Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC D/B/A AT&T FLORIDA	*	
Complainant,	*	
v.	*	Proceeding No.: 20-214 Bureau ID Number: EB-20-MD-002
FLORIDA POWER & LIGHT COMPANY,	*	
Respondent.	*	

OPPOSITION TO MOTION TO COMPEL

Pursuant to 47 C.F.R. §§ 1.729 and 1.730, Florida Power & Light Company ("FPL"), by and through its undersigned counsel, files its Opposition to AT&T's Motion to Compel. In support thereof, FPL states as follows:

I. INTRODUCTION

AT&T seeks to compel answers to interrogatories requiring 9 years' worth of FPL's contractual pole abandonment provisions and FPL's operations under such provisions. This, however, is a fact-specific and fact-intensive case, involving over two years of interactions, conduct, actions and reactions between FPL and AT&T. The record here is extensive and unique. Whether or how FPL approached pole abandonment issues with other attachers is irrelevant.

Indeed, AT&T has brought an as-applied challenge to FPL's implementation of the parties' 1975 Joint Use Agreement ("JUA"), not a facial challenge to the provision itself. AT&T's persistent and systematic failure to timely transfer attachments to FPL's storm-hardened poles, despite numerous requests and opportunities, is specific to the unique facts and circumstances of

this matter. No other FPL contractual relationship has any bearing on this as-applied review of AT&T's unique and lengthy pattern of egregious behavior. AT&T's motion should be denied.

II. BACKGROUND

AT&T's Complaint requests that the Commission find that the pole abandonment provision in the parties' 1975 Joint Use Agreement ("JUA") and FPL's implementation of the provision are unjust and unreasonable. Specifically, Count II of AT&T's Complaint alleges:

> 55. The JUA's pole abandonment provision, and FPL's reliance on the JUA's pole abandonment provision to charge AT&T for replaced poles and impose FPL's pole removal and disposal costs on AT&T, is unjust and unreasonable in violation of 47 U.S.C. § 224.[1]

Based upon these allegations, AT&T seeks the production of all pole abandonment provisions in all JUAs and License Agreements between FPL and third-party ILECs, CLECs, cable providers, and wireless providers since 2011 and extensive information regarding FPL's implementation of such provisions.[2]

III. ARGUMENT

The Commission should deny AT&T's Motion to Compel because the information sought in Interrogatory Nos. 1–3 is not relevant to material facts in dispute. AT&T filed its interrogatories pursuant to 47 C.F.R. § 1.730, which provides in pertinent part:

> Interrogatories filed and served pursuant to this procedure may be used to seek discovery of any non-privileged matter *that is relevant to the material facts in dispute in the pending proceeding.* This procedure may not be employed for the purpose of delay, harassment, or obtaining information that is beyond the scope of permissible inquiry *related to the material facts in dispute in the proceeding.*[3]

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[1] Compl. ¶ 55.

[2] *See* AT&T's First Set of Interrogatories at 4–6.

[3] 47 C.F.R. § 1.730(a) (emphasis added).

As the Commission's Rules make clear, AT&T may not obtain information that is unrelated to a material fact in dispute.

FPL's JUA's and License Agreements with other entities are not "relevant to the material facts in dispute in the pending proceeding."[4] Each of the three substantive arguments AT&T addresses in its motion to compel supports FPL's position.[5]

First, this is a *sui generis* situation. Whether and how either party approached pole abandonment provisions and processes with third parties has no bearing on the extensive two-year course of conduct leading to the present dispute. AT&T's request might be appropriate if it sought information regarding FPL's pole abandonment provisions and conduct with other ILECs that refused to timely transfer thousands of attachments over an extended period despite multiple requests and opportunities to remediate. AT&T, however, makes no such appropriately tailored request, but rather seeks all FPL pole abandonment provisions and conduct regarding all attachers dating back to 2011.

Second, AT&T has no serious response to the reality that this is not a complaint for discriminatory treatment under Section 224(f) but for unjust and unreasonable terms and conditions under Section 224(b). Whether or how FPL may treat other attachers differently as to pole abandonment provisions and operations is irrelevant to a 224(b) claim. There is no nondiscriminatory language or element under the plain terms of Section 224(b). Indeed, in response, AT&T offers merely an *ipse dixit*: "By definition, unreasonable discrimination among

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[4] *Id.*

[5] AT&T contends that any concerns as to the confidential and proprietary nature of the information sought can be alleviated by use of a confidentiality and non-disclosure agreement. FPL concedes that, in the event the Commission concludes that part or all of the requested information must be produced, an appropriate non-disclosure agreement can address FPL's confidentiality concerns.

attachers is unjust and unreasonable under § 224(b)." AT&T provides no statutory or decisional support for its opinion.

Instead, AT&T mistakenly attempts to bootstrap a bare citation to *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 17 FCC Rcd. 6268 (2002) for the proposition that it is entitled to FPL's other joint use and license agreements because the Commission considers "industry practice" in setting reasonable terms and conditions. As an initial matter, the *Mile Hi Cable Partners* decision is inapplicable to § 224(b) complaints, such as AT&T's Complaint, because the complainant in that case brought an action for unauthorized access under § 224(f).[6] It therefore makes FPL's point that claims under Section 224(f) are not the same as claims under Section 224(b).[7]

Moreover, the Commission only considered industry practice in setting the terms and conditions in *Mile Hi Cable Partners* because the Complaint included references to unauthorized fee attachment provisions found in pole attachment agreements "attached to complaints on file with the FCC."[8] In other words, the complainant had provided some evidence to support its position. Therefore, the Commission relied upon publicly available evidence of industry practice

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[6] *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, 17 FCC Rcd. 6268, 6270, ¶ 6 (2002) ("In its Application, Respondent argues that the Bureau exceeded its jurisdictional authority under the Pole Attachment Act when it concluded that Respondent's charges to Complainant for unauthorized attachments were not just and reasonable.").

[7] *See also Maw Commc'ns, Inc., Complainant v. Ppl Elec. Utilities Corp.*, No. DA19-771, 2019 WL 3812718, at *7 (OHMSV Aug. 12, 2019) ("Because the current Complaint contains only a single count alleging a denial of access, we deny these additional requests for relief. These requests might be appropriate if MAW's complaint contained a count alleging that PPL imposes unjust and unreasonable rates, terms, or conditions of attachment in violation of section 224(b) of the Act, but it does not."); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 32 F.C.C. Rcd. 11128, n. 21 (2017) ("A 'pole access complaint' is a complaint filed by a cable television system or a provider of telecommunications service that alleges a complete denial of access to a utility pole. This term does not encompass a complaint alleging that a utility is imposing unreasonable rates, terms, or conditions that amount to a denial of pole access.").

[8] *Id.* at 6271–72, ¶ 8. ("Complainant included the affidavit of its cable pole attachment expert, Michael Kruger, as evidence of industry standards. Mr. Kruger opined, and an attached survey of unauthorized attachment fee provisions in pole attachment agreements attached to complaints on file with the FCC showed, that the industry standard was a one-time charge of $15.00 to $25.00 per pole, or charges based on back rent for no more than three years, which charges would be no more than $30.00."). *See also Newport News Cablevision, Ltd. Comms, Inc. v. Va. Elec. and Power Co.*, 7 FCC Rcd. 2610, 2610–11, ¶ 5 (1992) (considering comments on industry practice contained in the affidavit attached to the complaint).

submitted on the record by the complainant. In contrast, AT&T's pleadings and declarations are wholly devoid of any such evidence and rely only on bald-faced assertions.

Third, even if AT&T had any valid claim to discovery of all of FPL's contractual pole abandonment provisions and practices – and it does not – it has no claim to discovery dating back to 2011. AT&T argues that it is entitled to discovery providing a "reasonable snapshot." Information regarding all pole abandonment provisions with all attachers dating back to 2011 is a photo album, not a reasonable snapshot. As FPL explained to AT&T:

> Throughout its Complaint, AT&T alleges that FPL began engaging in unjust and unreasonable practices in 2018. AT&T even admits that, prior to 2018, the parties "operated cooperatively for years" under the JUA's abandonment provision, but alleges that in 2018, "FPL's interpretation and implementation of the pole abandonment provision is unjust and unreasonable as compared to the parties' prior practice." As a result, information going back past 2018 is not relevant to AT&T's claims that FPL unjustly and unreasonably implemented and interpreted the JUA.[9]

Finally, nine years of information extends beyond any potentially applicable statute of limitations, whether it be the two-year statute FPL believes applies or the five-year statute AT&T believes applies.

IV. CONCLUSION

The Commission should deny AT&T's Motion to Compel. FPL's JUA's and License Agreements with third party ILECs, CLECs, cable companies, and wireless providers are not "relevant to the material facts in dispute in the pending proceeding."[10]

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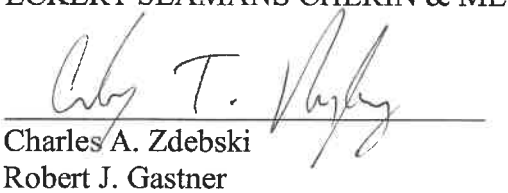
[9] *See* Letter from Cody T. Murphey to Frank Scaduto, dated October 5, 2020, attached as Exhibit F to AT&T's Motion to Compel, at 3.

[10] 47 C.F.R. § 1.730(a).

Respectfully submitted,

ECKERT SEAMANS CHERIN & MELLOTT, LLC



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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2021, I caused a copy of the foregoing Motion for Extension of Time to be served on the following by hand delivery, U.S. mail or electronic mail (as indicated):

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