitled to a lower rate."); Compl. Ex. 1 at ATT00029 (JUA, Art. VI).

[48] Reply Ex. E at ATT00651-652 (Rhinehart Reply Aff. ¶¶ 15-16).

[49] *See* Compl. Ex. 1 at ATT00029-63 (JUA).

whole purpose of the negotiations was to determine the amount that was due (if any, given AT&T's prior overpayments) under federal law and the JUA, which expressly requires compliance with federal law.[50] AT&T further states that FPL did not ask AT&T to pay an undisputed amount, but instead at all times insisted that the only acceptable payment was a full payment of all invoiced amounts.[51] AT&T denies that it did not attempt to "identify to FPL what it thought was due" because AT&T expressly asked for a new telecom rate or, should FPL establish a higher rate was justified by the existence and established value of net material competitive benefits, a rate as high as the old telecom rate.[52] AT&T denies the fourth sentence of footnote 11 because AT&T did not "simply withhold" payment, but instead sought to resolve the dispute through the JUA's mandatory pre-complaint dispute resolution process.[53] AT&T denies the invoices reflected "substantial payment obligations … due FPL" because the invoiced rates were unlawfully high.[54] AT&T denies that it made a "conclusory allegation that the rate was not

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[50] *See, e.g.*, Compl. Ex. A at ATT00004-09, ATT00011-12 (Miller Aff. ¶¶ 6-17, 25); Compl. Ex. 6 at ATT00081 (Email from K. Hitchcock, AT&T, to T. Kennedy, FPL (Aug. 21, 2018)); Compl. Ex. 7 at ATT00093-94 (Letter from K. Hitchcock, AT&T, to M. Jarro, FPL (Sept. 13, 2018)); Compl. Ex. 9 at ATT00099 (Email from D. Miller, AT&T, to M. Jarro, FPL (Dec. 6, 2018)); Answer Ex. A at FPL00077-78 (Jarro Decl., Ex. 10 (Email from D. Miller, AT&T, to D. Bromley, FPL (Dec. 14, 2018)); Reply Ex. B at ATT00608 (Miller Reply Aff. ¶ 6); Reply Ex. E at ATT00651-52 (Rhinehart Reply Aff. ¶¶ 15-16).

[51] *See, e.g.*, Compl. Ex. A at ATT00009 (Miller Aff. ¶ 17) ("FPL would not … agree to accept any amount other than the full amount of the 2017 and 2018 Invoices."); Reply Ex. A at ATT00573-574 (Peters Reply Aff. ¶ 8); Reply Ex. B at ATT00608 (Miller Reply Aff. ¶ 7); Reply Ex. C at ATT00616-617 (York Reply Aff. ¶¶ 3-4); Reply Ex. E at ATT00651 (Rhinehart Reply Aff. ¶ 14).

[52] *See, e.g.*, Compl. Ex. 5 at ATT00081 (Email from K. Hitchcock, AT&T, to T. Kennedy, FPL (Aug. 21, 2018)); Reply Ex. E at ATT0046 (Rhinehart Reply Aff. ¶ 7).

[53] *See, e.g.*, *FPL 2020 Order*, 35 FCC Rcd at 5326 (¶ 11); Compl. Ex. 1 at ATT00056-57 (JUA, Art. XIIIA); Compl. Ex. A at ATT00006 (Miller Aff. ¶ 12); Reply Ex. B at ATT00607-08 (Miller Reply Aff. ¶ 5).

[54] *See, e.g.*, *FPL 2020 Order*, 35 FCC Rcd at 5328 (¶ 13) ("AT&T is entitled to a lower rate."); *see also* Reply Ex. E at ATT00650-52 (Rhinehart Reply Aff. ¶¶ 13, 15-16).

lawful" because AT&T detailed its concerns with the invoiced rates throughout the JUA's mandatory pre-complaint dispute resolution process.[55]

AT&T denies the second and third sentences of FPL's response to paragraph 8, which contain allegations that are substantially similar or identical to allegations in footnote 11, and AT&T hereby incorporates its response to those allegations. The first half of the fourth sentence of FPL's response to paragraph 8 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. With respect to the second half of the fourth sentence of FPL's response to paragraph 8, AT&T admits that the Enforcement Bureau's Interim Order speaks for itself, but denies "that the Old Telecom Rate is consistent with the contract rate" because FPL charged AT&T rates under the JUA that were [redacted] to [redacted] times a properly calculated old telecom rate.[56] AT&T denies the allegation that AT&T "fail[ed]to timely compensate FPL for its attachments," which is substantially similar or identical to allegations in footnote 11, and AT&T hereby incorporates its response to those allegations. AT&T denies that "the proper remedy" for breach of the JUA ever could be "termination" of the JUA under Article XII (the default provision) because Article XII does not terminate the JUA, only the defaulting party's right "to attach to the poles involved in the default."[57]

With respect to the fifth, sixth, and seventh sentences of FPL's response to paragraph 8, AT&T admits that FPL was the party that initiated the JUA's mandatory pre-complaint dispute resolution process with respect to the dispute regarding FPL's allegation of default, but denies that a party needs to "invoke" the process in order to properly participate in it. Rather, the

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[55] *See, e.g.*, Answer Ex. 10 at FPL00075-78 (Jarro Decl., Ex. 10 (Email from D. Miller, AT&T, to D. Bromley, FPL (Dec. 14, 2018)); Reply Ex. E at ATT00648 (Rhinehart Reply Aff. ¶ 10).

[56] Reply Ex. E at ATT00649-650 (Rhinehart Reply Aff. ¶ 13).

[57] Compl. Ex. 1 at ATT00044-45 (JUA, Art. XII).

parties need to first try to resolve the dispute "in the normal course of business," after which "either Party may give the other Party written notice" to "initiate the dispute resolution process."[58] With respect to the eighth sentence of FPL's response to paragraph 8, AT&T admits that AT&T was the party that initiated the JUA's mandatory pre-complaint dispute resolution process with respect to the pole abandonment dispute, but denies that AT&T "never requested mediation" because AT&T asked the district court to require FPL to mediate after FPL prematurely included the pole abandonment dispute in the *FPL Civil Proceedings*.[59] AT&T also denies that FPL "insisted on participating in mediation" because FPL opposed AT&T's district court motion that sought to enforce the JUA's mediation requirement.[60]

1. Background

9. The first sentence of FPL's response to paragraph 9 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. The second and third sentences of FPL's response to paragraph 9 are denied because they do not respond to the allegations of paragraph 9, but to the extent a response is required, AT&T denies that FPL exercised "its lawful right" under the JUA when it threatened to dismantle AT&T's network of cables on FPL poles because FPL does not have the "lawful right" to impose these unjust and unreasonable terms, conditions, or practices on AT&T for reasons detailed in Section III.A of AT&T's Complaint, Section II.C of

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[58] *See id.* at ATT00056-57 (JUA, §§ 13A.1, 13A.2).

[59] *See* Compl. Ex. 30 at ATT00507 (Report and Recommendation at 11, *FPL v. AT&T*); Compl. Ex. 31 at ATT00517 (Opinion at 8, *FPL v. AT&T*).

[60] *See* Compl. Ex. 30 at ATT00507 (Report and Recommendation at 11, *FPL v. AT&T*); *see also* Pleadings Compilation at ATT00843, *AT&T v. FPL*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (Sept. 25, 2019) (FPL's Opp. to Mot. to Dismiss or Stay at 14, *FPL v. AT&T* (Aug. 20, 2019)) ("Further Mediation would be an exercise in Futility"); *id.* at ATT00844 (FPL's Opp. to Mot. to Dismiss or Stay at 15, *FPL v. AT&T* (Aug. 20, 2019)) ("To urge mediation once again … is pointless and will serve no purpose but delay these proceedings further.").

AT&T's Reply Legal Analysis, and this Reply. AT&T further states that whether FPL applied "the plain and express language of the 1975 JUA" is irrelevant in this case, which is about whether the JUA's terms and conditions and FPL's related practices are just and reasonable. It is also irrelevant that FPL previously charged, and AT&T previously paid, JUA rates that were also unlawful. AT&T is statutorily entitled to "just and reasonable" rates for use of FPL's poles; AT&T's payment of rates that were in violation of federal law "is of no consequence."[61]

The fourth sentence of FPL's response to paragraph 9 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the fifth through seventh sentences of FPL's response to paragraph 9, which contains allegations that are substantially similar or identical to allegations in FPL's response to paragraph 8, and AT&T hereby incorporates its response to those allegations. The fifth sentence of FPL's response to paragraph 9 contains legal conclusions to which no response is required. To the extent a response is required, AT&T denies for reasons detailed in Section III.A of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and because AT&T followed the agreed-upon mandatory pre-complaint dispute resolution process in the JUA[62] and the Enforcement Bureau has found it reasonable to discuss disputed invoices before paying them.[63] FPL admits the third sentence of paragraph 9, so no response is required.

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[61] *AT&T Servs. Inc. v. Great Lakes Comet, Inc.*, 30 FCC Rcd 2586, 2597 (¶ 36) (2015) ("AT&T is entitled to receive Defendants' services at rates no higher than what the Commission has determined to be just and reasonable. That AT&T ordered and paid for Defendants' services for a period of time, therefore, is of no consequence."); *see also S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002) (The FCC must ensure "just and reasonable" rates even if "the attacher has agreed, for one reason or another, to pay a rate above the statutory maximum or otherwise relinquish a valuable right to which it is entitled under the Pole Attachments Act and the Commission's rules.").

[62] *See* Compl. Ex. 1 at ATT0005-57 (JUA, Art. XIIIA).

[63] *MAW Commc'ns, Inc. v. PPL Elec. Util. Corp.*, 34 FCC Rcd 7145, 7152-53 (¶ 18) (2019).

10. FPL admits the first sentence of paragraph 10, so no response is required. FPL admits the parties required 10 months (instead of 7 months) to discuss their rate dispute and FPL's default allegations and admits the additional time was partially, if not principally, due to FPL's "requested extensions," so no response is required.[64] AT&T denies that AT&T added to the time required to complete the process or "insist[ed] that the mediation take place outside the contractual period for dispute resolution" because AT&T instead promptly identified a mediator previously selected by FPL who would satisfy the JUA's requirement that "such mediation take place in Miami, Florida"[65] and, when that mediator was rejected by FPL, agreed to the mediator FPL proposed within about an hour.[66] AT&T then agreed to his first available date for mediation.[67] FPL admits the third sentence of paragraph 10, so no response is required. AT&T denies that "there was no prohibition against FPL's issuance of the [2018] invoice" because federal law and the JUA (which expressly requires compliance with federal law) prohibit FPL from charging AT&T unjust and unreasonable pole attachment rates.[68]

11. The first sentence of FPL's response to paragraph 11 includes a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of the first sentence of FPL's response to paragraph 11, which contains conclusory and unsupported

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[64] *See also, e.g.*, Reply Ex. E at ATT00649 (Rhinehart Reply Aff. ¶ 12).

[65] *See* Compl. Ex. 13 at ATT00252 (Letter from D. Miller, AT&T, to M. Jarro, FPL (Jan. 16, 2019)); *see also* Compl. Ex. 1 at ATT00057 (JUA, § 13A.2).

[66] *See* Compl. Ex. 14 at ATT00255 (Email from D. Miller, AT&T, to M. Jarro, FPL (sent 4:19pm on Jan. 24, 2019)); *id.* at ATT00255 (Email from M. Jarro, FPL, to D. Miller, AT&T (sent 3:12pm on Jan. 24, 2019)).

[67] *See* Compl. Ex. A at ATT00007 (Miller Aff. ¶ 14).

[68] *See FPL 2020 Order*, 35 FCC Rcd at 5321 (¶ 1) ("[W]e address AT&T's claims through the end of the 2018 calendar year and find that, for that period, the rate AT&T paid to attach to FPL's poles was unjust and unreasonable under the *Pole Attachment Order*.").

allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 7, 9, 11, 12, 13, 16, and 25, and AT&T hereby incorporates its response to those allegations. The second sentence of FPL's response to paragraph 11 states that the JUA speaks for itself, so no response is required. The third sentence of FPL's response to paragraph 11 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. The fourth through eighth sentences of FPL's response to paragraph 11 are denied because they do not respond to the allegations of paragraph 11, but to the extent a response is required, AT&T denies the fourth and fifth sentences of FPL's response to paragraph 11 because AT&T has not "intentionally decreased its relative percentage of pole ownership between the parties," something that FPL previously admitted when its witness testified that "AT&T's [pole] ownership ratio has slowly declined … primarily due to FPL's FPSC-ordered storm hardening initiatives."[69] AT&T states that FPL's allegation that "AT&T's offset for pole attachments charges was reduced" is ambiguous, and so denies it. AT&T further states that FPL has charged AT&T unlawfully high pole attachment rates under the JUA that have increased each year.[70] With respect to the sixth and seventh sentences of FPL's response to paragraph 11, AT&T admits that FPL is obligated to compensate AT&T for FPL's attachments to AT&T's poles, but denies any suggestion that FPL has made a payment to AT&T for pole attachment rent.[71] Rather, under the JUA, FPL issues AT&T an annual invoice for a net annual rental amount, which it calculates by subtracting FPL's rent for use of AT&T's poles from AT&T's rent for use

[69] *See* Answer Ex. A at FPL00004 (Kennedy Decl. ¶ 8), *AT&T v. FPL*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (Sept. 16, 2019)); *see also* Reply Ex. A at ATT00582 (Peters Reply Aff. ¶ 25).

[70] *See* Reply Ex. B at ATT00609 (Miller Reply Aff. ¶ 10).

[71] *See id.* (Miller Reply Aff. ¶ 9).

of FPL's poles.[72] AT&T denies that "AT&T receives a full credit for each and every FPL attachment at the same rate AT&T pays for its attachments to FPL" because FPL has charged AT&T different per-pole rates for use of FPL's poles, with some rates that are far higher than the per-pole rates for FPL's use of AT&T's poles.[73] AT&T denies FPL's conclusory and unsupported allegation that "AT&T does not adequately maintain its poles," which is substantially similar or identical to allegations in FPL's response to paragraphs 7, 11, 19, 23, 26, and 32, and AT&T hereby incorporates its response to those allegations. With respect to the eighth sentence of FPL's response to paragraph 11, AT&T admits that "AT&T requires access to FPL's poles," and states that FPL's recognition of that fact confirms the unreasonableness of its effort to use the JUA's default provision to eject AT&T from FPL's poles, while remaining attached to AT&T's poles, due to AT&T's justified challenge of FPL's unlawful pole attachment rates.

The first half of the last sentence of FPL's response to paragraph 11 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. With respect to the second half of the last sentence, AT&T states that the JUA speaks for itself.

12. FPL admits the first sentence of paragraph 12, so no response is required. The first half of the second sentence of FPL's response to paragraph 12 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second half of the second sentence of FPL's response to paragraph 12 because FPL's rates and invoices did *not* comply

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[72] *See, e.g.*, Compl. Ex. 2 at ATT00066-67 (2018 Invoice); *see also* Compl. Ex. 1 at ATT00043 (JUA, § 10.9).

[73] *See* Reply Ex. B at ATT00609 (Miller Reply Aff. ¶ 10); *see also* Compl. Ex. 2 at ATT00065-67 (Invoices).

with the law or the JUA (which expressly requires compliance with federal law),[74] so FPL did not treat the parties equally under the JUA provision requiring each party "to perform its obligations under the JUA pending final resolution of any Dispute, unless to do so would be impossible or impracticable under the circumstances."[75] Instead, FPL took the position that AT&T must pay the unjust and unreasonable rental amounts FPL invoiced, but FPL did *not* need to perform its obligation as the majority pole owner to invoice AT&T rental rates that comply with the JUA and "all applicable provisions of law."[76]

The third sentence of FPL's response to paragraph 12 contain legal conclusions to which no response is required. To the extent a response is required, AT&T denies because AT&T *did* "pay the invoiced rates and then seek a refund at the Commission," which AT&T has not yet received—meaning that FPL continues to hold millions of dollars of excess rent that FPL invoiced in violation of law.[77] AT&T also denies that the "proper course of action" was to immediately pay the disputed invoices before discussing them for reasons detailed in Section III.A of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and this Reply.[78] AT&T denies the fourth and fifth sentences of FPL's response to paragraph 12, which contain allegations that are substantially similar or identical to allegations in FPL's response to

[74] *See FPL 2020 Order*, 35 FCC Rcd at 5321 (¶ 1) ("[W]e address AT&T's claims through the end of the 2018 calendar year and find that, for that period, the rate AT&T paid to attach to FPL's poles was unjust and unreasonable under the *Pole Attachment Order*.").

[75] *See* Compl. Ex. 1 at ATT00057 (JUA, § 13A.4).

[76] *See id.* at ATT00039 (JUA, Art. VI).

[77] *See* Reply Ex. B at ATT00608 (Miller Reply Aff. ¶ 8); Reply Ex. E at ATT00651-652 (Rhinehart Reply Aff. ¶ 16).

[78] *See also MAW Commc'ns*, 34 FCC Rcd at 7152-53 (¶ 18).

paragraphs 7, 8, 9, 11, 12, 20, 22, 24, and 25, and AT&T hereby incorporates its response to those allegations.

13. The first half of the first sentence of FPL's response to paragraph 13 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second half of the first sentence of FPL's response, which contains conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 7, 9, and 11, and AT&T hereby incorporates its response to those allegations. FPL admits the allegations in the second sentence of paragraph 13, so no response is required. The first half of the third sentence of FPL's response to paragraph 13 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of FPL's response to paragraph 13, which contains conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 7, 8, 9, 11, 12, 20, 22, 24, and 25, and AT&T hereby incorporates its response to those allegations.

14. FPL admits the first sentence of paragraph 14, so no response is required. AT&T denies the second half of the first sentence of FPL's response to paragraph 14 because the JUA defines the "mediation process" and states that it may end with the filing of litigation "sixty (60) calendar days following the first day of mediation."[79] The parties participated in mediation about FPL's default allegations on May 1, 2019, and the mediation process ended 60 days later.[80] With respect to the rest of FPL's response to paragraph 14, AT&T states that FPL's letter speaks for itself. AT&T denies that its direct quote from FPL's letter "misrepresent[s]" the letter, which states that "[i]n light of the upcoming mediation scheduled for May 1, 2019, FPL will not take

[79] Compl. Ex. 1 at ATT00057 (JUA, § 13A.2).

[80] Compl. Ex. A at ATT00008-09 (Miller Aff. ¶¶ 16, 18).

any immediate adverse action or require AT&T to begin removing its facilities"—and that it was only "[i]n the event the pending disputes" (described by FPL as nonpayment of the 2017 and 2018 invoices) "are not resolved at the close of the mediation process" that FPL would require "a written plan to expeditiously remove [AT&T's] facilities from all FPL poles."[81]

15. The first half of the first sentence of FPL's response to paragraph 15 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second half of the first sentence of FPL's response, which contains conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 8, 13, 20, 21, 23, and 24, and AT&T hereby incorporates its response to those allegations. AT&T denies the second sentence of FPL's response to paragraph 15 because FPL admits it received payment in full of its 2017 and 2018 rental invoices on July 1, 2019,[82] which was a full year before "AT&T filed its *Complaint II* with the FCC" on July 6, 2020. AT&T denies FPL's speculation in the third sentence of FPL's response to paragraph 15 because AT&T's payments of the 2017 and 2018 rental invoices were not "late," because AT&T's effort to discuss the disputed invoices before paying them was consistent with the JUA's mandatory pre-complaint dispute resolution process and Enforcement Bureau precedent, and for reasons detailed in Section III.A of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and Paragraphs 8, 9, 13, 20, 22, and 25 of this Reply.[83]

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[81] Compl. Ex. 23 at ATT00466 (Letter from M. Jarro, FPL, to AT&T (Mar. 25, 2019)).

[82] *See, e.g.*, Answer ¶ 8 n.11 (admitting receipt of payment "for the 2017 and 2018 calendar years" on July 1, 2019).

[83] *See also In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

16. The first sentence of FPL's response to paragraph 16 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second sentence of FPL's response to paragraph 16 because it misrepresents the allegations of paragraph 16, which state that the "day after FPL received payment in full of the disputed invoices, FPL *served* a state court complaint demanding AT&T 'remove immediately its equipment from FPL poles.'"[84] With respect to the third sentence of FPL's response to paragraph 16, FPL admits some allegations, so no response is required. AT&T lacks sufficient information to admit or deny the subjective motivation for FPL's demand that AT&T remove its facilities from FPL's poles, but states in district court, "FPL maintain[ed] that it was AT&T's failure to make timely payment that … authorized FPL to terminate AT&T's right to attach" under the default provision.[85] AT&T denies the rest of the third sentence of FPL's response to paragraph 16, which contains conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 7, 11, 13, and 25, and AT&T hereby incorporates its response to those allegations.

2. Argument

17. The first sentence of FPL's response to paragraph 17 does not contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply. The first half of the second sentence of FPL's response to paragraph 17 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second

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[84] Compl. ¶ 16 (emphasis added). FPL e-filed its complaint shortly after midnight on July 1, 2019, but served the complaint at about 5 p.m. on July 2, 2019. *See also* Compl. Ex. A at ATT00009 (Miller Aff. ¶¶ 19-20); Compl. Ex. 28 at ATT00478 (Complaint, *FPL v. AT&T*); Compl. Ex. 29 at ATT00495 (Service of Process, *FPL v. AT&T*).

[85] Compl. Ex. 30 at ATT00504 (Report and Recommendation at 8, *FPL v. AT&T*).

half of the second sentence of FPL's response to paragraph 17, which contains conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 7, 9, 11, and 13, and AT&T hereby incorporates its response to those allegations. AT&T denies the third sentence of FPL's response to paragraph 17, which is an absurd, conclusory, and unsupported statement that is contradicted by AT&T's publicly reported pole investment data.[86]

18. FPL's response to paragraph 18 does not contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply.

19. The first sentence of FPL's response to paragraph 19 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second sentence of FPL's response to paragraph 19 because "AT&T's lower pole ownership ratio places it in an inferior bargaining position."[87] AT&T denies the allegation in footnote 18 that "AT&T relies on FPL to replace its damaged poles rather than do so itself" because AT&T routinely replaces its poles when they are damaged and, if FPL should arrive at the scene of a damaged pole first during an emergency and replace a damaged AT&T pole, AT&T pays FPL's "reasonable costs and expenses."[88] AT&T denies that these emergency pole replacements could

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[86] *See* Pole Attachment Data Reports, CC Docket No. 86-182; *see also In re Applications of Priscilla L. Schwier*, 4 FCC Rcd at 2660 (¶ 7) ("General conclusory allegations and speculation simply are not sufficient.").

[87] *FPL 2020 Order*, 35 FCC Rcd at 5327 (¶ 12); *see also id.* at 5331 (¶ 18).

[88] *See* Compl. Ex. 1 at ATT00039 (JUA § 4.7); *see also* Reply Ex. A at ATT00583 (Peters Reply Aff. ¶ 26); Reply Ex. D at ATT00623-24 (Ellzey Reply Aff. ¶ 8). FPL relies on an outdated 14-year old document that states only that FPL replaced some AT&T poles following a 2004 hurricane—and *not* that "AT&T relies on FPL to replace its damaged poles rather than do so itself" as FPL falsely contends. *See* Reply Ex. A at ATT00582, ATT00602 (Peters Reply Aff. ¶ 25 & Ex. P-3).

reduce AT&T's pole ownership numbers under the JUA, because AT&T retains ownership of the pole that it paid FPL to replace.[89] AT&T denies the rest of FPL's response to paragraph 19, which contains conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraph 11, and AT&T hereby incorporates its response to those allegations.

20. The first sentence of FPL's response to paragraph 20 does not contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply. The first half of the second sentence of FPL's response to paragraph 20 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of FPL's response to paragraph 20, which contains conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 7, 8, 9, 11, 13, 15, 17, 21, and 23, and AT&T hereby incorporates its response to those allegations. AT&T also denies FPL's conclusory allegations that "AT&T's actions are incompatible with the concept of fair dealing in the marketplace," are "particularly unjust and unreasonable," and "the epitome of unfair dealing in the marketplace" for reasons detailed in Section III.A of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and this Reply.[90]

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[89] *See* Compl. Ex. 1 at ATT00039 (JUA § 4.7); *see also* Reply Ex. A at ATT00582 (Peters Reply Aff. ¶ 25). FPL relies on an affidavit it previously filed, which states that AT&T's pole ownership ratio has decreased "primarily due to FPL's FPSC-ordered storm hardening initiatives"—not due to any "intentional" action by AT&T as FPL now falsely contends. *See* Answer Ex. A at FPL00004 (Kennedy Decl. ¶ 8), *AT&T v. FPL*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (Sept. 16, 2019)) (cited at Answer ¶ 19 n.18).

[90] *See also In re Applications of Priscilla L. Schwier*, 4 FCC Rcd at 2660 (¶ 7) ("General conclusory allegations and speculation simply are not sufficient.").

21. The first and third sentences of FPL's response to paragraph 21 do not contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply. AT&T denies the second and fourth sentences of FPL's response to paragraph 21, which contain allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 7, 8, 9, 11, 12, 13, 15, 17, 19, 20, and 23, and AT&T hereby incorporates its response to those allegations. With respect to the fourth sentence of FPL's response to paragraph 21, FPL's allegation that AT&T "resorted to unlawful self-help" contains a legal conclusion to which no response is required. To the extent a response is required, AT&T denies because AT&T did *not* engage in "self-help" when it questioned FPL's invoices before paying them. Instead, AT&T proceeded as the parties intended when an invoice is disputed: by seeking to settle the amount that is due through the multi-step mandatory dispute resolution process.[91] When it became clear that the parties' dispute would not be resolved at the end of the dispute resolution process, AT&T processed payment of the full disputed amounts as FPL requested.[92] AT&T, therefore, *did* pay "the disputed rates while simultaneously challenging them."[93] AT&T also denies FPL's allegation of "unlawful self-help" for reasons detailed in Section II.C of AT&T's Reply Legal Analysis.

22. The first half of the first sentence of FPL's response to paragraph 22 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. The second half of the first sentence of FPL's response to paragraph 22 contains a legal conclusion to which no response is

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[91] Compl. Ex. 1 at ATT00056-57 (JUA, Art. XIIIA).

[92] Compl. Ex. A at ATT00009 (Miller Aff. ¶ 18); *see also* Compl. Ex. 23 at ATT00466 (Notice of Termination).

[93] *See* FPL Br. at 52.

required. To the extent a response is required, AT&T denies the second half of the first sentence, which contains conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraph 21, and AT&T hereby incorporates its response to those allegations. AT&T denies the second, third, and fourth sentences of FPL's response to paragraph 22, which contains conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraph 14, and AT&T hereby incorporates its response to those allegations. The first half of the last sentence of FPL's response to paragraph 22 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second half of the last sentence of FPL's response to paragraph 22 because AT&T has overpaid FPL millions annually in excess of the maximum just and reasonable rates that FPL can legally charge AT&T as of July 12, 2011[94] and because the applicable statute of limitations for AT&T's rate complaint (*Complaint I*) is the five-year statute of limitations that applies to contract actions in Florida.[95]

23. The first half of the first sentence of FPL's response to paragraph 23 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. With respect to the second half of the first sentence and the second sentence of FPL's response to paragraph 23, AT&T lacks sufficient information to admit or deny the subjective motivation for FPL's demand that AT&T remove its facilities from FPL's poles, but states that in district court, "FPL maintain[ed]

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[94] *See* Reply Ex. E at ATT00651-652 (Rhinehart Reply Aff. ¶¶ 15-16); *see also FPL 2020 Order*, 35 FCC Rcd at 5321 (¶ 1) ("[W]e address AT&T's claims through the end of the 2018 calendar year and find that, for that period, the rate AT&T paid to attach to FPL's poles was unjust and unreasonable under the *Pole Attachment Order*.").

[95] *Potomac Edison Order* at 22 (¶ 46) (holding the "applicable statute of limitations" is the "statute of limitations for contract actions" under State law); *see also* Fla. Stat. § 95.11(2)(b) (applying to "legal or equitable action[s] on a contract, obligation, or liability founded on a written instrument …").

that it was AT&T's failure to make timely payment that … authorized FPL to terminate AT&T's right to attach" under the default provision.[96] AT&T further states that FPL's reliance on bogus or overstated operational issues[97] to eject AT&T from its poles is *per se* unreasonable because those issues do not provide a basis for FPL to terminate AT&T's access to FPL's poles under the JUA's default provision.[98] AT&T also denies that it has "become an untenable and unreliable joint use partner" to FPL because FPL has conveyed *no* intention to remove its facilities from AT&T's poles,[99] seeking *only* to eject AT&T's facilities from FPL's poles.[100] In that event, FPL would continue to provide the "safe and reliable service to customers" it says it already provides using a "reliable network of poles" that includes more than 213,000 AT&T-owned poles.[101] AT&T denies the remaining allegations in the second half of the first sentence and the second sentence of FPL's response to paragraph 23, which contain allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 7, 8, 11, 13, 15, 19, 20, and 21, and AT&T hereby incorporates its response to those allegations. The last sentence of FPL's response to paragraph 23 does not contain specific factual allegations or legal arguments to

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[96] Compl. Ex. 30 at ATT00504 (Report and Recommendation at 8, *FPL v. AT&T*).

[97] *See* Reply Ex. A at ATT00581-583 (Peters Reply Aff. ¶¶ 23-26); Reply Ex. D at ATT00618-628 (Ellzey Reply Aff. ¶¶ 4-18).

[98] Compl. Ex. 1 at ATT00045 (JUA, § 12.3) ("If the default giving rise to a suspension of rights *involves the failure to meet a money payment obligation hereunder*, and such suspension shall continue for a period of sixty (60) days, then the party not in default may forthwith terminate the rights of the other party to attach to the poles involved in the default.") (emphasis added).

[99] *See, e.g.*, FPL Br. at 65 ("the default provision … terminates the breaching party's rights under the agreement"); *see also* Compl. Ex. 1 at ATT00045 (JUA, § 12.3).

[100] Compl. Ex. 28 at ATT00487, ATT00490 (seeking order "directing AT&T Florida to remove immediately its equipment from FPL poles"); *see also* Reply Ex. A at ATT00581-583 (Peters Reply Aff. ¶¶ 23-26) & Reply Ex. D at ATT00618-628 (Ellzey Reply Aff. ¶¶ 4-18) (refuting allegation that AT&T is "an untenable and unreliable joint use partner).

[101] FPL Br. at 58 ("FPL is attached to over 200,000 AT&T poles."); Compl. Ex. A at ATT00004 (Miller Aff. ¶ 7) (stating that AT&T owns about 213,210 of the joint use poles).

which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply.

24. The first sentence of FPL's response to paragraph 24 does not contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply. AT&T denies the second sentence of FPL's response to paragraph 24 because "general contract principles prohibit the enforcement of unreasonable penalties for breach of contract"[102] and no penalty could be more extreme and unreasonable than the forced removal of essential telecommunications facilities from over 425,000 poles. AT&T denies the third through sixth sentences of FPL's response to paragraph 24, which contain allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 7, 9, 11, 13, 15, 17, 20, and 22, and AT&T hereby incorporates its response to those allegations. AT&T denies that the JUA's default provision "allows a party to terminate when the other party does not pay" because the default provision does not terminate the JUA, only the defaulting party's right "to attach to the poles involved the default."[103]

The seventh sentence of FPL's response to paragraph 24 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the eighth sentence of FPL's response to paragraph 24, which contains conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraph 22, and AT&T hereby incorporates its response to those allegations. With respect to the ninth sentence of FPL's response to paragraph 24, AT&T states that the Enforcement Bureau's Interim Order speaks for

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[102] *See Mile Hi Cable Partners v. Pub. Serv. Co. of Colorado*, 17 F.C.C. Rcd. 6268, 6272 (2002) (¶ 10).

[103] Compl. Ex. 1 at ATT00044-45 (JUA, Art. XII).

itself, but denies "that the old telecom rate is not necessarily lower than the rate under the 1975 JUA" because the Enforcement Bureau expressly found that "AT&T is entitled to a lower rate."[104] AT&T denies the last sentence of FPL's response to paragraph 24, because the old telecom rate is *not* "more than the rate under the 1975 JUA" and FPL *has not* lawfully exercised its rights under the JUA because it has charged and collected from AT&T millions of dollars each year in excess of the just and reasonable rates required by law.[105]

25. The first half of the first sentence of FPL's response to paragraph 25 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second half of the first sentence and the second through fourth sentences of FPL's response to paragraph 25, which contain conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 7, 8, 9, 11, 13, 15, 17, 19, 20, 21, 23, and 2, and AT&T hereby incorporates its response to those allegations. The fifth sentence of FPL's response to paragraph 25 does not contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply. The first half of the last sentence of FPL's response to paragraph 25 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second half of the last sentence of FPL's response to paragraph 25, which contain conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 7, 11, 13, 16, and 25, and AT&T hereby incorporates its response to those allegations.

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[104] *FPL 2020 Order*, 35 FCC Rcd at 5328 (¶ 13); *see also* Reply Ex. E at ATT00650 (Rhinehart Reply Aff. ¶ 13).

[105] *FPL 2020 Order*, 35 FCC Rcd at 5328 (¶ 13) ("AT&T is entitled to a lower rate."); *see also* Reply Ex. E at ATT00650-652 (Rhinehart Reply Aff. ¶¶ 13, 15-16).

B. FPL's Use of the JUA's Pole Abandonment Provision to Try to Shift FPL's Replacement Pole Costs to AT&T is Unjust and Unreasonable.

26. The first half of the first sentence of FPL's response to paragraph 26 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second half of the first sentence and the second sentence of FPL's response to paragraph 26, which contain conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 7, 9, 11, 13, 17, 23, 25, 30, 37, and 42, and AT&T hereby incorporates its response to those allegations. The third sentence of FPL's response to paragraph 26 does not contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply.

The first half of the fourth sentence of FPL's response to paragraph 26 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. With respect to the second half of the fourth sentence of FPL's response to paragraph 26, AT&T denies that there are "abandoned poles at issue" because FPL's attempt to invoke the JUA's pole abandonment provision by unilaterally designating thousands of poles it has replaced as "abandoned poles" is improper, as they are not legitimately "abandoned poles."[106] A pole abandonment provision allows a pole owner to transfer ownership of a single pole when it no longer needs a pole in that location—and the attacher wants to continue to use that pole to support its facilities.[107] Conversely, when a pole is replaced (rather than abandoned), all attachers must transfer their facilities to the replacement pole before the pole owner removes and discards the replaced

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[106] Compl. Ex. B at ATT00016-17 (Peters Aff. ¶¶ 5-8); Reply Ex. A at ATT00574-76 (Peters Reply Aff. ¶¶ 10-13); Reply Ex. D at ATT00628 (Ellzey Reply Aff. ¶ 18).

[107] Compl Ex. B at ATT00016-17 (Peters Aff. ¶ 6); Reply Ex. A at ATT00574 (Peters Reply Aff. ¶ 10).

pole.[108] FPL's effort to "abandon" poles that are mid-way through the process of replacement is an unjust and unreasonable practice for reasons detailed in Section III.B of AT&T's Complaint, Section II.D of AT&T's Reply Legal Analysis, and this Reply.

AT&T denies that the replaced "poles at issue may still be used" in lieu of transferring facilities to FPL's replacement poles because there is no option to remain indefinitely on the replaced poles.[109] Among other things, local communities and residents do not like double poles in the right-of-way[110] and FPL admits it posted signs on the poles stating "Contact AT&T for Pole Removal."[111] AT&T denies that the "poles at issue … are still being used by AT&T" because AT&T has transferred its facilities to FPL's replacement poles.[112] In the second half of the fourth sentence and the fifth sentence of FPL's response to paragraph 26, FPL admits "that the plain meaning of 'replace' with regard to a pole means to remove the existing pole and install a similar pole in the same place," as confirmed by the authorities AT&T cited, which distinguish between a pole replacement (meaning all parties will continue to use the replacement pole at the specific location) and a pole abandonment (meaning the pole owner will no longer use a pole at that location), so no response is required.

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[108] Compl. Ex. B at ATT00017 (Peters Aff. ¶ 7); Reply Ex. A at ATT00574-76 (Peters Reply Aff. ¶¶ 10-13).

[109] Compl. Ex. B at ATT00017 (Peters Aff. ¶ 8).

[110] *Id.*

[111] Compl. ¶ 33; Answer to Compl. ¶ 33 ("FPL admits that it posted signs on the 5,230 poles").

[112] *See* Compl. Ex. B at ATT00026 (Peters Aff. ¶ 27); Reply Ex. A at ATT00578 (Peters Reply Aff. ¶ 17); *see also, e.g.*, FPL Br. at 78 (quoting unrebutted allegation of Compl. ¶ 35 that "[b]y the end of June 2020, AT&T completed transfers for 99 percent of the poles on FPL's list that were ready for AT&T to complete its transfer.").

1. Background

27. In the first sentence of its response to paragraph 27, FPL admits that Florida law requires the storm-hardening of FPL's [utility poles] to strengthen the electric grid, so no response is required. The first sentence of FPL's response to paragraph 27 also contains a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of the first sentence because paragraph 27 alleges that FPL has tried to force a mass transfer of its pole removal and disposal costs onto AT&T, which is not part of "a legal mandate designed to better protect and serve FPL customers who face the drastic challenges and effects of Florida's annual storm season." To the contrary, FPL's effort to shift its pole removal and disposal costs to AT&T is an unjust and unreasonable practice in violation of federal law for reasons detailed in Section III.B of AT&T's Complaint, Section II.D of AT&T's Reply Legal Analysis, and this Reply.

In the second sentence of FPL's response to paragraph 27, FPL admits the allegations in the second sentence of paragraph 27, so no response is required. In the first half of the third sentence of FPL's response to paragraph 27, FPL admits "that FPL sought and the Florida [PSC] approved FPL's Storm Hardening Plan," so no response is required. AT&T denies the second half of the third sentence of FPL's response to paragraph 27 because FPL admits "Florida has a cost recovery process to compensate FPL for any expenses incurred as part of its storm hardening efforts" and that FPL nonetheless seeks "to reduce its costs" by having AT&T pay for them.[113]

[113] FPL Br. at 72; *see also* Second Supp. Resp. to Interrogatory No. 4 (Dec. 3, 2020) (listing FPL's pole removal costs).

28. In the first sentence of its response to paragraph 28, FPL admits that a critical feature of FPL's Storm Hardening Plans is the installation of taller, stronger wood or concrete poles than the wood utility poles it has historically used, so no response is required. AT&T denies the rest of the first sentence of FPL's response to paragraph 28 because FPL *is* "engaged in the 'replacement' of poles" that are at issue.[114] FPL admits most of the allegations of the second sentence of paragraph 28, so no response is required. AT&T denies FPL's conclusory and unsupported allegation in the second sentence of its response to paragraph 28 that its storm hardening costs are not "unprecedented" and states that the [redacted][115] AT&T further states that the fact that the Florida PSC has approved FPL's recovery of the costs of its Storm Hardening Plans through rates or surcharges under State law confirms the unreasonableness of FPL's effort to foist the same costs on AT&T for reasons detailed in Section III.B of AT&T's Complaint and Section II.D of AT&T's Reply Legal Analysis. With respect to the last sentence of FPL's response to paragraph 28, AT&T admits that the [redacted] speaks for itself. The last sentence of FPL's response to paragraph 28 does not otherwise contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply.

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[114] *See* Compl. Ex. 6 at ATT00090 (Notice of Default (Aug. 31, 2018)) (alleging that "AT&T is not promptly transferring its facilities as FPL replaces its poles"); Answer Ex. A at FPL00003 (Jarro Decl. ¶ 8) (criticizing the timeliness of AT&T's "transfer [of] its facilities to FPL replacement poles").

[115] Compl. Ex. 1 at ATT00060 (JUA, [redacted]).

29. In the first sentence of its response to paragraph 29, FPL "admits that, following 2006, it has been hardening its pole network pursuant to an FPSC program that requires improved grid resiliency in Hurricane-prone Florida," so no response is required. AT&T denies the conclusory and unsupported allegation in the second sentence of FPL's response to paragraph 29 that "FPL furnishes AT&T information regarding FPL's hardening plans each year in advance of doing the work," because AT&T typically learns the specific work it must complete on a pole-by-pole basis when it receives a notification through the National Joint Utilities Notification System ("NJUNS").[116] The last sentence of FPL's response to paragraph 29 does not contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply. AT&T further states that FPL failed to address many allegations in paragraph 29, so they are admitted.[117]

30. With respect to the first sentence of FPL's response to paragraph 30, AT&T admits that the JUA speaks for itself. The first sentence of FPL's response to paragraph 30 does not otherwise contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply. The first half of the second sentence of FPL's response to paragraph 30 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second half of the second sentence of FPL's response to paragraph 30 because AT&T promptly transferred its facilities to FPL's replacement poles for reasons detailed in Section III.B of AT&T's Complaint and Section II.D of AT&T's Reply Legal

[116] Reply Ex. A at ATT00580-581 (Peters Reply Aff. ¶ 22).

[117] 47 C.F.R. § 1.726(d) ("Averments in a complaint … are deemed to be admitted when not denied in the answer.").

Analysis. AT&T denies that FPL "lawfully exercised" rights under the JUA because FPL does not have the "lawful right" to impose unjust and unreasonable terms, conditions, or practices on AT&T for reasons detailed in Section III.B of AT&T's Complaint, Section II.D of AT&T's Reply Legal Analysis, and this Reply. AT&T further states that whether FPL exercised "express contractual rights under the 1975 JUA" is irrelevant in this case, which is about whether the JUA's pole abandonment terms and conditions and FPL's related practices are just and reasonable.

AT&T denies the third sentence of FPL's response to paragraph 30 because AT&T did not have "the option to transfer its facilities" to the replacement poles because FPL made it impossible for AT&T to complete the transfers to all replacement poles when it demanded that AT&T complete transfers on over 11,000 poles in 60 days, for reasons detailed in Section III.B of AT&T's Complaint and Section II.D of AT&T's Reply Legal Analysis.[118] AT&T denies that it "chose" to accept ownership of the replaced poles because AT&T initiated the JUA's mandatory dispute resolution process, as AT&T has *not* accepted ownership of the replaced poles.[119] The fourth sentence of FPL's response to paragraph 30 contains a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of the fourth sentence of FPL's response to paragraph 30 because FPL's December 2018 Notice of Abandonment listed 11,142 poles, including many poles that still had existing facilities of other

[118] *See also* Reply Ex. A at ATT00580 (Peters Reply Aff. ¶ 21); Reply Ex. D at ATT00627-28 (Ellzey Reply Aff. ¶ 17).

[119] *See, e.g.*, Compl. Ex. 22 at ATT00463 (Letter from B. Ball, AT&T, to M. Jarro, FPL (Mar. 25, 2019)) ("AT&T continues to disagree that ownership of any poles transferred to AT&T on February 21, 2019 for the reasons we discussed at our March 8th meeting and our counsel detailed in prior letters.")

companies attached, which precluded AT&T from initiating its transfer work.[120] FPL did not send a "revised list" until February 2019, when it declared that 5,230 poles had become "the property of AT&T on February 20, 2019."[121] In other words, by FPL's unreasonable deadline, AT&T had reduced the pending transfers by over 50 percent—from 11,142 to 5,230 poles—by devoting significant resources to the effort.[122] With respect to the last sentence of FPL's response to paragraph 30, AT&T states that what the JUA pole abandonment provision permits is irrelevant in this case, which is about whether the JUA's pole abandonment terms and conditions and FPL's related practices are just and reasonable, but notes that FPL's claim that it can abandon its worthless replaced poles to AT&T even though it was impossible for AT&T to complete the transfer work in 60 days because other companies had attachments on the poles confirms the unreasonableness of FPL's pole abandonment practices.[123] AT&T must at least have a reasonable opportunity to avoid the pole abandonment or FPL has turned the pole abandonment provision into a pure money-making scheme.

31. With respect to the first sentence of FPL's response to paragraph 31, AT&T admits that the cited documents speak for themselves. The second sentence of FPL's response to paragraph 31 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the third sentence of FPL's response to paragraph 31, which contains conclusory

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[120] *See* Compl. Ex. 10 at ATT00104-243 (Notice of Abandonment (Dec. 19, 2018)); Compl. Ex. 15 at ATT00259 (Letter from J. Thomas, AT&T, to FPL (Jan. 25, 2019)); Compl. Ex. B at ATT00019 (Peters Aff. ¶ 12); Reply Ex. A at ATT00580 (Peters Reply Aff. ¶ 21); Reply Ex. D at ATT00627-28 (Ellzey Reply Aff. ¶ 17).

[121] *See* Compl. Ex. 20 at ATT000274-358 (Letter from M. Jarro, FPL to AT&T (Feb. 22, 2019)); *see also* Reply Ex. A at ATT00577 (Peters Reply Aff. ¶ 15).

[122] *See* Compl. Ex. B at ATT00025 (Peters Aff. ¶ 24); Reply Ex. A at ATT00577 (Peters Reply Aff. ¶ 15).

[123] *See also* Reply Ex. A at ATT00580 (Peters Reply Aff. ¶ 21); Reply Ex. D at ATT00627-28 (Ellzey Reply Aff. ¶ 17).

and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraph 28, and AT&T hereby incorporates its response to those allegations. AT&T denies the fourth sentence of FPL's response to paragraph 31 because the work related to replacing and relocating poles is governed by *both* Section 3.3 and Article IV of the JUA, but not by the pole abandonment provision in Article IX.[124] AT&T further states that FPL agrees that Section 3.3 of the JUA applies to the timing of transfer work, as it expressly alleged that "AT&T is not promptly transferring its facilities as FPL replaces its poles as required under Section 3.3 of the Agreement."[125]

With respect to the first three sentences of the second paragraph of FPL's response to paragraph 31, AT&T states that Section 3.3 speaks for itself, denies that AT&T's direct quote from Section 3.3 "misquoted and misinterpreted" Section 3.3, and denies that AT&T alleged that Section 3.3 "*merely* requires 'that AT&T perform transfers to replacement poles 'promptly.'"[126] With respect to the fourth sentence of the second paragraph of FPL's response to paragraph 31, AT&T admits that FPL asserted that AT&T failed to perform its transfer work "promptly,"[127] but denies FPL's conclusory, unsupported, and unfounded allegation that AT&T performed its transfer work in a way that interfered with FPL's provision of electric service.[128] AT&T further

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[124] Compl. Ex. 1 at ATT00034, ATT00036-39 (JUA, § 3.3 & Art. IV).

[125] Compl. Ex. 6 at ATT00090 (Notice of Default (Aug. 31, 2018)).

[126] *See* Compl. ¶ 31; *see also* Compl. Ex. 1 at ATT00034 (JUA, § 3.3) ("Except as herein otherwise expressly provided, each party shall place, maintain, rearrange, transfer and remove its own attachments at its own expense, and shall at all times perform such work promptly and in such a manner as not to interfere with the service of the other party.").

[127] *See* Compl. Ex. 6 at ATT00090 (Notice of Default (Aug. 31, 2018)).

[128] *In re Applications of Priscilla L. Schwier*, 4 FCC Rcd at 2660 (¶ 7) ("General conclusory allegations and speculation simply are not sufficient."); *see also* Reply Ex. D at ATT00627 (Ellzey Reply Aff. ¶ 16).

notes that FPL has consistently taken the position that it sent its "Notice of Abandonment" because AT&T had *not* performed its transfer work on the relevant poles. If so, AT&T could not have *performed* the transfer work in a way that "interfere[d]" with FPL's service. With respect to the last sentence of FPL's response to paragraph 31, AT&T states that the referenced letter speaks for itself and states that FPL's allegation was then and remains now conclusory and unsupported.

32. The first sentence of FPL's response to paragraph 32 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. With respect to footnote 26, AT&T states that its witness has over 21 years of experience with AT&T-affiliated entities, including more than a decade as a subject matter expert on issues related to joint use,[129] that neither party has a witness whose testimony spans the entirety of the JUA, which was entered in 1975, let alone the "parties' overall joint use relationship," which dates back decades further,[130] and denies that AT&T's allegation "contradicts" other allegations in the Complaint. To the contrary, AT&T alleged that, before this dispute, the parties had followed a cooperative "pole-by-pole" approach to the pole abandonment provision when one would no longer need a pole or a pole line at a specific location.[131] The parties did not—as FPL attempts here—unilaterally declare that over 11,000 poles would be "abandoned" if AT&T did not complete its transfer work to a replacement pole in 60 days.[132]

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[129] *See* Compl. Ex. B at ATT00015 (Peters Aff. ¶ 3).

[130] *See* Answer Ex. A at FPL00002 (Jarro Decl. ¶ 3); Answer Ex. B at FPL00136 (Allain Decl. ¶ 4).

[131] *See, e.g.*, Compl. ¶¶ 26, 36, 59.

[132] *See, e.g.*, Compl. Ex. 3 at ATT00071 (sample FPL pole abandonment notice); Compl. Ex. B at ATT00022 (Peters Aff. ¶ 18); Reply Ex. A at ATT00574-75 (Peters Reply Aff. ¶ 11).

With respect to the second sentence of FPL's response to paragraph 32, AT&T admits that there was no "discussion of the abandonment provision" in FPL's August 31, 2018 letter, which alleged that "AT&T is not promptly transferring its facilities as FPL replaces its poles as required under Section 3.3 of the Agreement"—without suggesting that FPL would unjustly and unreasonably attempt to unilaterally set a hard-and-fast 60-day deadline on the transfers using the JUA's pole abandonment provision.[133] AT&T denies the rest of the second sentence of FPL's response to paragraph 32 because FPL's Notice of Abandonment was an abrupt change in position, as confirmed by its witness who stated that FPL discussed the timing of AT&T's transfers at a December 7, 2019 meeting—and decided to send the December 19, 2018 Notice of Abandonment 12 days later because AT&T did not accede to FPL's demands.[134] With respect to the third sentence of FPL's response to paragraph 32, AT&T admits that FPL's August 31, 2018 letter speaks for itself. With respect to the fourth sentence of FPL's response to paragraph 32, AT&T states that FPL's August 31, 2018 letter speaks for itself and denies FPL's conclusory and unsupported allegation that AT&T was in default of its obligations under the JUA, which is substantially similar or identical to allegations in FPL's response to paragraphs 7, 11, 13, 16, and 25, and AT&T hereby incorporates its response to those allegations. The last sentence of FPL's response to paragraph 32 is denied because it does not respond to the allegations of paragraph 32, but to the extent a response is required, AT&T states that the JUA speaks for itself and denies FPL's conclusory and unsupported allegation that AT&T was in default of its obligations under the JUA, which is substantially similar or identical to allegations in FPL's response to

[133] *See* Compl. Ex. 6 at ATT00090 (Notice of Default (Aug. 31, 2018)); *see also* Compl. Ex. B at ATT00021-22 (Peters Aff. ¶¶ 17-18).

[134] *See* Answer Ex. A at FPL00009 (Jarro Decl. ¶ 43 & n.4); *see also* Compl. Ex. 10 at ATT00104-243 (Notice of Abandonment (Dec. 19, 2018)).

paragraphs 7, 11, 13, 16, and 25, and AT&T hereby incorporates its response to those allegations.

33. With respect to the first sentence of FPL's response to paragraph 33, AT&T denies that the first sentence of paragraph 33 constitutes a legal conclusion because it instead states that "AT&T opposed FPL's unjust and unreasonable attempt to 'abandon' more than 11,000 replaced poles to AT&T mid-transfer, which would shift FPL's pole removal and disposal costs to AT&T and, according to FPL, also require AT&T to pay for the useless assets."[135] AT&T denies footnote 28 because FPL said that it would abandon over 11,000 poles to AT&T should AT&T fail to complete its transfers within 60 days of its December 19, 2018 notice, and only reduced the list to 5,230 on February 22, 2019—after the 60 days had concluded—when FPL declared that 5,230 poles "now belong to AT&T."[136] AT&T admits that the February 22, 2019 list came "shortly" after the December 19, 2018 notice, which confirms the unreasonableness of FPL's demand that AT&T complete the transfer work on over 11,000 poles in that impossibly short time.[137] And the fact that AT&T had reduced the pending transfers by over 50 percent—from 11,142 to 5,230 poles—in that impossibly short time period confirms AT&T's diligence and the unreasonableness of FPL's refusal to discuss an extension to FPL's unilaterally imposed transfer deadline when the parties met on March 8, 2019.[138]

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[135] *See* Compl. ¶ 33; *see also* Resp. to Interrogatory No. 7; Second Supp. Resp. to Interrogatory No. 4.

[136] *See* Compl. Ex. 10 at ATT00104-243 (Notice of Abandonment (Dec. 19, 2018)); Compl. Ex. 20 at ATT00274-358 (Letter from M. Jarro, FPL, to AT&T (Feb. 22, 2019)); Reply Ex. A at ATT00577 (Peters Reply Aff. ¶ 15).

[137] *See* Compl. Ex. B at ATT00022-23 (Peters Aff. ¶¶ 19-20).

[138] *See* Compl. Ex. B at ATT00025-26 (Peters Aff. ¶¶ 24-26); Reply Ex. A at ATT00577 (Peters Reply Aff. ¶ 15).

The first half of the second sentence of FPL's response to paragraph 33 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. The second half of the second sentence of FPL's response to paragraph 33 does not contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply.

With respect to the third sentence of FPL's response to paragraph 33, FPL admits "that it posted signs on the 5,230 poles that FPL was abandoning to AT&T," so no response is required. AT&T notes that FPL did not deny that it posted the signs on poles stating they were the property of AT&T *before* 60 days had passed from FPL's Notice of Abandonment.[139] AT&T lacks sufficient information to admit or deny the subjective motivation for FPL to post the signs, but states that FPL did not deny AT&T's allegation that it did so "in an attempt to further increase pressure on AT&T."[140] AT&T denies the last sentence of FPL's response to paragraph 33, which contains conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraph 30, and AT&T hereby incorporates its response to those allegations.

34. In the first sentence of its response to paragraph 34, FPL admits "that AT&T invoked the contract's mandatory pre-complaint dispute resolution process," so no response is required. AT&T denies the second sentence and the first half of the third sentence of FPL's response to paragraph 34 because AT&T invoked the mandatory pre-complaint dispute resolution process and sought to discuss a reasonable schedule before and shortly after FPL

[139] *See* 47 C.F.R. § 1.726(d) ("Averments in a complaint … are deemed to be admitted when not denied in the answer.").

[140] *See* Compl. ¶ 33; *see also* 47 C.F.R. § 1.726(d) ("Averments in a complaint … are deemed to be admitted when not denied in the answer.").

claims the replaced poles were abandoned to AT&T.[141] AT&T denies the second half of the third sentence, the fourth sentence, and footnote 29 of FPL's response to paragraph 34 for reasons detailed in Section II.E of AT&T's Reply Legal Analysis, paragraphs 3 and 6 of this Reply, AT&T's denials of FPL's affirmative defenses, and because AT&T discussed its legal claims and arguments through each step of the parties' mandatory pre-complaint dispute resolution process, which included correspondence, a face-to-face executive-level meeting, and a full-day private mediation on May 5, 2020.[142] AT&T further states that FPL prematurely filed litigation about the parties' pole abandonment dispute, confirming that AT&T also has the right to do so now that the parties have completed the JUA's mandatory pre-complaint dispute resolution process.[143] And, because FPL refused to discuss a settlement of the pole abandonment dispute in June 2020, AT&T was forced to file its complaint.[144]

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[141] Compl. Ex. B at ATT00025-2 (Peters Aff. ¶¶ 25-26) (stating that, on March 8, 2019, "FPL's executives seemed pleased by AT&T's herculean efforts, but were unconcerned that its list was wrong and insisted that ownership of 5,230 of FPL's replaced poles had already transferred to AT&T."); Compl. Ex. 15 at ATT00258 (Letter from J. Thomas, AT&T, to FPL (Jan. 25, 2019)) ("Given AT&T's receipt of the notice on the eve of the Christmas holidays, as well as the enormous number of poles involved, it is not reasonable to expect AT&T to be able to respond in 60 days, and AT&T has no reason to believe FP&L has such an unreasonable expectation."); Reply Ex. A at ATT00571-72 (Peters Reply Aff. ¶ 4); *see also* Compl. Ex. 20 at ATT00274-358 (Letter from M. Jarro, FPL, to AT&T (Feb. 22, 2019)) (alleging that poles were abandoned on February 20, 2019).

[142] Compl. Ex. A at ATT00005-12 (Miller Aff. ¶¶ 9-25); Reply Ex. B at ATT606-607 (Miller Reply Aff. ¶¶ 2-4); Reply Ex. A at ATT00571-574 (Peters Reply Aff. ¶¶ 3-9).

[143] *See* Compl. Ex. 30 at ATT00507 (Report and Recommendation at 11, *FPL v. AT&T*); Compl. Ex. 31 at ATT00517 (Opinion at 8, *FPL v. AT&T*); *see also* Compl. Ex. A at ATT00010-11 (Miller Aff. ¶¶ 23-26).

[144] Compl. Ex. 33 at ATT0052-27 (Joint Status Report); Reply Ex. A at ATT00572 (Peters Reply Aff. ¶ 5); Reply Ex. B at ATT00606-07, ATT00612-13 (Miller Reply Aff. ¶ 3 & Ex. M-1); *see also Nev. State Cable Tel. Ass'n v. Nev. Bell*, 13 FCC Rcd 16774 (¶ 4) (1998) ("The parties are not required to engage in extended negotiations where the parties apparently are far apart in their analysis of the issues.").

35. FPL's response to paragraph 35 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

2. Argument

36. With respect to the first sentence of FPL's response to paragraph 36, AT&T denies that the first, second, and fourth sentences of paragraph 36 are legal conclusions and denies that they are unsupported.[145] The second and third sentences of FPL's response to paragraph 36 are general denials prohibited by 47 C.F.R. § 1.726(b), so no response is required. With respect to the fourth sentence of FPL's response to paragraph 36, AT&T admits the prior testimony submitted by FPL speaks for itself. With respect to the fifth and sixth sentences of FPL's response to paragraph 36, AT&T denies that its direct quote from FPL's prior testimony "misrepresent[s]" the testimony, which unambiguously stated that a different ILEC had "the right to take ownership of a pole being abandoned by FPL *if FPL is leaving the pole line*."[146] FPL's witness did not state that this was just "one example of potential pole abandonment" as FPL now falsely contends, nor did the witness submit a declaration in this case to attempt to explain or distinguish his prior testimony.

In the seventh sentence of FPL's response to paragraph 36, FPL admits the allegations in the fourth sentence of paragraph 36, FPL admits that, "[i]n this instance, FPL is not leaving the pole line (it is replacing it) and the replaced poles cannot remain in place for other attachers once the replacement pole is installed and all transfers are completed," so no response is required. The second half of the seventh sentence of FPL's response to paragraph 36 is denied because it does not respond to the allegations of paragraph 36, but to the extent a response is required,

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[145] *See* Compl. ¶ 36.

[146] *See* Response Ex. A at Ex. 1 ¶ 31, *Verizon Fla. v. FPL*, FCC Docket No. 15-73, related to FCC Docket No. 14-216 (June 29, 2015) (public version) (emphasis added).

AT&T admits that the pole removal and disposal costs that FPL seeks to impose on AT&T are FPL's costs, incurred "for FPL's customers and infrastructure," and approved by the Florida PSC, which ensures that FPL will obtain full cost recovery under Florida law. The last sentence of FPL's response to paragraph 36 does not contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply.

37. The first sentence of FPL's response to paragraph 37 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second sentence of FPL's response to paragraph 37 because the third and fourth sentences of FPL's response to paragraph 37 confirm the accuracy of AT&T's contention—that "FPL contends it may 'abandon' these replaced poles because the JUA's pole abandonment provision has no limits."[147] With respect to the third and fourth sentences of FPL's response to paragraph 37, AT&T states that whether FPL applied "the clear language" or "actual language" of the pole abandonment provision is irrelevant in this case, which is about whether the JUA's pole abandonment terms and conditions and FPL's practices are just and reasonable. AT&T denies the fifth sentence of FPL's response to paragraph 37 because FPL's December 2018 Notice of Abandonment stated that 11,142 replaced poles would be abandoned to AT&T if AT&T did not complete its transfers to FPL's 11,142 replacement poles within 60 days.[148] Due to AT&T's diligence in completing transfers, after 60 days FPL reduced the number of poles that it claimed were "abandoned" to AT&T to 5,230 poles, not 5,280 as FPL incorrectly contends.[149]

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[147] *See* Compl. ¶ 37.

[148] *See* Compl. Ex. 10 at ATT00104-243 (Notice of Abandonment (Dec. 19, 2018)).

[149] *See* Compl. Ex. 20 at ATT00274-358 (Letter from M. Jarro, FPL, to AT&T (Feb. 22, 2019)); *see also* Compl. Ex. 28 at ATT00492-93 (Complaint ¶¶ 83, 85-88, *FPL v. AT&T*) (alleging 5,230

The sixth sentence of FPL's response to paragraph 37 does not contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply. The last sentence of FPL's response to paragraph 37 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required.

38. AT&T denies the first sentence of FPL's response to paragraph 38 because the allegations of paragraph 38 are neither unsupported nor conclusory, and the paragraph correctly references the more than 11,000 poles that were the subject of the December 2018 Notice of Abandonment in which FPL unreasonably and unilaterally tried to set a hard-and-fast 60-day deadline on the transfer of facilities from 11,142 poles to the new replacement poles.[150] The second sentence of FPL's response to paragraph 38 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the third sentence of FPL's response to paragraph 38 because there were no "unjustified delays" in AT&T's completion of its transfer work,[151] FPL did not then and has not now substantiated its conclusory and unsupported claim that there were "problems caused" by the timing of AT&T's transfer work, and FPL admits it did not mention its intent to unjustly and unreasonably attempt to unilaterally set a hard-and-fast 60-day deadline on the transfers using the JUA's pole abandonment provision when the parties met

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poles were abandoned to AT&T 60 days after FPL's Notice of Abandonment); Reply Ex. A at ATT00577 (Peters Reply Aff. ¶ 15).

[150] *See* Compl. Ex. 10 at ATT00104-243 (Notice of Abandonment (Dec. 19, 2018)).

[151] *See, e.g.*, Compl. Ex. B at ATT00020-21 (Peters Aff. ¶¶ 14-16); Reply Ex. A at ATT00577-79 (Peters Reply Aff. ¶¶ 16-20); Reply Ex. D at ATT00626 (Ellzey Reply Aff. ¶ 13).

face-to-face on December 7, 2018—just 12 days before FPL sent its December 19, 2018 Notice of Abandonment.[152]

AT&T denies the fourth sentence of FPL's response to paragraph 38 because FPL gave AT&T even less than 60 days to complete the transfer work because FPL included many poles that still had existing facilities of other companies attached, which precluded AT&T from initiating its transfer work during the 60 days that FPL demanded completion of the work.[153] Indeed, by the end of June 2020—18 months *after* FPL served its December 2018 Notice of Abandonment, AT&T still could not complete its transfer for all the poles on FPL's list because some poles still had existing facilities of other companies attached.[154] With respect to the fifth sentence of FPL's response to paragraph 38, AT&T admits that FPL has unreasonably demanded that AT&T complete transfer work at an impossibly fast pace and denies that FPL had a reasonable basis for challenging the exceptional pace of AT&T's work throughout the past decade, particularly as compared to the much slower pace at which FPL has transferred its facilities to poles AT&T replaces.[155] With respect to the sixth sentence of FPL's response to paragraph 38, AT&T states that FPL's August 31, 2018 letter speaks for itself and denies FPL's unsupported and conclusory allegation that AT&T "refus[ed] to timely transfer its equipment," which is substantially similar or identical to allegations in FPL's response to paragraphs 7, 30,

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[152] *See* Answer to Compl. ¶ 32 (stating there was no "discussion of the abandonment provision" at the December 7, 2018 meeting); Compl. Ex. A at ATT00022 (Peters Aff. ¶ 18); Compl. Ex. 10 at ATT00104-243 (Notice of Abandonment (Dec. 19, 2018)).

[153] *See* Compl. Ex. 10 at ATT00104-243 (Notice of Abandonment (Dec. 19, 2018)); Compl. Ex. 15 at ATT00259 (Letter from J. Thomas, AT&T, to FPL (Jan. 25, 2019)); Compl. Ex. B at ATT00019 (Peters Aff. ¶ 12); Reply Ex. A at ATT00580 (Peters Reply Aff. ¶ 21); Reply Ex. D at ATT00627-28 (Ellzey Reply Aff. ¶ 17).

[154] *See* Compl. Ex. B at ATT00026 (Peters Aff. ¶ 27); Reply Ex. A at ATT00580 (Peters Reply Aff. ¶ 21); *see also* Reply Ex. D at ATT00627-28 (Ellzey Reply Aff. ¶ 17).

[155] *See* Compl. Ex. B at ATT00020, ATT00023 (Peters Aff. ¶¶ 16, 20).

31, and 43, and AT&T hereby incorporates its response to those allegations. AT&T denies the last two sentences of FPL's response to paragraph 38 because the Commission's make-ready rules evidence the Commission's conclusion about the timing and collaboration that is reasonable for the completion of make-ready, including the transfer of facilities to replacement poles. AT&T denies FPL's conclusory and unsupported allegations that AT&T's "lack of responsiveness is generating constant complaints" and that the "make-ready rules were designed to prevent delays" like AT&T's because AT&T has instead diligently and expeditiously devoted substantial resources to accommodate FPL's exceptional pole replacement program by timely transferring AT&T's facilities to FPL's replacement poles.[156]

39. AT&T denies the first sentence of FPL's response to paragraph 39 because the allegations of paragraph 39 are neither unsupported nor conclusory. The second sentence of FPL's response to paragraph 39 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the conclusory and unsupported allegations in the third and fourth sentences of FPL's response to paragraph 39, which is apparently based on a mischaracterization of the record in that FPL elsewhere claims that AT&T admitted it could complete transfers on 97% of the 11,142 poles when FPL served the Notice of Abandonment in December 2018—when, in fact, AT&T's witness testified that it was not until the end of June 2020 that 97% of the poles were ready for AT&T's transfer.[157]

AT&T denies the fifth sentence of FPL's response to paragraph 39 because AT&T had not received notice that each of the 11,142 poles was ready for a transfer of AT&T's facilities

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[156] *See, e.g., id.* at ATT00020-21 (Peters Aff. ¶¶ 14-17); Reply Ex. A at ATT00576-80 (Peters Reply Aff. ¶¶ 14-22); Reply Ex. D at ATT00626 (Ellzey Reply Aff. ¶ 13).

[157] *Compare* Compl. Ex. A at ATT00026 (Peters Aff. ¶ 27) with FPL Br. at 77-78 and Answer Ex. B at FPL00138 (Allain Decl. ¶ 13); *see also* Reply Ex. A at ATT00580 (Peters Reply Aff. ¶ 21).

before FPL sent its December 2018 Notice of Abandonment because many were not ready then or during the next 60 days for AT&T to complete its transfer due to the existing facilities of other companies.[158] AT&T denies the conclusory and broad-brush allegations in the sixth and seventh sentences of FPL's response to paragraph 39 because it did *not* take "many months if not more than a year [for AT&T] to respond" to each request to transfer facilities to FPL's 11,142 replacement poles and because FPL's allegation ignores the thousands of transfers AT&T had been completing at FPL's request every year for a decade.[159] AT&T further states that FPL's allegation that the transfer requests were pending for, on average, 1.28 years confirms the unreasonableness of FPL's complaint, as between 2015 and July 2020, FPL required more than 2 years to complete over half of the far fewer requests AT&T made for FPL to transfer its facilities to an AT&T replacement pole.[160] In the last sentence of FPL's response to paragraph 39, FPL does not deny that it previously identified "potential issues involved in the make ready process" that can delay the process of transferring facilities to a replacement pole, so they are admitted.[161] AT&T denies that it has not explained how the issue impacted AT&T's ability to complete its transfers,[162] and denies that it must make that showing for each of the 11,142 poles to establish

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[158] *See* Compl. Ex. B at ATT00022, ATT00025 (Peters Aff. ¶¶ 19, 24); Compl. Ex. 15 at ATT00259 (Letter from J. Thomas, AT&T, to FPL (Jan. 25, 2019) ("AT&T's preliminary review of the 11,142 locations identified shows that for 2,149 (19.3%) locations, AT&T has either completed the transfer or is not the next-to-go, meaning AT&T is waiting on another attacher before we can transfer."); Reply Ex. A at ATT00580 (Peters Reply Aff. ¶ 21); Reply Ex. D at ATT00627-28 (Ellzey Reply Aff. ¶ 17).

[159] Compl. Ex. B at ATT00020-21 (Peters Aff. ¶ 16); Reply Ex. A at ATT00577-79 (Peters Reply Aff. ¶¶ 16, 19).

[160] Compl. Ex. B at ATT00023 (Peters Aff. ¶ 20); Reply Ex. A at ATT00578 (Peters Reply Aff. ¶ 18).

[161] 47 C.F.R. § 1.726(d) ("Averments in a complaint … are deemed to be admitted when not denied in the answer.").

[162] *See, e.g.*, Compl. Ex. B at ATT00017-19, ATT00025-26 (Peters Aff. ¶¶ 9-12, 24, 27).

that FPL's unilaterally imposed one-size-fits-all 60-day deadline for transfers to 11,142 replacement poles was unjust and unreasonable.

40. AT&T denies the first sentence of FPL's response to paragraph 40 because the allegations of paragraph 40 are neither unsupported nor conclusory. The second sentence of FPL's response to paragraph 40 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the last two sentences of FPL's response to paragraph 40, which contain conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 38, 39, and 41, and AT&T hereby incorporates its response to those allegations. AT&T denies that it "continuously ignored the problem" when FPL admits AT&T was averaging about 1,200 transfers per month before this dispute,[163] an accelerated pace that AT&T's competitors did not match.[164] AT&T also denies that FPL had "no alternative but to send the Notice of Abandonment," when FPL could have continued to work with AT&T through the JUA's mandatory dispute resolution process in which AT&T had already committed to an accelerated pace for the transfer work.[165]

41. AT&T denies the first sentence of FPL's response to paragraph 41 because the first sentence of paragraph 41 is not unsupported. The second sentence of FPL's response to paragraph 41 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. With respect to the third sentence of FPL's response to paragraph 41, AT&T admits that FPL's prior pleadings speak for themselves. In the fourth sentence of FPL's response to paragraph 41, FPL admits most of the allegations of paragraph 41, so no response is required. AT&T denies

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[163] *See* FPL Br. at 62 (stating AT&T's commitment to complete "an average of 1,200 transfers per month during 2019" was about the same as "AT&T's past transfer rate.").

[164] *See* Reply Ex. A at ATT00577-79 (Peters Reply Aff. ¶¶ 16, 17, 19).

[165] *See* Compl. Ex. B at ATT00021 (Peters Aff. ¶ 17).

the conclusory and unsupported allegations in the fourth and fifth sentences of FPL's response to paragraph 41, which are substantially similar or identical to allegations in FPL's response to paragraphs 7, 11, 13, 16, 23, 25, 26, 32, 38, 39, and 40, and AT&T hereby incorporates its response to those allegations.

42. The first sentence of FPL's response to paragraph 42 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the second sentence of FPL's response to paragraph 42, which contains a conclusory and unsupported allegation that is substantially similar or identical to allegations in FPL's response to paragraphs 33, 37, and 38, and AT&T hereby incorporates its response to those allegations. AT&T denies the third sentence of FPL's response to paragraph 42 because AT&T's evidence uniformly shows that industry practice and the parties' past practice limits pole abandonments to a single pole or pole line—and not to 11,142 poles scattered throughout the parties joint serving area.[166] With respect to the fourth sentence of FPL's response to paragraph 42, AT&T admits that the JUA speaks for itself. With respect to the last sentence of FPL's response to paragraph 42, AT&T states that whether the "language of the parties' agreement" permits FPL's effort to abandon 11,142 replaced poles at one time is irrelevant in this case, which is about whether the JUA's pole abandonment terms and conditions, and FPL's related practices are just and reasonable.

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[166] *See, e.g.*, Compl. Ex. B at ATT00022 (Peters Aff. ¶ 18); Compl. Ex. 3 at ATT00069-71 (sample pole abandonment); Reply Ex. A at ATT00574-76 (Peters Reply Aff. ¶¶ 10-13); Reply Ex. D at ATT00628 (Ellzey Reply Aff. ¶ 18); Response Ex. A at Ex. 1 ¶ 31, *Verizon Fla. v. FPL*, FCC Docket No. 15-73, related to FCC Docket No. 14-216 (June 29, 2015) (public version) (emphasis added) (describing "the right to take ownership of a pole being abandoned by FPL if FPL is leaving the pole line"); *see also* Compl. § III.B; Reply Legal Analysis § II.D.

43. The first sentence of FPL's response to paragraph 43 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. With respect to the second sentence of FPL's response to paragraph 43, AT&T admits that the Commission's order speaks for itself. AT&T denies the third sentence of FPL's response to paragraph 43 because it misrepresents the allegations of paragraph 43, which explain the intent and impact of FPL's unjust and unreasonable pole abandonment practices: to improperly shift costs to AT&T that FPL would otherwise incur to improve FPL's storm resiliency under State regulations that already provide FPL compensation, that [redacted], and that have already been accounted for in properly calculated FCC rental rates.[167] This will occur regardless of "FPL's goal in issuing its Notice of Abandonment" and it is unjust and unreasonable for reasons detailed in paragraph 43.

AT&T denies the fourth and fifth sentences of FPL's response to paragraph 43 because FPL has not made a formal offer to purchase AT&T's joint use assets and allow AT&T to attach to FPL's facilities as a licensee on the same rates terms and conditions as other licensees, as the Enforcement Bureau already found.[168] And, in any event, AT&T "should not be required to sell its poles in order to receive a just and reasonable rate"—or just and reasonable terms and conditions—for its use of FPL's poles.[169] AT&T denies the last sentence of FPL's response to paragraph 43, which contains conclusory and unsupported allegations that are substantially

[167] *See* Compl. ¶ 43 (citing support).

[168] *See FPL 2020 Order*, 35 FCC Rcd at 4327 (¶ 12); Reply Ex. A at ATT00573 (Peters Reply Aff. ¶ 6).

[169] *See FPL 2020 Order*, 35 FCC Rcd at 4327 (¶ 12); Reply Ex. A at ATT00573 (Peters Reply Aff. ¶ 7).

similar or identical to allegations in FPL's response to paragraphs 7, 30, 31, and 38, and AT&T hereby incorporates its response to those allegations.

44. The first sentence of FPL's response to paragraph 44 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the last sentence of FPL's response to paragraph 44, which contains conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraph 43, and AT&T hereby incorporates its response to those allegations.

C. The Commission Should Ensure Just and Reasonable Terms and Conditions for AT&T's Use of FPL's Poles.

45. The first sentence of FPL's response to paragraph 45 does not contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply. The second sentence of FPL's response to paragraph 45 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. With respect to the third sentence of FPL's response to paragraph 45, AT&T admits that the cited authorities speak for themselves. The fourth sentence of FPL's response to paragraph 45 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the last sentence of FPL's response to paragraph 45 because termination of the JUA is *not* at issue and would not require removal of either party's facilities.[170] Count I of AT&T's Complaint is about FPL's attempt to eject AT&T

[170] Compl. Ex. 1 at ATT00048 (JUA, Art. XVI) ("notwithstanding any such termination, other applicable provisions of this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination.").

from FPL's poles under the JUA's default provision,[171] which cannot terminate the JUA; it can only terminate one party's right to attach to poles of the other party.[172]

46. AT&T denies the first sentence of paragraph 46 and footnote 37 of FPL's response to paragraph 46 because AT&T sought a negotiated resolution of the issues in this Complaint through each step of the JUA's mandatory pre-complaint dispute resolution process and made a global settlement offer that would have resolved all disputes between the parties; FPL, in return, refused to discuss a settlement of the issues raised in this Complaint.[173] The second sentence of FPL's response to paragraph 46 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the third and fourth sentences of FPL's response to paragraph 46, which contain conclusory and unsupported allegations that are substantially similar or identical to allegations in FPL's response to paragraphs 7, 8, 24, and 45, and AT&T hereby incorporates its response to those allegations.

47. The first sentence of FPL's response to paragraph 47 does not contain specific factual allegations or legal arguments to which a response is required. To the extent a response is required, AT&T denies for reasons detailed in its Complaint, Reply Legal Analysis, and this Reply. The second sentence of FPL's response to paragraph 47 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the third sentence of FPL's response to paragraph 47 because the Commission should issue a cease and desist order to enjoin FPL's ongoing unjust and unreasonable practices for reasons detailed in AT&T's Complaint,

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[171] *Id.* at ATT00044-45 (JUA, Art. XII).

[172] *See, e.g.*, FPL Br. at 65 ("Importantly, the default provision of the 1975 JUA merely terminates the breaching party's rights under the agreement.").

[173] *See, e.g.*, Compl. Ex. 33 at ATT00526-27 (Joint Status Report); Compl. Ex. A at ATT00011 (Miller Aff. ¶ 25); Reply Ex. A at ATT00572 (Peters Reply Aff. ¶ 5); Reply Ex. B at ATT00606-607, ATT00612-613 (Miller Reply Aff. ¶¶ 2-4 & Ex. M-1).

AT&T's Reply Legal Analysis, and this Reply. AT&T denies footnote 38 because "[t]he Commission has broad authority to 'enforc[e] any determinations resulting from complaint procedures' and to 'take such action as it deems appropriate and necessary, including issuing cease and desist orders…'"[174]

The first half of the fourth sentence of FPL's response to paragraph 47 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the rest of FPL's response to paragraph 47 because the "applicable statute of limitations" is the 5-year statute of limitations that applies to actions involving a Florida contract,[175] and the 2-year statute of limitations of 47 U.S.C. § 415 is not the "applicable statute of limitations" because it does not apply to the Pole Attachment Act or to this case, which does not seek to recover "lawful" charges or obtain damages from a "carrier."[176]

III. COUNT I – UNJUST AND UNREASONABLE TERMS, CONDITIONS, AND PRACTICES: FORCED REMOVAL OF AT&T'S FACILITIES

48. AT&T adopts and incorporates its replies to FPL's responses to paragraphs 1 through 47 as though fully set forth herein.

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[174] *In the Matter of Implementation of Section 224 of the Act, A Nat'l Broadband Plan for Our Future*, 25 FCC Rcd 11864, 11900 (¶ 83) (2010). FPL cites a distinguishable 1973 decision that pre-dates the Pole Attachment Act, where a plaintiff sought preliminary injunctive relief from the Commission in a case where it could seek that relief in court and where any harm could be remedied through monetary damages. *See Matter of Mocatta Metals Corp.*, 42 FCC.2d 453, 454 (1973) (cited at Answer n.38). Nothing about this case limits the Commission's broad authority to terminate unjust and unreasonable practices through cease and desist orders. *See* 47 C.F.R. § 1.1407(a).

[175] *See Potomac Edison Order* at 22 (¶ 46) (holding the "applicable statute of limitations" is the "statute of limitations for contract actions" under State law); *see also* Fla. Stat. § 95.11(2)(b) (applying to "legal or equitable action[s] on a contract, obligation, or liability founded on a written instrument …"); Compl. § III.C.

[176] *See* 47 U.S.C. § 415; *see also Potomac Edison Order* at 21 (¶¶ 44-45).

49-51. AT&T denies the first sentence of FPL's response to paragraphs 49-51 because the allegations of paragraphs 49-51 are not unsupported. The second sentence of FPL's response to paragraphs 49-51 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the first half of the third sentence of FPL's response to paragraphs 49-51 because it conflicts with Commission precedent and the plain language of 47 U.S.C. § 224. FPL argues that, even if the Commission has authority to regulate the rates charged ILECs, the Commission is not "'statutorily *required*' to ensure that the pole attachment terms and conditions FPL provides AT&T are just and reasonable." On the contrary, the statute states that "the Commission *shall regulate* the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[177] The Commission therefore held that where ILECs, like AT&T, have access to utility poles, "they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)."[178] AT&T denies the rest of the third sentence of FPL's response to paragraphs 49-51 because the JUA's default terms and conditions and FPL's practices are unjust and unreasonable for reasons detailed in Section III.A of AT&T's Complaint, Section II.C of AT&T's Reply Legal Analysis, and this Reply.

IV. COUNT II – UNJUST AND UNREASONABLE TERMS, CONDITIONS, AND PRACTICES: ABANDONMENT OF THOUSANDS OF REPLACED POLES

52. AT&T adopts and incorporates its replies to FPL's responses to paragraphs 1 through 47 as though fully set forth herein.

53-55. AT&T denies the first sentence of FPL's response to paragraphs 53-55 because the allegations of paragraphs 53-55 are not unsupported. The second sentence of FPL's response

[177] 47 U.S.C. § 224(b)(1) (emphasis added).

[178] *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202).

to paragraphs 53-55 is a general denial prohibited by 47 C.F.R. § 1.726(b), so no response is required. AT&T denies the first half of the third sentence of FPL's response to paragraphs 53-55, which is identical to an allegation in FPL's response to paragraphs 49-51, and AT&T hereby incorporates its response to that allegation. AT&T denies the rest of the third sentence of FPL's response to paragraphs 53-55 because the JUA's pole abandonment terms and conditions and FPL's practices are unjust and unreasonable for reasons detailed in Section III.B of AT&T's Complaint, Section II.D of AT&T's Reply Legal Analysis, and this Reply.

V. REQUEST FOR RELIEF

56-60. FPL's responses to paragraphs 56-60 contain legal conclusions to which no response is required. To the extent a response is required, AT&T denies FPL's responses to paragraphs 56-60 for reasons detailed in AT&T's Complaint, AT&T's Reply Legal Analysis, and this Reply.

AT&T'S DENIAL OF FPL'S AFFIRMATIVE DEFENSES

AT&T specifically denies each of FPL's affirmative defenses[179] because they lack merit on the facts and the law, assert defenses that are not available in a pole attachment complaint proceeding, and improperly seek to relitigate matters that "already fully have been considered and rejected by the Commission" in prior proceedings.[180] In addition:

1. AT&T denies FPL's first affirmative defense, which asserts that AT&T should be estopped from receiving relief due to "unclean hands" because AT&T did not immediately make a payment of undisputed charges during the parties' negotiations and FPL does not recall

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[179] AT&T incorporates its Pole Attachment Complaint, Reply Legal Analysis in Support of Pole Attachment Complaint, this Reply to FPL's Answer, and all Affidavits and Exhibits filed by AT&T in support of each, as if fully set forth in denial of each of FPL's Affirmative Defenses.

[180] *In the Matter of Improving Pub. Safety Commcns in the 800 Mhz Band New 800 Mhz Band Plan for Puerto Rico & the U.S. Virgin Islands*, 26 FCC Rcd 1058, 1063 (¶¶ 12-13) (2011).

discussing AT&T's claims during the negotiations.[181] Whether an estoppel or unclean hands defense is available in a pole attachment complaint proceeding is doubtful.[182] But if it were available, it fails. AT&T is statutorily entitled to "just and reasonable" rates for use of FPL's poles; that AT&T challenged the unlawful rental rates FPL charged before paying them "is of no consequence."[183] And irrespective of what FPL recalls or fails to recall about the negotiations, AT&T's correspondence shows it has long tried to negotiate a resolution of the issues raised here.[184] FPL at all times demanded payment of its rental invoices in full and refused to discuss a

[181] *See* Answer, Affirmative Defense A.

[182] *See Marzec v. Power*, 15 FCC Rcd 4475, 4480, n.35 (2000) ("[T]he Commission has expressed doubt that the unclean hands defense is available in [formal complaint] proceedings.").

[183] *Qwest Commc'ns Co. v. Sancom, Inc.*, 28 FCC Rcd 1982, 1993-94 (¶ 27) (2013) ("We also are unpersuaded by Sancom's argument that Qwest has 'unclean hands,' in that Qwest did not first pay Sancom amounts owing under the Tariff. Even if this defense were available in a section 208 formal complaint proceeding, it would fail in this case. As discussed above, Sancom unlawfully charged Qwest for tariffed switched access services. Accordingly, Qwest cannot have violated any alleged equitable principle by failing to pay the charges before disputing them."); *see also AT&T Servs. Inc. v. Great Lakes Comet, Inc.*, 30 FCC Rcd 2586, 2597 (¶ 36) (2015) ("[T]he doctrines of waiver, estoppel, laches, and ratification do not preclude AT&T from challenging [the] rates .... AT&T is entitled to receive Defendants' services at rates no higher than what the Commission has determined to be just and reasonable. That AT&T ordered and paid for Defendants' services for a period of time, therefore, is of no consequence.");

[184] *See, e.g.*, Compl. Ex. 7 at ATT00093 (Letter from K. Hitchcock, AT&T, to M. Jarro, FPL (Sept. 13, 2018)) ("[W]e disagree with FPL's claim that AT&T is in default of the Joint Use Agreement as a result of our asking FPL to substantiate its 2017 rental invoice."); Compl. Ex. 15 at ATT00258 (Letter from J. Thomas, AT&T, to FPL (Jan. 25, 2019)) ("Given AT&T's receipt of the Notice [of Abandonment] on the eve of the Christmas holidays, as well as the enormous number of poles involved, it is not reasonable to expect AT&T to be able to respond in 60 days."); Compl. Ex. 32 at ATT00522 (Email from H. Gurland, Counsel for AT&T, to M. Moncada, FPL (Apr. 20, 2020)) ("AT&T considers a contract provision allowing a party to declare itself the victor of the dispute being negotiated—and to require the other to dismantle its network regardless of how the dispute is resolved—to be a quintessential unjust and unreasonable term prohibited by law."); *see also* Reply Ex. A at ATT00574 (Peters Reply Aff. ¶ 9); Reply Ex. B at ATT00606-7 (Miller Reply Aff. ¶ 3).

compromise,[185] and AT&T is "not required to engage in extended negotiations when the parties apparently are far apart in their analysis of the issues."[186]

2. AT&T denies FPL's second affirmative defense, which asserts that AT&T failed to satisfy the pre-complaint negotiation requirement of 47 C.F.R. § 1.722(g).[187] The record shows that AT&T repeatedly and exhaustively explained its argument that the default and pole abandonment terms and conditions in the JUA and FPL's related practices are unjust and unreasonable and in good faith tried to negotiate with FPL, including in face-to-face executive-level meetings and private mediations.[188] AT&T thus "notified [FPL] in writing of the allegations that form the basis of the complaint," "invited a response within a reasonable period of time," and "in good faith, discussed or attempted to discuss the possibility of settlement with [FPL]."[189] FPL has provided no valid basis for dismissing or staying this complaint for further negotiations—particularly when FPL has repeatedly refused to negotiate.[190]

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[185] *See, e.g.*, Compl. Ex. A at ATT00011-12 (Miller Aff. ¶ 25); Compl. Ex. B at ATT00026 (Peters Aff. ¶ 26); Compl. Ex. 32 at ATT00522 (Email from M. Moncaada, FPL, to H. Gurland, Counsel for AT&T (Apr. 20, 2020); Compl. Ex. 33 at ATT00526-27 (Joint Status Report); Reply Ex. A at ATT00571-72 (Peters Reply Aff. ¶¶ 4-5); Reply Ex. B at ATT00612-613 (Miller Reply Aff., Ex. M-1).

[186] *Nevada State Cable Television Ass'n v. Nevada Bell*, 13 FCC Rcd 16774 (¶ 4) (1998).

[187] *See* Answer, Affirmative Defense B.

[188] *See, e.g.*, Compl. Ex. A at ATT00005-12 (Miller Aff. ¶¶ 9-25); Compl. Ex. B at ATT00024-27 (Peters Aff. ¶¶ 23-28); Compl. Ex. 32 at ATT00522 (Email from H. Gurland, Counsel for AT&T, to M. Moncada, Counsel for FPL (Apr. 20, 2020)) ("AT&T would like to take the opportunity at the mediation [about the abandonment dispute] to try again to resolve our dispute over FPL's claims that it may require AT&T to remove its existing facilities from FPL's poles."); Reply Ex. A at ATT00571-574 (Peters Reply Aff. ¶¶ 3-9); Reply Ex. B at ATT00606-610 (Miller Reply Aff. ¶¶ 2-11).

[189] 47 C.F.R. § 1.722(g).

[190] *See, e.g.*, Compl. Ex. 32 at ATT00522 (Email from M. Moncaada, FPL to H. Gurland, Counsel for AT&T (Apr. 20, 2020); Compl. Ex. 33 at ATT00526-27 (Joint Status Report); Reply Ex. A at ATT00571-72 (Peters Reply Aff. ¶¶ 4-5); Reply Ex. B at ATT00612-613 (Miller Reply Aff., Ex. M-1); *see also* Pleadings Compilation at ATT00843, *AT&T v. FPL*, Proceeding No. 19-

3. AT&T denies FPL's third affirmative defense, which asks the Commission to forbear from enforcing its rules.[191] The Enforcement Bureau has previously rejected this forbearance defense and should do so again here.[192] The "facts that gave rise to the Commission's assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles"[193] *are* present in this case because "AT&T is, in fact, in an inferior bargaining position and … the JUA [terms and conditions and FPL's practices are] neither just nor reasonable."[194] FPL also has not filed a proper forbearance request and the Commission cannot forbear from applying its rules only to one ILEC's attachments on one electric utility's poles.[195] Forbearance is also precluded by statute because enforcement of AT&T's right to just and reasonable terms, conditions, and practices is (1) "necessary to ensure that the … regulations … in connection with … telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory," (2) "necessary for the protection of consumers," and (3) "consistent with the public interest."[196]

187, Bureau ID No. EB-19-MD-006 (Sept. 25, 2019) (FPL's Opp. to Mot. to Dismiss or Stay at 14, *FPL v. AT&T* (Aug. 20, 2019)) ("Further Mediation would be an exercise in Futility"); *id.* at ATT00844 (FPL's Opp. to Mot. to Dismiss or Stay at 15, *FPL v. AT&T* (Aug. 20, 2019)) ("To urge mediation once again … is pointless and will serve no purpose but delay these proceedings further.").

[191] *See* Answer, Affirmative Defense C.

[192] *See FPL 2020 Order*, 35 FCC Rcd at 5331-32 (¶ 19).

[193] *See* Answer, Affirmative Defense C.

[194] *See FPL 2020 Order*, 35 FCC Rcd at 5332 (¶ 19); *see also* Section II.A-B.

[195] 47 C.F.R. §§ 1.53-1.59.

[196] *See* 47 U.S.C. § 160(a); *see also Pole Attachment Order*, 26 FCC Rcd at 5240 (¶ 208) (finding jurisdiction over ILEC pole attachment rates, terms, and conditions is consistent with the Commission's obligation to "encourage the deployment . . . of advanced telecommunications capability to all Americans by utilizing, in a manner consistent with the public interest . . . measures that promote competition . . . or other regulatory methods that remove barriers to infrastructure investment.") (quoting 47 U.S.C. § 1302(a)).

4. AT&T denies FPL's fourth affirmative defense, which asks the Commission to change its longstanding sign-and-sue rule, arguing that it is arbitrary and capricious because AT&T should have been required to take exception to the pole abandonment and default provisions in the JUA when it was negotiated in 1975.[197] But "the rule is a reasonable exercise of the agency's duty under the statute to guarantee fair competition in the [pole] attachment market,"[198] and this is not the time or the appropriate vehicle to reconsider it.[199] The Commission is required to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and … to hear and resolve complaints concerning such rates, terms, and conditions."[200] The FCC, therefore, must ensure "just and reasonable" terms, conditions, and practices even if "the attacher has agreed, for one reason or another, to … relinquish a valuable right to which it is entitled under the Pole Attachments Act and the Commission's rules."[201] Any other standard "would subvert the supremacy of federal law over contracts."[202]

5. AT&T denies FPL's fifth affirmative defense, which argues that the Commission's assertion of jurisdiction over the pole attachment terms, conditions, and practices imposed on ILECs is "unlawful, ultra vires, arbitrary, capricious and unreasonable" because the

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[197] *See* Answer, Affirmative Defense D.

[198] *S. Co. Servs.*, 313 F.3d at 583-84.

[199] *See, e.g., In the Matter of Am. Tel. & Tel. Co.*, 8 FCC Rcd 1767, 1771-74 (1993) (rejecting "arguments that were previously considered and rejected by the Commission" in a prior Order).

[200] 47 U.S.C. § 224(b).

[201] *S. Co. Servs.*, 313 F.3d at 583 (citation omitted).

[202] *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50) (internal quotation and alteration omitted); *see also Pole Attachment Order NPRM*, 25 FCC Rcd at 11908 (¶ 105) ("The Commission would not be fulfilling [its statutory] duty if it were to substitute the requirements of contract law for the dictates of section 224.").

statutory term "providers of telecommunications service" should be read as "synonymous with 'telecommunications carrier,'" a term that excludes ILECs.[203] The Commission correctly rejected this argument in its 2011 *Pole Attachment Order* when it found that ILECs, including AT&T, are "providers of telecommunications service" that are statutorily entitled to just and reasonable pole attachment rates, terms, and conditions.[204] The D.C. Circuit affirmed.[205]

Respectfully submitted,

By: _____
Robert Vitanza
Gary Phillips
David Lawson
AT&T SERVICES, INC.
1120 20th Street NW, Suite 1000
Washington, DC 20036
(214) 757-3357

Attorneys for BellSouth Telecommunications, LLC d/b/a AT&T Florida

Christopher S. Huther
Claire J. Evans
Frank Scaduto
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevans@wiley.law
fscaduto@wiley.law

Dated: December 4, 2020

[203] *See* Answer, Affirmative Defense E.

[204] *See Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 211).

[205] *See Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 188 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 18 (2013).

RULE 1.721(M) VERIFICATION

I, Robert Vitanza, as signatory to this submission, hereby verify that I have read this Reply to FPL's Answer and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

Robert Vitanza

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2020, I caused a copy of the foregoing Reply to FPL's Answer to be served on the following (service method indicated):

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9050 Junction Drive
Annapolis Junction, MD 20701
(confidential version of Reply by hand delivery; public version of Reply by ECFS)

Charles A. Zdebski
Robert J. Gastner
Cody T. Murphey
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, NW, 12th Floor
Washington, DC 20006
(confidential and public versions of Reply by email)

Rosemary H. McEnery
Lisa B. Griffin
Lia B. Royle
Federal Communications Commission
Enforcement Bureau
Market Disputes Resolution Division
445 12th Street, SW
Washington, DC 20554
(confidential version of Reply by email; public version of Reply by ECFS)

Joseph Ianno, Jr.
Maria Jose Moncada
Charles Bennett
Florida Power and Light Company
700 Universe Boulevard
Juno Beach, FL 33408
(confidential and public versions of Reply by overnight delivery)

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(public version of Reply by overnight delivery)

Kimberly D. Bose, Secretary
Nathaniel J. Davis, Sr., Deputy Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426
(public version of Reply, Affidavits by overnight delivery)

Frank Scaduto