

PUBLIC VERSION

REDACTED

Before the
Federal Communications Commission
Washington, DC 20554

_____)	
VERIZON FLORIDA LLC,)	Docket No. 15-73
)	File No. EB-15-MD-002
Complainant,)	
v.)	
)	Related to
FLORIDA POWER AND LIGHT)	Docket No. 14-216
COMPANY,)	File No. EB-14-MD-003
Respondent.)	
_____)	

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**VERIZON FLORIDA’S OPPOSITION TO
FLORIDA POWER AND LIGHT COMPANY’S
MOTION FOR LEAVE TO FILE A RECORD SUPPLEMENT**

The Commission should reject FPL’s Motion, which does not seek to “supplement” the record, but rather to *change* the record and FPL’s arguments – long after discovery has concluded and Verizon has filed its case. The Commission’s rules placed on FPL the obligation to include in its Response all evidence and argument on all disputed issues: “Failure to respond may be deemed an admission of the material factual allegations contained in the complaint.”¹ Here, FPL did not simply fail to respond, it expressly adopted positions that are the *opposite* of the ones it now wants to make.² And it did so with full access to the information that FPL now relies on about an inventory that it conducted in 2011 and 2012.³ The Commission “cannot condone [FPL]’s failure to provide [this] information at the required time.”⁴

¹ See 47 C.F.R. § 1.1407(d) (“Failure to respond may be deemed an admission of the material factual allegations contained in the complaint.”).

² 2015 Resp. at 29, 41-43, *Verizon Fla. v. FPL*, Docket No. 15-73, File No. EB-15-MD-002, related to Docket No. 14-216, File No. EB-14-MD-003 (June 29, 2015) (“*Verizon v. FPL II*” or the “2015” pleadings); 2014 Resp. at 33-35, *Verizon Fla. v. FPL*, Docket No. 14-216, File No. EB-14-MD-003 (Apr. 4, 2014) (“*Verizon v. FPL I*” or the “2014” pleadings).

³ See Mot. for Leave to File Record Supplement ¶ 13, *Verizon v. FPL I* (Feb. 29, 2016); see also 2014 Compl. Ex. 11 ¶ 19 (Compl., *FPL v. Verizon Fla.*, Case No. 13-014808-CA-01 (Fla. 11th

PUBLIC VERSION

FPL has shown no good cause for the delay, and even admits that it knew that it wanted to change its position *before* Verizon filed its Reply in this proceeding – and yet waited over five months to seek leave to do so.⁵ It is far too late for FPL to reverse its position regarding the pole height and average number of attaching entity inputs to the Commission’s rate formulas. The Enforcement Bureau should deny FPL’s Motion for Leave and resolve this long-standing dispute on the merits based on the record materials that were properly and timely filed.

From the outset, FPL has consistently worked to delay this proceeding – and then tried to use that delay to its advantage in state court. FPL has consistently disparaged the speed of the Commission’s review, urging the state court to rush to judgment because:

- “It is not uncommon for FCC proceedings of this nature to reside, unaddressed, in the FCC’s administrative machinery for years.”⁶
- “[A]ttachment-related complaints before the FCC have taken years to resolve, when they are resolved at all.”⁷
- “The FCC moves at its own pace we have learned. We don’t know when they will get to this or if they will get to this.”⁸
- “[Verizon] predicts, as it did before, that there will be a prompt decision. [The Commission’s] track record does not invite confidence in this wishful prediction.”⁹

The reason for FPL’s strategy is now plain: it thinks that a state court judgment can shield it from Commission oversight and statutorily required just and reasonable rates.¹⁰ Of course, it cannot.¹¹

Cir. Ct. Mar. 27, 2014) (“*FPL v. Verizon*”) (“The most recent joint field check was completed . . . in early 2012.”).

⁴ *Teleport Commc’ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19869 (¶ 24) (2002).

⁵ See Mot. for Leave to File Record Supplement ¶ 11, *Verizon v. FPL II* (Feb. 29, 2016).

⁶ 2015 Compl. Ex. 13 (Opp. to Mot. to Stay at 5, *FPL v. Verizon* (Mar. 27, 2014)).

⁷ 2015 Compl. Ex. 17 at 6-7 (Mot. for Reconsideration, *FPL v. Verizon* (Nov. 11, 2014)).

⁸ Tr. at 9:22-24, *FPL v. Verizon* (Mar. 17, 2015).

⁹ Opp. to Mot. to Dismiss at 5, *FPL v. Verizon Fla.*, Case No. 15-024288-CA-01 (Fla. 11th Cir. Ct. Nov. 25, 2015).

PUBLIC VERSION

But that does not mean that the Commission should accept FPL's invitation to devote time and resources to meritless and untimely arguments. There is no "good cause" to let FPL create more of the delay it craves – so that it can run back to the state court and continue its critique of the Commission.

FPL had every opportunity to present this information at the required time so that Verizon could have reviewed and responded to the information in its Reply filing. FPL instead chose *not* to attach this information – and to instead rely in filing after filing on the Commission's rebuttable presumptions that there are an average of five attaching entities in its urbanized service area and that its average pole height is 37.5 feet tall. For example, at times when FPL had the data that it now claims can show an average of 2.8 attaching entities on its poles, FPL represented to Verizon, to the Commission, and in sworn testimony that:

- [REDACTED]
- "The rates FPL would be permitted to charge Verizon under the old telecommunications rate [formula] . . . use[] the presumptive average of 5 attaching entities."¹³
- "Number of Attaching Entities: 5.0"¹⁴

FPL similarly chose to disregard the inventory it now tries to offer in favor of the Commission's presumptive 37.5 foot pole height:

¹⁰ See Mot. for Leave to File Supplemental Br., *Verizon v. FPL II* (Feb. 29, 2016).

¹¹ See Opp. to Mot. for Leave to File Supplemental Br., *Verizon v. FPL II* (Mar. 7, 2016).

¹² 2014 Compl. Ex. 8 at 6 [REDACTED]

¹³ 2014 Resp. Ex. A ¶ 41 (Declaration of Thomas J. Kennedy (Apr. 4, 2014) ("Kennedy 2014 Decl."); 2015 Resp. at 29.

¹⁴ 2014 Resp. Ex. B at Attachment E (Declaration of Roger A. Spain (Apr. 4, 2014)); *see also* Resp. to Request for Production No. 22, *Verizon v. FPL II* (July 28, 2015).

PUBLIC VERSION

- “FPL uses the FCC’s presumptive pole height of 37.5 feet in its rental rate calculations.”¹⁵
- “In fact, the correct average pole height should be the presumptive height of 37.5 feet.”¹⁶

And, as competitive neutrality is the key concern in this proceeding, it is important to note that FPL uses the presumptive number of five attaching entities when charging Verizon’s competitors:

- “FPL utilizes the presumptions in the calculation of the space factor outlined in the Code of Federal Regulations (CFR), Title 47, Sections 1.1417 and 1.1418.”¹⁷
- “In FPL’s calculation of the telecom rate, we currently use the FCC’s presumption of five average attaching entities (FPL’s service territory is ‘urbanized’).”¹⁸

FPL uses that presumptive number because:

- FPL “cannot identify the number of attaching entities on any particular pole or any specific subset of poles” because of “[t]he manner in which [FPL] currently capture[s] data in [its] five-year revolving audit,”¹⁹
- “[t]he number of attachments and attaching entities on an FPL distribution pole with Verizon attached is not readily available to FPL,”²⁰ and
- “FPL does not specifically track . . . attachments” by “governmental agencies,”²¹ even though they must be part of any attaching entity calculation.

FPL now reverses course, argues that its data produces inputs that it does not produce, and even blames *Verizon* for not rebutting the attaching entities presumption. But Verizon had

¹⁵ 2014 Resp. Ex. A ¶ 38 (Kennedy 2014 Declaration).

¹⁶ 2015 Resp. at 43.

¹⁷ 2015 Reply Ex. 5 at 8 (FPL Interrogatory Responses).

¹⁸ Decl. of Thomas J. Kennedy ¶ 19, attached to Initial Comments of Florida Power and Light, Tampa Electric, and Progress Energy Florida, *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245 (Mar. 7, 2008).

¹⁹ *Id.*

²⁰ Resp. to Interrogatory No. 7, *FPL v. Verizon* (May 1, 2014).

²¹ *Id.*

PUBLIC VERSION

no responsibility to rebut a presumptive value, or to request information about it.²² The rebuttable presumptions were adopted in order to “expedite the process” and avoid the need to append a “statistically valid survey or actual data” showing “location specific averages” to each pole attachment complaint.²³ If FPL disputed the presumption, the burden was on FPL to *timely* rebut the presumption with valid evidence.²⁴

FPL still cannot rebut the presumption for reasons that Verizon will detail should the Commission accept FPL’s filing. But the Commission should not have to consider those arguments, and Verizon should not be pressed to make them, because FPL provides no good reason for the delay in presenting this evidence or for its about-face. Instead, FPL claims that it had an epiphany that it should rely on different inputs while it discussed this dispute with Commission Staff at the parties’ September 2015 mediation.²⁵ Until then, FPL argues that “[n]either party had focused” on “the specific details and methodology of calculating” rates under the Commission’s new and pre-existing telecom formulas because they were focused instead on “whether the joint use agreement rate or the telecommunications rate applied.”²⁶

²² Notably, Verizon did ask FPL for information about the inputs to its rate calculations—and FPL responded with calculations showing the inputs of 5 and 37.5 that FPL now contests. *See* 2015 Reply Ex. 7 at 14-15 (FPL Responses to Requests for Production of Documents); Resp. to Request for Production No. 22, *Verizon v. FPL II* (July 28, 2015).

²³ *In Re Amendment of Commission’s Rules & Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12139 (¶ 70) (2001); *see also id.* at 12165 (¶ 131) (“[W]e allow parties to a pole attachment proceeding to substitute presumptive numbers of attaching entities in the formula.”).

²⁴ *Id.* at 12139 (¶ 70) (“As with all our presumptions, either party may rebut this presumption with a statistically valid survey or actual data.”); *see also Teleport Commc’ns Atlanta, Inc.*, 16 FCC Rcd at 20243 (¶ 11) (using presumptive number of attaching entities because “*Respondent* has not provided sufficient evidence to overcome these presumptions.”) (emphasis added).

²⁵ Mot. for Leave to File Record Supplement ¶ 11, *Verizon v. FPL II* (Feb. 29, 2016).

²⁶ *Id.* ¶¶ 10-11.

PUBLIC VERSION

That argument does not pass the red-face test. It is certainly not true for Verizon, which provided detailed rate calculations under the Commission's formulas,²⁷ explicitly stated that it was relying on the "FCC urban default" of five for the average number of attaching entities,²⁸ and repeatedly addressed the flaws in FPL's pole height argument.²⁹ It is also not true for FPL, which was well aware that the calculation of rates under the Commission's formulas was at issue. FPL included a section in each of its Responses detailing the rate that should apply "if the Commission determines that Verizon qualifies for CLEC treatment."³⁰ It retained a consultant to conduct and describe rate calculations "based on the FCC new and prior telecommunications formulae."³¹ It sought discovery from Verizon about its inputs for "the number of attaching entities on FPL poles . . . and the average height of FPL poles."³²

This record is closed, and it has been closed for over three months. FPL had ample opportunity to present this information – in [REDACTED], its April 2014 Response, and its June 2015 Response –

²⁷ 2014 Compl. Exs. B ¶¶ 3-10 and Ex. C-1 (Affidavit of Mark. S. Calnon, Ph.D. (Jan. 31, 2014)) ("Calnon Aff."), 7 at Ex. F [REDACTED];

2015 Compl. Ex. B ¶¶ 3-10 and Ex. C-1 (Calnon Aff.).

²⁸ 2014 Compl. Ex. B at Ex. C-1, line 50 (Calnon Aff.); 2015 Compl. Ex. B at Ex. C-1, line 50 (Calnon Aff.).

²⁹ 2014 Compl. ¶ 45, Ex. B ¶ 11 (Calnon Aff.); 2014 Compl. Ex. 7 at Ex E [REDACTED]; 2014 Reply at 10; 2015 Compl. ¶ 100 and Ex. B ¶ 11 (Calnon Aff.); 2015 Reply at 52.

³⁰ 2014 Resp. at 33-35; 2015 Resp. at 41-43.

³¹ 2014 Resp. Ex. B ¶¶ 20-24 and Attachment E (Declaration of Roger Spain (Apr. 24, 2014)); 2015 Resp. Ex. B ¶¶ 25-26 (Declaration of Roger Spain (June 29, 2015)).

³² 2015 Resp. Exs. C at 18 (FPL's Requests for Production of Documents), J at 10 (FPL's Interrogatories).

PUBLIC VERSION

and to make the arguments it now wants to make. It did not. The Commission should hold FPL to the filings it made – and resolve this case without further delay.

Respectfully submitted,

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Dated: March 7, 2016

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2016, I caused a copy of the foregoing Opposition to FPL's Motion for Leave to File Record Supplement to be filed via the Federal Communications Commission's Electronic Comment Filing System and to be served on the following (service method indicated):

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