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.	*	

MOTION TO COMPEL

Pursuant to 47 C.F.R. §§ 1.729 and 1.730(h) of the Commission's Rules, Florida Power & Light Company ("FPL"), by and through its undersigned counsel, files this Motion to Compel BellSouth Telecommunications, LLC d/b/a AT&T Florida's ("AT&T's") Responses to Interrogatory Nos. 1 through 5 and Interrogatory No. 10 of FPL's First Set of Interrogatories, which were filed on September 16, 2020.

I. BACKGROUND

On July 6, 2020, AT&T filed its Complaint against FPL. In its Complaint, AT&T alleges that FPL's invocation of the abandonment and default provisions of the parties' 1975 Joint Use Agreement ("1975 JUA") is unjust and unreasonable.[1]

In response to AT&T's conclusory assertions that FPL's actions were unjust and unreasonable, FPL alleged in its Answer and Brief in Support that its actions were justified as a result of AT&T's ongoing failure to maintain and replace its joint use poles, which was one of

[1] Compl. at 2.

several failures on AT&T's part constituting defaults under the terms of the 1975 JUA.[2] Accordingly, to supplement the record with information supporting the reasonableness of FPL's implementation of the provisions of the 1975 JUA, FPL's First Set of Interrogatories to AT&T sought information relevant to AT&T's continued failure to maintain and replace its joint use poles.[3]

II. ARGUMENT

Interrogatory Nos. 1–5 and Interrogatory No. 10 of FPL's First Set of Interrogatories are "relevant to the material facts in dispute in the pending proceeding."[4] Specifically, FPL's interrogatories, which are identified below, are relevant to FPL's argument that its implementation of the JUA's default and abandonment provisions was just and reasonable.[5] AT&T even seems to agree when it argued that "[t]he burden is on FPL to justify its default and pole abandonment . . . practices."[6]

Interrogatory No. 1:

> Fully describe and identify any and all plans, programs, systems, protocols or processes AT&T had or has since 2011, through the present and for the next five years to inspect, maintain and replace joint use poles owned by AT&T and subject to the 1975 JUA.

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[2] FPL's Brief in Support of its Answer ("Br. in Support") at 3, 57–60.

[3] *See* FPL's First Set of Interrogatories to AT&T, Interrogatory Nos. 1–5.

[4] 47 C.F.R. § 1.730(a). At certain points in AT&T's objections, AT&T lodges objection stating that certain self-explanatory words and phrases are "vague and ambiguous." AT&T, therefore, should provide an explanation of its interpretation of these otherwise self-explanatory words and phrases.

Further, AT&T lodges a general objection because FPL has not provided an explanation as to "why the information sought in each interrogatory is both necessary to the resolution of the dispute and not available from any other source." 47 C.F.R. § 1.730(b). At this point, however, FPL and AT&T have discussed FPL's Interrogatories on multiple occasions. AT&T suggests that information regarding its plans, maintenance practices and operations for pole inspections should be available in NJUNS. They are not. If any such information exists, AT&T should have it readily at hand. In addition, at a minimum AT&T has in its possession the requisite knowledge as to "why the information sought in each interrogatory is both necessary to the resolution of the dispute and not available from any other source." *Id.* § 1.730(b).

[5] FPL's Br. in Support at 42–61, 68–84.

[6] AT&T Reply at 11.

AT&T Objections:

> AT&T objects to this Interrogatory because the phrases "plans, programs, systems, protocols or processes" and "had or has since 2011, through the present and for the next five years" are vague and ambiguous. AT&T also objects to this Interrogatory as overly broad, unduly burdensome, and seeking information that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" default and pole abandonment terms, conditions, and practices required by 47 U.S.C. § 224(b) for AT&T's use of FPL's poles. AT&T further objects to this Interrogatory to the extent it seeks information that is already in FPL's possession, custody, or control through the National Joint Utilities Notification System ("NJUNS") and/or testimony from AT&T's witnesses in *BellSouth Telecommunications, LLC d/b/a AT&T Fla. v. Fla. Power and Light Co. ("AT&T v. FPL")*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 that it is AT&T's practice to inspect every pole before and after attaching its facilities and to complete random inspections of its poles and facilities thereafter. AT&T also objects to this Interrogatory to the extent it seeks information that is protected from discovery by the attorney-client privilege, the work-product doctrine, or any other applicable privilege.

FPL Response:

Interrogatory No. 1 is relevant to material issues in dispute because it sheds light on AT&T's failure to properly inspect, maintain, and replace the joint use poles that it owns, which forms part of FPL's basis for implementing the default provision of the 1975 JUA.[7] Specifically, the August 31, 2018 Notice of Default identifies three separate defaults by AT&T under the 1975 JUA: (1) non-payment of the 2017 invoice, (2) AT&T's failure to maintain its poles, and (3) AT&T's failure to transfer its facilities.[8]

Additionally, AT&T, through the Reply Affidavit of Mr. Jonathan Ellzey, refutes FPL's claims that AT&T fails to maintain its joint use poles because "AT&T has robust methods and

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[7] *See, e.g.*, FPL Answer, Ex. A (Jarro Decl.), Ex. 7 (Notice of Default) at FPL00060–63.

[8] *Id.*

procedures in place for testing, inspecting, maintaining and replacing its joint use poles."[9] However, AT&T provides no support for this assertion apart from merely stating that its "protocols incorporate industry-standard practices from the Telcordia Blue Book."[10] AT&T further states that it is "constantly testing, inspecting, maintaining and replacing its poles as necessary and appropriate" but cites no documentation detailing these practices or otherwise identifying when "necessary and appropriate."[11]

As a result, FPL's Interrogatory No. 1 is "relevant to the material facts in dispute in this proceeding," and the Commission should, therefore, overrule AT&T's objections.[12]

Interrogatory No. 2:

> Pursuant to any plan, program, system, protocol or process described in response to Interrogatory No. 1, fully describe and identify the number of poles inspected, the number of poles failing inspection, the number of poles replaced, the precise reason for the replacement and the cost of the replacement.

AT&T Objections:

> Because this Interrogatory incorporates Interrogatory No. 1, AT&T incorporates by reference its objection to Interrogatory No. 1. AT&T also objects to this Interrogatory as vague, ambiguous, overly broad, and unduly burdensome to the extent it seeks information about poles that are not covered by the parties' JUA or asks AT&T to predict actions that may occur during the next five years. AT&T further objects to this Interrogatory as overly broad, unduly burdensome, and seeking information that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" default and pole abandonment terms, conditions, and practices required by 47 U.S.C. § 224(b) for

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[9] AT&T Reply, Ex. D (Ellzy Aff.) at ATT00621.

[10] *Id.*

[11] *Id.*

[12] FPL also notes that AT&T's repeated use of the phrase "not relevant to, or likely to lead to the discovery of admissible evidence" to form the basis of its objections is improper as this is not the relevant discovery standard applicable to this proceeding. The Commission's rules very clearly allow the discovery of any information that "related to the material facts in dispute in the proceeding." *See* 47 CFR § 1.730(a). The rules make no reference to admissibility. Thus, the admissibility of information sought by FPL is simply not relevant to the evaluation of any of the discovery requests at issue, and AT&T's repeated reference to such a standard is misleading.

> AT&T's use of FPL's poles. AT&T also objects to this Interrogatory to the extent it seeks information that is already in FPL's possession, custody, or control through NJUNS and/or testimony from AT&T's witnesses in AT&T v. FPL, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 that it is AT&T's practice to inspect every pole before and after attaching its facilities and to complete random inspections of its poles and facilities thereafter.

FPL Response:

Interrogatory No. 2 is relevant to material facts in dispute for the same reasons that Interrogatory No. 1 is relevant to AT&T's failure to properly maintain its poles, which supports FPL's position that its implementation of the 1975 JUA's default provision was just and reasonable. Additionally, FPL provides one example of a pole that was identified for replacement in 2011, but was still in use in 2018.[13] AT&T, however, claims that even though the pole was in service at least six years after it failed inspection, AT&T was diligent because it visited the pole the same day it learned of the City's concern and was prepared to replace the pole.[14] Yet, the pole remained in service for six additional years. The information FPL requests in its Interrogatory No. 2 would assist the parties in resolving the factual dispute of whether the example provided by FPL is exemplary of AT&T's systemic failure to replace its joint use poles that failed inspections.

Therefore, the number of poles inspected, the number failing inspection, the number replaced, the precise reason for the replacement, and the cost of the replacement are all relevant to Commission's determination that FPL justly and reasonably implemented the 1975 JUA's default provisions. As such, the Commission should overrule AT&T's objections and require AT&T to produce the information responsive to FPL's Interrogatory No. 2.

Interrogatory No. 3:

[13] FPL Answer, Ex. A (Jarro Decl.) ¶ 38, at FPL00008.

[14] AT&T Reply, Ex. D (Ellzy Aff.) ¶ 9, at ATT00624.

> With respect to all poles failing inspection and replaced as described and identified in response to Interrogatory No. 2, describe and identify the average time that AT&T took to replace all poles after failing inspection.

AT&T Objections:

> Because this Interrogatory incorporates Interrogatory No. 2, which incorporates Interrogatory No. 1, AT&T incorporates by reference its objections to Interrogatory Nos. 1 and 2. AT&T also objects to this Interrogatory because the term "failing inspection" is vague and ambiguous. AT&T further objects to this Interrogatory because the "time that AT&T took to replace all poles after failing inspection" is a single number and not an "average." AT&T further objects to this Interrogatory as overly broad, unduly burdensome, and seeking information that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" default and pole abandonment terms, conditions, and practices required by 47 U.S.C. § 224(b) for AT&T's use of FPL's poles. AT&T also objects to this Interrogatory to the extent it seeks information that is already in FPL's possession, custody, or control through NJUNS.

FPL Response:

AT&T's objections should be overruled because FPL's Interrogatory No. 3 is relevant to material facts in dispute in this proceeding. For instances, Interrogatory No. 3 is relevant to AT&T's ongoing failure to maintain and replace the joint use poles it owns, which serves as one of the three reasons that FPL issued its Notice of Default and terminated AT&T's rights pursuant to the 1975 JUA.[15] More specifically, this Interrogatory is relevant to FPL's assertion that AT&T does not promptly replace poles failing inspection, and AT&T's unsupported opposition thereto.[16] AT&T opposes these allegations stating that AT&T is vigilant in its replacing such poles, but admits that "the pole replacements do not occur as quickly as AT&T would like."[17]

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[15] *See* FPL Answer, Ex. A (Jarro Decl.) ¶ 8, at FPL00003.

[16] FPL Answer, Ex. B (Allain Decl.) ¶¶ 21–23, at FPL00140–43; AT&T Reply, Ex. D (Ellzy Aff.) ¶ 6, at ATT00622.

[17] AT&T Reply, Ex. D (Ellzy Aff.) ¶ 6, at ATT00622.

Therefore, the information sought in FPL's Interrogatory No. 3 is relevant to the Commission's evaluation of AT&T's professed vigilance regarding its pole maintenance and replacement duties under the parties' agreement. As a result, the Commission should overrule AT&T's objections and order AT&T to respond to Interrogatory No. 3.

Interrogatory No. 4:

> With respect to all poles failing inspection as described and identified in response to Interrogatory No. 2 but that were not or have not been replaced, identify and describe the average time that such poles have remained in service since they failed inspection.

AT&T Objections:

> Because this Interrogatory incorporates Interrogatory No. 2, which incorporates Interrogatory No. 1, AT&T incorporates by reference its objections to Interrogatory Nos. 1 and 2. AT&T also objects to this Interrogatory because the terms "failing inspection" and "remained in service" are vague and ambiguous. AT&T further objects to this Interrogatory as overly broad, unduly burdensome, and seeking information that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" default and pole abandonment terms, conditions, and practices required by 47 U.S.C. § 224(b) for AT&T's use of FPL's poles. AT&T also objects to this Interrogatory to the extent it seeks information that is already in FPL's possession, custody, or control through NJUNS.

FPL Response:

Interrogatory No. 4 is relevant to material facts in dispute in the pending proceeding because it seeks information related to AT&T's repeated default under the 1975 JUA for failure to replace defective poles. Similar to the reasons set forth above regarding the relevance of Interrogatory No. 3, FPL seeks information about AT&T's supposed "vigilant" replacement of poles that fail inspection.[18] FPL's witness testifies that AT&T failed to replace 45% of its poles

[18] *See* AT&T Reply, Ex. D (Ellzy Aff.) ¶ 6, at ATT00622.

failing an inspection within two years after the inspection occurred.[19] In response, AT&T states that it promptly replaces poles it categorizes as needing replacement, but provides no support and no timeline of the replacement.[20]

Accordingly, the Commission should overrule AT&T's objections and order AT&T to respond to FPL's Interrogatory No. 4 because it is relevant to the disputed issue of whether FPL's implementation of the default provisions for AT&T's repeated defaults under the 1975 JUA was just and reasonable and whether AT&T in fact had met its contractual obligations to maintain its infrastructure.

Interrogatory No. 5:

> Identify and fully describe the average age of all joint use poles owned by AT&T and subject to the 1975 JUA.

AT&T Objections:

> AT&T objects to this Interrogatory as vague, ambiguous, overly broad, and unduly burdensome because it is not limited in time so seeks information about all joint use poles owned by AT&T at any point during the last 45 years. AT&T also objects to this Interrogatory as overly broad, unduly burdensome, and seeking information that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" default and pole abandonment terms, conditions, and practices required by 47 U.S.C. § 224(b) for AT&T's use of FPL's poles.

FPL Response:

Interrogatory No. 5 is relevant to material facts in dispute because the average age of poles owned by AT&T, and to which FPL attaches under the 1975 JUA, is determinative of AT&T's

[19] FPL Answer, Ex. B (Allain Decl.) ¶ 21.C, at FPL00141.

[20] AT&T Reply, Ex. D (Ellzy Aff.) ¶ 7, at ATT00623.

failure to maintain and replace its pole infrastructure. AT&T's failure to maintain and replace its pole infrastructure constitutes a default under the 1975 JUA, as FPL alleged.[21]

As a result, AT&T's objections should be overruled and FPL requests that the Commission enter an order compelling AT&T's response to Interrogatory No. 5.

Interrogatory No. 10:

> Identify any invoice issued to AT&T pursuant to a joint use agreement or pole attachment license agreement since 2011 for which AT&T disputed the amount invoiced. For each such invoice, please specifically provide: 1) the name of the entity that issued the invoice; 2) the date on which the invoice was issued; 3) the amount for which the invoice was issued; 4) the payment terms of each invoice; 5) the amount of payments AT&T made; 6) the dates on which AT&T made such payments; and 7) a brief description of the dispute.

AT&T Objections:

> AT&T objects to this Interrogatory as overly broad, unduly burdensome, and seeking information that is not relevant to, or likely to lead to the discovery of admissible evidence regarding, the "just and reasonable" default and pole abandonment terms, conditions, and practices required by 47 U.S.C. § 224(b) for AT&T's use of FPL's poles.

FPL Response:

Interrogatory No. 10 is relevant to material facts in dispute and arguments raised by FPL. In this proceeding, FPL has argued that AT&T's refusal to pay constituted unlawful self-help and FPL has raised an affirmative defense of "unclean hands" on AT&T's part.[22] Moreover, FPL has questioned AT&T's motives and behavior during the parties' negotiations. Understanding whether or not AT&T's behavior was part of a larger overall pattern would provide support for FPL's assertions.

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[21] FPL Br. in Support at 57–60; *see also* FPL Answer, Ex. A (Jarro Decl.) ¶¶ 35–40, at FPL00007–08.

[22] *See* FPL Br. in Support at 52–57 (arguing that AT&T unlawfully engaged in self-help by refusing to pay the invoices); FPL Answer at 27–28 (alleging unclean hands as an affirmative defense).

AT&T has offered to provide an answer to Interrogatory No. 10 if FPL agrees to limit the scope of as follows:

> Since 2011, state whether AT&T Florida has paid only the undisputed portion of a disputed pole rental invoice issued by an investor-owned utility other than FPL in Florida. If so, for each such invoice, please provide the name of the investor-owned utility that issued the invoice, the date of the invoice, the date on which AT&T made a payment of only the undisputed portion of the invoice, and a brief description of AT&T's reason for paying only the undisputed portion of the invoice.

However, FPL finds this proffered limitation unacceptable for several reasons. First, FPL sees no reason to geographically limit this request to Florida and no reason to limit the request to "AT&T Florida." AT&T Florida is not a distinct legal entity. It is a fictitious name used by BellSouth Telecommunications, LLC.[23] BellSouth Telecommunications, LLC in fact uses several such fictitious names to operate in ten different states.[24] Moreover, BellSouth Telecommunications, LLC is one of several regional operating companies used by AT&T nationwide.[25] The evidence submitted by AT&T in this proceeding indicates that: 1) AT&T's joint-use strategy is directed on a nationwide basis by its "National Joint Utility Team"; and 2) FPL and AT&T's negotiations involved individuals who were employees of a variety of different corporate entities falling under AT&T's corporate umbrella and not just BellSouth Telecommunications, LLC.[26] Thus, it makes little sense to limit any inquiry into the management of AT&T's pole joint-use activities to any particular state, region, or operating company.

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[23] *See Application for Renewal of Fictitious Name*, SEC. OF STATE, FLA. DEP'T OF ST., DIVISION OF CORPS. (Sept. 23, 2016), http://dos.sunbiz.org/pdf/00103908.pdf.

[24] *See, e.g.*, AT&T, Inc., 2019 Report to Stockholders (Form 10-K), Ex. 21 (Feb. 19, 2020) (providing that BellSouth Telecommunications, LLC conducts business under the following names: AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky, AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina, AT&T Tennessee, and AT&T Southeast).

[25] *See id.*

[26] *See, e.g.*, Compl., Ex. 15 (Response to Notice of Abandonment) at ATT00258–60 (AT&T's Response to FPL's Notice of Abandonment was sent by AT&T's Assistant Vice President and Senior Legal Counsel, Jeffrey Brooks

Second, there is no reason to limit the request to "pole rental invoice[s] issued by an investor-owned utility." Interrogatory No. 10 seeks information regarding AT&T's behavior with respect to its contractual obligations imposed by a "joint use agreement or pole attachment license agreement." The nature or regulatory classification of the entity to whom AT&T failed to meet its contractual obligations should not matter.

As a result, AT&T's objections should be overruled and FPL requests that the Commission enter an order compelling AT&T's response to Interrogatory No. 10 as originally phrased.

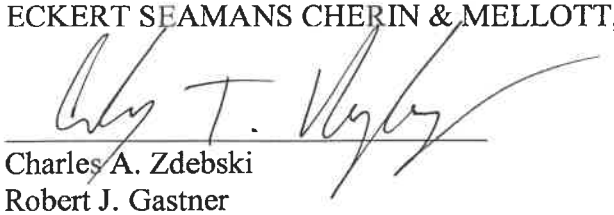
III. CONCLUSION

WHEREFORE, for the reasons explained above, Florida Power & Light Company respectfully requests that the Commission: (i) overrule all of AT&T's objections to FPL's Interrogatory Nos. 1 – 5 and Interrogatory No. 10; and (ii) order AT&T to immediately response to said Interrogatories.

Thomas, who is located in Dallas, Texas.); *see also* Compl., Ex. 5 (AT&T Email dated 8/21/18) at ATT00081 (Kyle Hitchcock, AT&T's Associate Director, National Joint Utility Team, and based in Cedarburg, Wisconsin, responded to FPL's inquiries about AT&T's failure to pay the 2017 invoice.).

Respectfully submitted,

ECKERT SEAMANS CHERIN & MELLOTT, LLC



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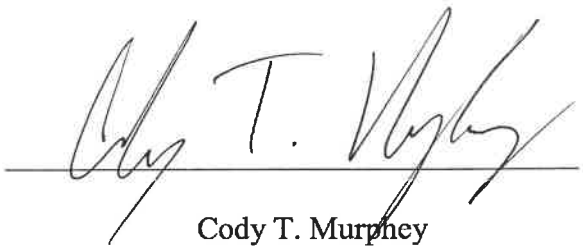
RULE 1.721(M) VERIFICATION

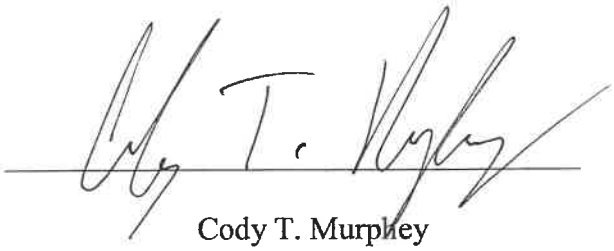
I, Cody T. Murphey, as signatory to this Submission, hereby verify that I have read the Motion to Compel and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification 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

RULE 1.729(B) CERTIFICATION

I, Cody T. Murphey, as counsel for Florida Power & Light Company ("FPL") hereby certify that a good faith attempt to resolve the dispute was made prior to filing this Motion to Compel.



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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2021, I caused a copy of the foregoing to be served on the following by hand delivery, U.S. mail or electronic mail (as indicated):

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