

PUBLIC VERSION

Before the  
Federal Communications Commission  
Washington, DC 20554

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

Complainant,

v.

DUKE ENERGY FLORIDA, LLC,

Defendant.

Proceeding No. 20-276  
Bureau ID No. EB-20-MD-003

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COMMISSION  
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**JOINT STATEMENT**

Pursuant to 47 C.F.R. § 1.733(b)(2), the Commission’s September 17, 2020 Notice of Complaint, and the Enforcement Bureau’s December 16, 2020 email extending the due date for this Joint Statement, Complainant BellSouth Telecommunications, LLC d/b/a AT&T Florida (“AT&T”) and Defendant Duke Energy Florida, LLC (“Duke Florida”), through undersigned counsel, submit the following Joint Statement regarding (I) stipulated facts, (II) disputed facts, (III) key legal issues, (IV) discovery matters, (V) scheduling, and (VI) settlement prospects.

**I. Stipulated Facts<sup>1</sup>**

1. AT&T is an incumbent local exchange carrier (“ILEC”) that provides telecommunications and other services in areas of Florida.

<sup>1</sup> The parties’ stipulation to a fact does not mean the parties agree that the stipulated fact is relevant or material to any issue in this proceeding—only that the stated fact is uncontroverted. The parties stipulate to facts for purposes of this proceeding only.

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2. Duke Florida is an investor-owned electric utility that provides electric and other services within the state of Florida. Duke Florida own poles in Florida that are used for wire communications. Duke Florida is not owned by a railroad, a person who is cooperatively organized, or a person owned by the Federal Government or a State.

3. AT&T and Duke Florida are parties to a Joint Use Agreement between Florida Power Corporation and Southern Bell Telephone and Telegraph Company that was entered into on June 1, 1969 and was amended thereafter on October 16, 1980 and again on January 2, 1990 (the “JUA”).<sup>2</sup>

4. Neither party has given notice of termination of the JUA pursuant to Section 16.1.

5. A termination under Section 16.1 applies only to the “further granting of joint use of poles” and Section 16.1 states that, “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.”<sup>3</sup>

6. Section 10.4 of the JUA, as amended in 1990, contains the methodology for determining “the yearly rental charges for each company.”<sup>4</sup> Under Section 11.1, the rates are calculated “yearly by the party owning the majority of the jointly used poles.”<sup>5</sup>

7. Currently, Duke Florida and AT&T share approximately 67,569 utility poles in Florida. AT&T owns approximately 5,233 (7.7%) of the jointly used poles and Duke Florida owns approximately 62,363 (92.3%) of the jointly used poles.<sup>6</sup>

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<sup>2</sup> See Compl. Ex. 1 at ATT00089-110; Answer Exs. 1-3 at DEF000245-67.

<sup>3</sup> See Compl. Ex. 1 at ATT00102-03; Answer Ex. 1 at DEF000258-59.

<sup>4</sup> See Compl. Ex. 1 at ATT00108; Answer Ex. 3 at DEF000265.

<sup>5</sup> See Compl. Ex. 1 at ATT00109; Answer Ex. 3 at DEF000266.

<sup>6</sup> See Compl. Ex. 3 at ATT00159.

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8. Under Section 10.4(a) of the JUA, a party's annual "rental charge" is "based on that company's total number of joint use pole attachments ... times that company's annual rate, as defined in Section 10.4(b)." Section 10.4(b), in turn, states that "[t]he Electric company as a Licensee, shall pay [REDACTED] of the majority pole owner's annual pole cost and the Telephone Company as a Licensee, shall pay [REDACTED] of the majority pole owner's annual pole cost."<sup>7</sup>

9. In order to determine the "annual pole cost" to be used for purposes of calculating each party's rate, Section 10.4(b) of the JUA provides that, "the net investment per bare pole shall be multiplied by an annual carrying charge rate comprised of: return (cost of capital), depreciation, federal and state income taxes, other taxes, maintenance expense and administrative expense. Distribution FERC accounts will be used for these calculations."<sup>8</sup>

10. As majority pole owner, Duke Florida calculates "the yearly rental charges for each company" and issues AT&T an annual net rental invoice that subtracts Duke Florida's "rental charges" for use of AT&T's poles from AT&T's "rental charges" for use of Duke Florida's poles.<sup>9</sup>

11. For the 2015 through 2019 rental years, prior to issuing invoices for annual rental payments, Duke Florida sent to AT&T "its documentation establishing the latest annual pole cost with the resulting annual rates for each company ... as defined in Section 10.4(a)."<sup>10</sup>

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<sup>7</sup> See Compl. Ex. 1 at ATT00108-09; Answer Ex. 3 at DEF000265-66.

<sup>8</sup> Compl. Ex. 1 at ATT00109; Answer Ex. 3 at DEF000266.

<sup>9</sup> Compl. Ex. 1 at ATT00108; Answer Ex. 3 at DEF000265; *see also* Compl. Ex. 3 at ATT00155-59.

<sup>10</sup> *See* Compl. Ex. 1 at ATT00109; Answer Ex. 3 at DEF000266; *see also* Compl. Ex. 4 at ATT00161-70; Answer Ex. D-1 at DEF000177-188.

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12. For the 2015 through 2019 rental years, AT&T returned to Duke Florida a “Schedule of Pole Rental” referred to as a “Form 6407,” which “certif[ied] that we now have attachments on the total number of poles as shown below, at the rentals and under the terms and conditions of the AGREEMENT FOR JOINT USE OF POLES.”<sup>11</sup>

13. For the 2015 through 2019 rental years, Duke Florida, after receipt of the Form 6407 from AT&T, invoiced the following per-pole rates:

	2015	2016	2017	2018	2019
Rate for AT&T’s use of Duke Florida’s poles	██████	██████	██████	██████	██████
Rate for Duke Florida’s use of AT&T’s poles	██████	██████	██████	██████	██████

14. For the 2015 through 2019 rental years, Duke Florida calculated the invoiced “pole rent” as follows:

Rental Year	AT&T’s Rent to Duke Florida		- Duke Florida’s Rent to AT&T		= Net Rent
	Per-Pole Rate for AT&T’s Use of Duke Florida’s Poles	x Duke Florida Poles	Per-Pole Rate for Duke Florida’s Use of AT&T’s Poles	x AT&T Poles	= Net Rent Paid by AT&T
2015	\$██████	60,807	\$██████	3,342	\$██████
2016	\$██████	60,972	\$██████	3,342	\$██████
2017	\$██████	61,098	\$██████	3,342	\$██████
2018	\$██████	62,336	\$██████	5,233	\$██████
2019	\$██████	62,363	\$██████	5,233	\$██████

<sup>11</sup> See Answer Ex. A-2 at DEF000144-148.

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15. AT&T paid Duke Florida's invoices in full for the 2015 through 2019 rental years.

16. The net rentals invoiced for the 2015 – 2019 rental years were properly calculated under the rate formula in the JUA.

17. In a letter dated May 22, 2019, AT&T requested a meeting with Duke Florida's executives "to discuss the pole attachment rental rates that [AT&T] should be paying to attach to poles covered by the 1969 [JUA]."12

18. The parties met on July 2, 2019 at Duke Energy Corporation's offices in Raleigh, North Carolina. Attending the meeting for AT&T were Dianne Miller, Director – Construction & Engineering with responsibility for AT&T's National Joint Utility Team; Mark Peters, Area Manager – Regulatory Relations; and Daniel Rhinehart, Director – Regulatory. Attending the meeting for Duke Florida were Scott Freeburn, Joint Use Manager; and David Hatcher, Managing Director Infrastructure Solutions.

19. Following the July 2, 2019 meeting, Duke Florida and AT&T exchanged certain cost data related to utility poles. Duke Florida also provided a document titled "Telecommunications Pole Attachment License Agreement Between Duke Energy Progress, LLC and \_\_\_\_\_."13

20. In a letter dated September 5, 2019, AT&T requested "a follow-up meeting with the hope of reaching a negotiated resolution."14

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<sup>12</sup> Compl. Ex. 6 at ATT00174-75.

<sup>13</sup> Compl. Ex. 2 at ATT00112-53.

<sup>14</sup> Compl. Ex. 8 at ATT00181; Answer Ex. 4 at DEF000269.

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21. The parties met on October 24, 2019 at Duke Energy Corporation's offices in Raleigh, North Carolina. Ms. Miller, Mr. Peters, and Mr. Rhinehart attended the meeting for AT&T. Mr. Freeburn and Mr. Hatcher attended the meeting for Duke Florida, with Andy Russell, Project Manager, and Greg Fields, Managing Director Connected Communities.

22. The parties did not resolve the dispute at the October 24, 2019 meeting.

23. On November 7, 2019, Mr. Freeburn sent an email to Ms. Dianne Miller stating that Duke Florida "wanted the opportunity to submit a new rate proposal."<sup>15</sup>

24. In 2019 and through February 18, 2020, the parties exchanged additional correspondence and spoke by phone.<sup>16</sup> AT&T filed its pole attachment complaint on August 25, 2020.

25. On September 10, 2020, Duke Florida made a settlement proposal to AT&T (which also proposed resolution of a separate dispute between AT&T and Duke Energy Progress, LLC).<sup>17</sup>

26. As of the date of this Joint Statement, AT&T has not made a counteroffer to Duke Florida, but the parties have agreed to resume settlement negotiations following its filing.

## **II. Disputed Facts**

All facts from the parties' pleadings that are not stipulated above are disputed.

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<sup>15</sup> Compl. Ex. 10 at ATT00187.

<sup>16</sup> Compl. Exs. 11-15 at ATT00189-202.

<sup>17</sup> Answer Ex. 5 at DEF000271-76.

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### III. Key Legal Issues<sup>18</sup>

1. Are the joint use agreement rates for AT&T's use of Duke Florida's poles just and reasonable under 47 U.S.C. § 224(b), the Commission's regulations and orders, and other applicable law?

- (a) Do the presumptions in 47 C.F.R. § 1.1413(b) apply?
- (b) If the presumptions apply, did Duke Florida meet its burden to rebut the presumptions under the standard in 47 C.F.R. § 1.1413(b) and the Commission's 2018 *Third Report and Order*?
- (c) If the presumptions do not apply, has AT&T established that the joint use agreement rates are unjust and unreasonable under the standard adopted in the Commission's 2011 *Pole Attachment Order*?

2. If the joint use agreement rates for AT&T's use of Duke Florida's poles are not just and reasonable, what is the just and reasonable rate?

- (a) If the just and reasonable rate is the new telecom rate, what are the inputs used in the new telecom rate formula and how is it calculated?
- (b) If the old telecom rate is a "reference point" or a "hard cap," what are the inputs used in the old telecom rate formula?
- (c) If the just and reasonable rate is determined by some other formula or methodology, what is the formula or methodology and what are the inputs?
- (d) Under either the new telecom rate formula or the old telecom rate formula, should the "safety space" on Duke Florida's poles be allocated to AT&T?

3. Is a refund available to AT&T under 47 C.F.R. § 1.1407(a)(3)?

- (a) If refunds are awarded, what is the applicable statute of limitations under 47 C.F.R. § 1.1407(a)(3)?
- (b) If refunds are awarded, for what rental years, based on what rental rate formula, and in what amount?

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<sup>18</sup> The inclusion of an issue in this list does not mean the parties agree that the issue is unsettled.

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- (c) Is AT&T estopped from claiming a refund for periods prior to May 22, 2019?

**IV. Discovery**

The parties are currently discussing supplemental responses to the parties' interrogatories that would eliminate the need for discovery motion practice. The parties' outstanding discovery issues fall within the following three categories:

1. Duke Florida has committed to providing AT&T the following information:
  - a complete set of Duke Florida's agreements with cable companies, CLECs, and wireless providers,
  - all data related to "field surveys performed on 941 DEF poles to which AT&T is attached ... as part of the third-party pole attachment process,"<sup>19</sup> and
  - all data related to a 2017 VentureSum inventory of Duke Florida's poles.<sup>20</sup>

2. Duke Florida is presently assessing AT&T's request for the following information:

- support for Duke Florida's alleged "average wood pole replacement cost for the year ending 2019,"<sup>21</sup> and
- support for Duke Florida's alleged "cost[s] for constructing new pole lines within DEF's service area."<sup>22</sup>

3. AT&T is presently assessing Duke Florida's request for the following information:

- information concerning the methodology by which AT&T calculates rates for wireless providers attached to its poles,<sup>23</sup>

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<sup>19</sup> Answer Ex. A at DEF00132-33 (Freeburn Decl. ¶¶ 12-14).

<sup>20</sup> Answer Ex. A at DEF000139 (Freeburn Decl. ¶ 28).

<sup>21</sup> Answer Ex. A at DEF000139 (Freeburn Decl. ¶ 29).

<sup>22</sup> Answer Ex. A at DEF000140 (Freeburn Decl. ¶ 30).

<sup>23</sup> Duke Florida Interrogatory #3.



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- information concerning “size and type of pole(s) does AT&T set when such pole(s) will not be jointly used with DEF or another electric utility pursuant to a Joint Use Agreement” and “the costs incurred by AT&T in the preceding 5 years to construct non-joint use pole lines (including the cost of installing AT&T’s communication facilities).”<sup>24</sup>

To the extent either party decides to stand on its prior objections with respect to the information listed in categories 2 and 3, or Duke Florida fails to provide the information identified in category 1, the parties agree that any motions to compel will be filed by January 29, 2021.

### **V. Schedule for Pleadings**

To the extent the Commission believes additional briefing on a particular issue or issues would be helpful to its understanding of this case under 47 C.F.R. § 1.732(a), the September 17, 2020 Notice of Complaint sets February 12, 2021 as the deadline for all briefing.

### **VI. Settlement**

The parties are open to settlement and have agreed to resume negotiations following the filing of this Joint Statement.

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<sup>24</sup> Duke Florida Interrogatory #6.

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Dated: January 8, 2021

Respectfully and jointly submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2021, I caused a copy of the foregoing Joint Statement to be served on the following (service method indicated):

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