Before the
Federal Communications Commission
Washington, DC 20554

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

RESPONDENT'S MOTION FOR EVIDENTIARY HEARING

Pursuant to 47 C.F.R. §§ 0.111(a)(12), 0.111(a)(18), 1.729(a), and 1.735, the Respondent, Florida Power & Light Company ("FPL"), by and through its undersigned counsel, respectfully requests that the Federal Communications Commission ("Commission") order an evidentiary hearing upon the issues raised by the filings in this matter. In support thereof, FPL states as follows.

I. INTRODUCTION AND SUMMARY

This is a "unique" case for the Commission.[1] It does not involve a review of numerical inputs and application of a specified formula for calculating a rate. Nor does it involve the facial review of the reasonableness of a term in a pole attachment agreement, such as an unauthorized attachment provision or requirement to pay make-ready fees in advance.

Rather, this case involves an as-applied challenge to the implementation of the terms of the parties' joint use agreement in light of two years of negotiations and factual developments.

[1] Counsel for AT&T stated the case was unique, and counsel for FPL agreed, on the parties' February 2, 2021 status conference with the Commission.

Deciding that as-applied challenge requires determining the objective facts contained within those two years of factual developments, then applying them to the balancing and potential unwinding of the parties' legal rights and obligations entwined in a 45-year-plus relationship of shared infrastructure. The Commission has rarely, if ever, had a "pole attachment" case like this one.

In addition, diametrically opposed views of material facts and sharp contests of credibility have arisen. There is no need to dance around the issue: AT&T's witnesses repeatedly call FPL's witnesses liars. AT&T's Reply papers and affidavits accuse FPL's witnesses of making "false and misleading statements" and purport to contradict the specifics of FPL's testimony regarding the scope, nature and contents of the parties' negotiations. AT&T also attacks the facts and credibility of FPL's defense that AT&T was an unacceptable joint use partner which not only failed to pay any of its share of joint use costs, but also failed to competently and timely inspect, maintain, repair, and transfer facilities.

This particular case cannot and should not be decided on the papers. As it has done before in cases where extensive and critical factual disputes are involved and may turn largely on the credibility of opposing witnesses, the Commission should find here that "a hearing presents the best opportunity for the Commission to examine and test the many conflicting allegations that all parties have leveled in [the] case."[2]

II. BACKGROUND

On October 21, 2020, FPL filed its Answer and Brief in Support in response to AT&T's Complaint. In its Answer and Brief in Support, FPL showed that its termination of the parties'

[2] *Arkansas Cable Telecomms. Ass'n, et al. v. Entergy Arkansas, Inc.*, Hearing Designation Order, 21 FCC Rcd. 2158, 2160, ¶ 6 (2006) (The Commission found that a hearing before an ALJ in the pole attachment complaint proceeding was the best opportunity "to arrive at a just, equitable, and expeditious resolution.").

1975 Joint Use Agreement ("JUA") and AT&T's rights thereunder was just and reasonable due to AT&T's multiple and ongoing defaults under the provisions of the JUA. These defaults were significant and included: (1) AT&T's complete failure to pay any amounts owed under the JUA for the 2017 and 2018 years until it filed the Complaint on July 1, 2019; (2) AT&T's ongoing and systemic failure to inspect, maintain, and repair joint use poles; and (3) AT&T's failure to timely transfer its facilities to FPL's new poles.[3] FPL also demonstrated that its abandonment of poles to AT&T as permitted under the JUA was just and reasonable. This was due to the third of FPL's underlying bases supporting FPL's decision to exercise its termination rights; namely, AT&T's pervasive and persistent failure to transfer its facilities to new FPL poles in a timely manner In support of these arguments, FPL provided the Declarations of Michael Jarro and Thomas G. Allain.[4] Both Mr. Jarro and Mr. Allain cite to numerous exhibits for their factual statements concerning AT&T's defaults and improper conduct under the JUA.

On December 4, 2020, AT&T filed its Reply to FPL's Answer, Reply Legal Analysis, and Reply Affidavits. AT&T's reply papers systematically attack both the facts and the credibility of FPL's witness testimony. Indeed, AT&T's reply testimony, including first-time testimony from three new witnesses — Jonathan Ellzey, Daniel P. Rhinehart, and Joe York — repeatedly accuses FPL's witnesses of making "false and misleading statements."[5]

Mr. Ellzey, for example, claims that Mr. Jarro's and Mr. Allain's testimony that AT&T fails to maintain and replace AT&T-owned joint use poles is not true.[6] Mr. Ellzey attempts to

[3] *See* FPL Brief in Support at 36–66.

[4] *See* FPL Answer, Ex. A (Jarro Decl.) and Ex. B (Allain Decl.).

[5] AT&T Reply, Ex. D (Ellzey Aff.) at ATT00619; *see also* AT&T Reply Ex. C (York Aff.) at ATT00616 (noting that the purpose for executing the Reply Affidavit to correct certain statements); AT&T Reply Ex. E (Rinehart Aff.) at ATT00644) (stating that in the Affidavit, he "will correct and respond to several statements made by FPL and . . . Michael Jarro").

[6] AT&T Reply, Ex. D (Ellzey Aff. ¶ 4) at ATT00621.

rebut FPL's evidence by stating, "AT&T has robust methods and procedures in place for testing, inspecting, maintaining and replacing its joint use poles."[7] However, Mr. Ellzey provides no evidence of AT&T's alleged "robust methods and procedures" and merely states that its protocols incorporate practices from the "Telcordia Blue Book."[8] The condition of AT&T's poles in the field state otherwise.

Indeed, AT&T makes a similar assertion in AT&T's Opposition to FPL's Motion to Compel filed February 12, 2021 ("Opposition"). The Opposition claims that AT&T has provided a "repudiation of FPL's operational criticisms" and that AT&T's "arguments were supported by sworn testimony, specific examples from the field, and operational data establishing AT&T's diligence."[9] Whether or not these claims are true — and they are not — they call for an evidentiary hearing.

In addition, Mr. Ellzey later states that Mr. Allain is "completely wrong" in his assertion that FPL must immediately dispatch a crew to remove and replace one of AT&T's poles that is identified as a Type 3 failure because AT&T lacks the resources and materials to do so.[10] Mr. Ellzey provides no actual evidence that AT&T has "ample resources to replace its own poles and does so promptly."[11] Moreover, Mr. Ellzey spins Mr. Allain's testimony by asserting that "Mr. Allain says FPL does not even give AT&T a chance to replace [AT&T's] pole that has a 'Type 3' classification."[12] Mr. Ellzey attempts to depict FPL as a wrongdoer when it immediately

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[7] AT&T Reply, Ex. D (Ellzey Aff. ¶ 4) at ATT00621.

[8] AT&T Reply, Ex. D (Ellzey Aff. ¶ 4) at ATT00621.

[9] Opposition at 7 & n.3.

[10] AT&T Reply, Ex. D (Ellzey Aff. ¶ 8) at ATT00623 (quoting FPL Answer, Ex. B (Allain Decl. ¶ 21.D) at FPL00141).

[11] AT&T Reply, Ex. D (Ellzey Aff. ¶ 8) at ATT00623.

dispatches a crew to remove and replace poles owned by AT&T that are deemed a safety hazard to the general public.

AT&T's second new Reply witness, Mr. Rhinehart, states in his Affidavit that "Mr. Jarro is also wrong that AT&T somehow 'fabricate[] reasons for the delay in making payment' when we referred to a new internal vetting process for joint use rental invoices"[13] Mr. Rhinehart also purports to contradict Mr. Jarro's assertion that AT&T informed him that the new internal review process was the result of an internal audit.[14] In support for these propositions, Mr. Rhinehart points to a January 31, 2019 email from Dianne Miller stating that the internal report is not specific to any utility.[15] However, Mr. Rhinehart then testifies that AT&T "reviews *selected* joint use rental invoices."[16]

AT&T's third new Reply witness, Joe York, provides brand new testimony claiming to recite statements by FPL's President as to the content and nature of the parties' negotiations.[17] Mr. York seeks to create a factual question as to whether the issue of AT&T making at least a

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[12] AT&T Reply, Ex. D (Ellzey Aff. ¶ 8) at ATT00623. Mr. Ellzey further assails Mr. Allain's classification of pole failures as Type 2 and Type 3 because those categorizations are used by FPL, and not AT&T. AT&T Reply, Ex. D (Ellzey Aff. ¶ 7) at ATT00622–23. However, Mr. Allain, in his Declaration, defines the three categories of pole failures:

> Type 1 Failure – a failure that can be addressed through repairs as opposed to replacement; Type 2 Failure – a failure that does not present an immediate threat but the pole needs to be replaced; or Type 3 Failure – a failure that is deemed a hazard and needs to be replaced immediately.

FPL Answer, Ex. B (Allain Decl. ¶ 21.B) at FPL00141. Mr. Ellzey notes this, and then states that these categorizations suggest that Mr. Allain's "outrage about these poles is wildly exaggerated." AT&T Reply, Ex. D (Ellzey Aff. ¶ 7) at ATT00623. However, FPL was simply demonstrating the fact that AT&T's poles have been categorized as needing replacement, and AT&T has failed to do so. This is yet another example of AT&T's unsupported attempts to impeach FPL's witnesses and their assertions.

[13] AT&T Reply, Ex. E (Rinehart Aff. ¶ 11) at ATT00648.

[14] AT&T Reply, Ex. E (Rinehart Aff. ¶ 11) at ATT00648 (citing FPL Answer, Ex A (Jarro Decl. ¶ 21) at FPL00005).

[15] AT&T Reply, Ex. E (Rinehart Aff. ¶ 11) at ATT00648 (citing FPL Answer, Ex. A (Jarro Decl., Ex. 13) at FPL000116).

[16] AT&T Reply, Ex. E (Rinehart Aff. ¶ 11) at ATT00648.

[17] AT&T Reply, Ex. C (York Aff. ¶ 11) at ATT00616-17.

partial payment of an "undisputed amount" ever arose in the parties' negotiations. Indeed, AT&T's Reply affidavits systematically purport to contradict FPL's evidence as to the parties' negotiations.[18] AT&T's Reply affidavits dispute the scope and content of the parties' negotiations as well as the actions and intentions of the parties during the negotiations.[19] Given that much of AT&T's asserted claims directly turn on the reasonableness of FPL's behavior in light of the inability of parties to, thus far, resolve their disputes, these contradictions prevent resolution of multiple material issues in this proceeding without an additional evidentiary hearing.

Finally, for his part, Mark Peters asserts that "FPL is flat wrong" in arguing that AT&T abandons its poles in a similar fashion as FPL.[20] In an attempt to confirm his assertion that FPL is flat wrong, Mr. Peters partially quotes Mr. Allain as stating that AT&T has been abandoning its poles to FPL after converting its facilities.[21] Mr. Peters then states that this abandonment practice is "the industry-standard scenario" without providing evidence of, or support for, an industry-standard of abandoning unsafe and unreliable poles to a joint-use partner. Additionally, Mr. Peters' assertion that FPL "sometimes replaces the poles abandoned by AT&T with a stronger pole" completely misstates Mr. Allain's testimony that FPL replaces the poles

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[18] *See e.g.*, AT&T Reply (Miller Aff. ¶ 3) at ATT00607 ("FPL claims that our communications and meetings only covered "certain" of the matters in dispute. This is not true."); *see also id.* ¶ 4, at ATT00616–17 ("Each time I spoke with Mr. Silagy, I thought we were trying to see whether we could help the parties reach common ground. Yet in all my conversations with Mr. Silagy, he never once suggested or asked that AT&T pay an amount that it thought was an 'undisputed amount.' Instead, at all times he insisted that AT&T must pay the outstanding amount.").

[19] *See, e.g.*, AT&T Reply (Peters Aff. ¶¶ 3–9) at ATT00571–74.

[20] AT&T Reply, Ex. A (Peters Aff. ¶ 12) at ATT00575 (citing FPL Br. in Support at 86).

[21] AT&T Reply, Ex. A (Peters Aff. ¶ 12) at ATT00575 (quoting FPL Answer, Ex. B (Allain Decl. ¶ 17) at FPL00139). The remainder of Mr. Allain's statement with regard to AT&T's historic pole abandonments clarified that the poles AT&T abandoned were old and had not been maintained, thus requiring FPL to replace the poles for safety and reliability reasons at FPL's cost. FPL Answer, Ex. B (Allain Decl. ¶ 17) at FPL00139.

abandoned by AT&T due to safety and reliability issues caused by AT&T's lack of maintenance.[22] And he provides no evidence for his conclusory assertion.

The above examples are but a few of the attacks made throughout AT&T's Reply papers on the credibility and factual proffers of FPL's witnesses. An evidentiary hearing is therefore the appropriate procedure for making a determination as to facts in dispute and the credibility of opposing witnesses.

III. ARGUMENT

A. The Standard for an Evidentiary Hearing

The Bureau clearly has the authority to order an evidentiary hearing. Specifically, the Commission delegated the authority to the Bureau to perform all functions described in 47 C.F.R. § 0.111.[23] Under 47 C.F.R. § 0.111(a)(12), a function of the Enforcement Bureau is to "[r]esolve complaints regarding pole attachments filed under section 224 of the Communications Act."[24] The Bureau's function also includes "issu[ing] or draft[ing] orders taking or recommending appropriate action in response to complaints or investigations, including . . . hearing designation orders."[25] In addition, previous hearing designation orders in pole attachment complaint proceedings have relied, in part, upon Rule 1.735,[26] which provides that "[t]he Commission may issue such orders and conduct its proceedings as will best conduce to the

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[22] AT&T Reply, Ex. A (Peters Aff. ¶ 12) at ATT00575 (citing FPL Answer, Ex. B (Allain Decl. ¶ 17) at FPL00139).

[23] 47 C.F.R. § 0.311 ("The Chief, Enforcement Bureau, is delegated authority to perform all functions of the Bureau, described in [47 C.F.R.] § 0.111").

[24] 47 C.F.R. § 0.111(a)(12).

[25] *Id.* § 0.111(a)(18).

[26] *See, e.g., Ark. Cable Telecomms. Ass'n v. Entergy Arkansas, Inc.*, Hearing Designation Order, 21 FCC Rcd. 2158 (2006) (citing to 47 C.F.R. § 1.411, which is now § 1.735); *Fla. Cable Tel. v. Gulf Power Co.*, Hearing Designation Order, 19 FCC Rcd. 18718 (2004) (citing to 47 C.F.R. § 1.411, which is now § 1.735).

proper dispatch of business and the ends of justice."[27] Finally, "[t]he Commission may decide each complaint upon the filings and information before it, may request additional information from the parties, and may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute."[28]

While "[t]he decision whether to hold a hearing on any issues related to the complaint is solely within the discretion of the Commission,"[29] the Communications "Act gives [the Commission] the flexibility to adopt special or additional forms of relief where the public interest so requires."[30] As a result, the Commission has typically set an evidentiary hearing in Section 224 pole attachment cases in "exceptional circumstances."[31] The Commission has found such circumstances where, as here, the pleadings present "a large number of factual and legal issues in dispute, the resolution of which may, in many cases, depend on determinations as to the credibility of opposing witnesses."[32] In those situations, the Commission has found that "a

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[27] 47 C.F.R. § 1.735(a).

[28] *Id.* § 1.735(b).

[29] *Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 16 FCC Rcd. 20238, 20242, ¶ 10 (2001) (citations omitted).

[30] *Applications of Westel Samoa, Inc. and Westel, L.P. for Broadband C Block Personal Communications Services Facilities*, 13 FCC Rcd. 6342, 6344, ¶ 10 (1998) (holding that designating a hearing on disputed issues was within the Commission's jurisdiction despite no specific statute or rule permitting such a hearing) (citations omitted); *see also Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1263–66 (3rd Cir. 1974).

[31] *TCA Mgmt. Co., et al. v. Sw. Pub. Serv. Co.*, 10 FCC Rcd. 11832, 11838–39, ¶¶ 16–19 (1995); *see also Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co.*, Memorandum Opinion and Hearing Designation Order, 11 FCC Rcd. 11202 (1996) (designating the Section 224 complaint for an evidentiary hearing); *Fla. Cable Telecomms. Assoc., Inc. v. Gulf Power Co.*, Hearing Designation Order, 19 FCC Rcd. 18718 (2004) (ordering an evidentiary hearing in a pole attachment complaint proceeding).

[32] *Arkansas Cable Telecomms. Ass'n, et al. v. Entergy Arkansas, Inc.*, Hearing Designation Order, 21 FCC Rcd. 2158, 2160, ¶ 6 (2006); *see also Alabama Power Co. v. FCC*, 311 F.3d 1357, 1372 (11th Cir. 2002) (holding that the Commission may commit a Fifth Amendment due process violation for failing to hold an evidentiary hearing on a disputed material question of fact); *see Knology, Inc. v. Ga. Power Co.*, 18 FCC Rcd. 24615, ¶ 58 (2003) (citing *Alabama Power Co.*, 311 F.3d at 1372) (denying Georgia Power's request for an evidentiary hearing because Georgia Power failed to "identify a material question of fact that warrants a hearing").

hearing presents the best opportunity for the Commission to examine and test the many conflicting allegations that all parties have leveled in [the] case."[33]

B. This Case Requires an Evidentiary Hearing

The proper resolution of this proceeding requires an evidentiary hearing given the importance of the matter to the parties and the numerous material factual issues in dispute, the resolution of which depends upon the credibility of the parties' witnesses. This is especially true for FPL's defenses as established by its witnesses, whom AT&T repeatedly claims are simply wrong on the facts and, indeed, are liars.

AT&T's claims do not simply attack the language of the parties' JUA, nor could they. The statute of limitations long ago ran on any facial attack on the language of the JUA.[34]

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[33] *Id.* (The Commission found that a hearing before an ALJ in the pole attachment complaint proceeding was the best opportunity "to arrive at a just, equitable, and expeditious resolution."); *see also Am. Cablesystems of Fla., Ltd. v. Fla. Power & Light Co.*, 10 FCC Rcd. 10934, 10935–36, ¶ 11 (1995). While the Commission revised its pole attachment rules in 2018 and deleted the specific reference to requests for an evidentiary hearing, it did so without significant comment and, of course, without affecting 47 C.F.R. § 0.111(a)(11) and (12). *See Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Report and Order, 33 FCC Rcd. 7178 (2018). To the extent that AT&T might argue that the Commission intended to do away with evidentiary hearings in pole attachment proceedings, the Commission certainly neither said so nor eliminated all authority for such hearings. In the process of streamlining its formal complaint rules, the Commission noted that such proceedings do not typically involve "actual conflicts in testimony between two witnesses concerning outcome determinative facts." 34 FCC Rcd. 8341, 8344, ¶ 6 (2019). However, given the conflicts between the parties' allegations outlined above, this proceeding is obviously not a typical adjudication that can be fairly and adequately solely based on the pleadings currently on file with the Commission.

[34] FPL's understanding has always been that AT&T's complaint only included two counts that challenged the JUA's language "as applied." FPL does not believe that there are any facial challenges to the language of the JUA properly before the Commission nor could there be. A challenge to language of a contract itself accrues at the time of formation. *See e.g., Yerkovich v. MCA, Inc.*, 11 F. Supp. 2d 1167, 1173 (C.D. Cal. 1997), aff'd, 211 F.3d 1276 (9th Cir. 2000) ("An unconscionability claim accrues at the moment when the allegedly unconscionable contract is formed."); *Bruning v. Nationstar Mortg., L.L.C.*, No. 3:17-CV-0802-M-BK, 2018 WL 1135417, at *3 (N.D. Tex. Feb. 8, 2018), report and recommendation adopted sub nom. *Bruning v. Nationstar Mortg., L.L.C.*, No. 3:17-CV-0802-M, 2018 WL 1083621 (N.D. Tex. Feb. 28, 2018) ("It is not disputed that Plaintiff entered into the Loan Agreement in 2007; thus, his claim began to accrue at that time.") (internal citation omitted); *Tucson Elec. Power Co. v. Westinghouse Elec. Corp.*, 597 F. Supp. 1102, 1104–05 (D. Ariz. 1984) ("Based on this policy and the dictates of the statute it must be concluded that the issue of unconscionability accrues for statute of limitations purposes at the time the contract is entered."). To the extent, that AT&T asserts that the Commission's 2011 Order imbued it with the right to seek the relief it is now seeking then the statute of limitations with respect to the enforcement of that right would have begun to run as of the effective date of that order. *See e.g., Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1548–49 (9th Cir. 1989) (holding that a contractual claim that arises in part due to a change in law accrues as of the effective date of the law in question).

Likewise, AT&T's claims do not rely simply on FPL's actions. Rather, AT&T's claims also turn upon whether FPL exercised its contractual rights under the JUA in bad faith and contrary to its stated purposes, such that the as-applied exercise of those rights was unjust and unreasonable.[35]

Both parties agree that FPL has certain safety and reliability obligations as a result of Florida's storm hardening legislation and regulations.[36] FPL has explained that it was simply acting to meet these state-mandated safety and reliability obligations.[37] AT&T engaged in a variety of behaviors over a period of several years that led FPL to believe that AT&T simply was no longer a reliable joint use partner, and that AT&T's ongoing failures to meet its contractual obligations represented a growing impediment to FPL's ability to continue to meet its storm hardening obligations.[38]

For its part, AT&T has countered that FPL's stated explanations for its actions are a ruse and that FPL's real (and hidden) intent was: 1) to pressure AT&T to settle the 2019 complaint proceeding it had initiated against FPL at the Commission; and 2) to shift various costs onto AT&T (despite the fact that AT&T admits that FPL would be reimbursed by Florida for these costs regardless).[39] Thus, unlike a typical complaint proceeding conducted pursuant to Section

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[35] Compl. ¶ 21 ("FPL's reliance on the 60-day deadline was thus a transparent ploy to foist its pole removal and disposal costs on AT&T.").

[36] Joint Statement ¶¶ 32–35.

[37] *See, e.g.*, Answer, Ex. A (Jarro Decl. ¶ 35) at FPL00007 ("Delivering safe and reliable service to customers is FPL's first priority and its fundamental obligation as a public utility."); Answer, Ex. B (Allain Decl. ¶¶ 19–29) at FPL00140–46.

[38] *See generally* FPL Br. in Support at 42–63; Answer, Ex. A (Jarro Decl. ¶¶ 34–46) at FPL00007–09; Answer, Ex. B (Allain Decl. ¶¶ 19–29) at FPL00140–46 (providing testimony on "AT&T's poor performance and irresponsible construction practices associated with the operation and maintenance of their own pole infrastructure").

[39] *See e.g.*, Compl. ¶ 19. ("FPL's Notice of Abandonment for those 11,142 replaced poles was a transparent effort to try to increase the pressure on AT&T during the rate negotiations by converting the 'prompt' standard that applies to transfers from replaced poles into a strict 60-day deadline that applies to abandoned poles (including running over the Winter holidays) with exorbitant cost consequences if it was not met."); Compl. (Miller Aff. ¶ 10) at ATT00005 ("At the time, I thought FPL's threats to limit AT&T's pole access were posturing—pure negotiation tactics designed to increase pressure on AT&T. I also thought FPL would try to negotiate a resolution of the rate issues

224, AT&T is not asking the Commission to resolve a pure legal question, assist with the application of the Commission's rate formula, or even review and evaluate purely objective documentary evidence. Instead, AT&T is asking the Commission to resolve this proceeding in large part, if not solely, based on AT&T's affiants' subjective interpretations of FPL's motives.

The issues in dispute in this case cannot be resolved within the framework of the complaint process due to conflicting factual allegations and to claims regarding the credibility of witnesses. This is not a rate calculation complaint involving essentially just crunching numbers. Rather, in its Complaint, AT&T alleges that FPL engaged in unjust and unreasonable practices, over the course of two years and numerous interactions, with respect to the removal of AT&T's facilities from the joint use poles and the abandonment of poles to AT&T. These allegations turn on the lengthy and extensive factual events involving both parties. To counter these allegations, FPL provided the declarations of Mr. Jarro and Mr. Allain, which, together with accompanying exhibits, contradict AT&T's factual allegations. AT&T attempts to rebut the testimony of FPL's witnesses through its Reply Affidavits, which repeatedly state that FPL's witnesses are wrong on the facts and providing inaccurate and untruthful testimony.[40] They persistently claim that FPL's witnesses make "false and misleading statements."[41] Therefore, the resolutions of the disputed facts "depend on determinations as to the credibility of opposing witnesses."[42] The only proper way to make a determination as to the facts and the credibility of opposing witnesses is to have

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using the JUA's mandatory precomplaint dispute resolution process and that its pole access threats would be resolved at the same time.").

[40] *See* AT&T Reply Exs. A, B, C, D, and E.

[41] AT&T Reply, Ex. D (Ellzey Aff.) at ATT00619; *see also* AT&T Reply Ex. C (York Aff.) at ATT00616 (noting that the purpose for executing the Reply Affidavit to correct certain statements); AT&T Reply Ex. E (Rinehart Aff.) at ATT00644) (stating that in the Affidavit, he "will correct and respond to several statements made by FPL and . . . Michael Jarro").

[42] *Arkansas Cable Telecomms. Ass'n*, 21 FCC Rcd. at 2160, ¶ 6.

an evidentiary hearing.[43] Indeed, prior decisions have indicated that the failure to provide an evidentiary hearing where the parties have put similar material facts into dispute raises clear due process concerns.[44] Thus, in order to fairly resolve the factual and credibility conflicts created by AT&T's Reply affidavits, the Commission must provide the opportunity for a hearing.[45]

One final point bears mention. AT&T's Reply Affidavits actually go beyond questioning the factual bases and credibility of FPL's witnesses. They make completely new factual allegations, such as in the testimony provided by first-time witnesses Daniel P. Rhinehart, Joe York, and Jonathan Ellzey.[46] For this reason also, FPL therefore requests that the Commission issue a hearing designation order.

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[43] FPL submits that an evidentiary hearing would be its preferred mechanism to resolve the parties' disputes for several reasons. First, on February 2, 2021, counsel for both parties participated in a telephonic conference with Commission Staff. During this conference, counsel for A&T indicated that were the Commission to grant FPL the opportunity to file a sur-reply, AT&T would likely also consider a request for additional briefing. Thus, although the filing of sur-reply would address some of FPL's concerns, it would also pose the risk that AT&T would file additional testimony creating new factual disputes between the parties and again injecting new factual allegations into this proceeding without the opportunity for FPL to address them. Moreover, simply filing additional affidavits would not allow the parties to present live testimony in order to provide a finder of fact with the best opportunity to evaluate the credibility of both parties' witnesses. Thus, an evidentiary hearing would provide both sides with the most efficient and fair process to resolve the various factual disputes currently at issue between the parties in this proceeding.

[44] *See e.g., Alabama Power Co. v. FCC*, 311 F.3d 1357, 1372 (11th Cir. 2002) ("For example, if APCo and the cable companies were to later disagree about [a material fact in dispute] the FCC may commit a due process violation if it were to adopt the cable companies' position without an evidentiary hearing."); *Rogal v. Am. Broad. Cos., Inc.*, 74 F.3d 40, 45 (3d Cir. 1996) (Alito J.) (holding that a failure to provide an evidentiary hearing specifically addressing material facts in dispute prior to imposing sanctions is a possible due process violation despite opportunity for the presentation for similar testimony at trial).

[45] Moreover, each party's witnesses are willing and able to provide live testimony. In particular, each of AT&T's witnesses has expressly indicated their amenability to such participation in this proceeding. *See e.g.*, AT&T Reply, Ex. A (Peters Aff. ¶ 1) at ATT00570-71 ("... if called as a witness in this action, I could and would testify competently to these facts under oath."); AT&T Reply, Ex. C (York Aff. ¶ 2) at ATT00616 ("... if called as a witness in this action, I could and would testify competently to these facts under oath."); AT&T Reply, Ex. E (Rinehart Aff. ¶ 1) at ATT00643 ("... if called as a witness in this action, I could and would testify competently to these facts under oath.").

[46] The assertions contained in AT&T's Reply Affidavits largely rely on the witnesses' conclusory statements rather than actual evidence. However, those assertions should still be tested and resolved in a hearing.

IV. CONCLUSION

The Commission should exercise its authority to issue an order designating a hearing on the facts in dispute in this case. Clear precedent demands the opportunity for an evidentiary hearing to resolve the conflicting factual assertions and credibility questions that have been presented to the Commission.

WHEREFORE, Florida Power & Light Company respectfully requests that the Commission issue an Order designating a hearing on this matter.

Respectfully submitted,

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RULE 1.721(M) VERIFICATION

I, Cody T. Murphey, as signatory to this Submission, hereby verify that I have read the Motion for Evidentiary Hearing and, to the best of my knowledge, information and belief formed after reasonable 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.

Cody T. Murphey

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 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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