PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 19-187 Bureau ID No. EB-19-MD-006 Proceeding No. 20-214 Bureau ID No. EB-20-MD-002

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA'S REPLY IN FURTHER SUPPORT OF THE APPLICATION FOR REVIEW OF FOUR *BUREAU ORDERS*[1]

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[1] The 4 *Bureau Orders* include 3 *Rate Orders*, *see* Mem. Op. and Order, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (EB Aug. 16, 2021) ("*Aug. 2021 Rate Order*"); Mem. Op. and Order, 36 FCC Rcd 243 (EB 2021) ("*Jan. 2021 Rate Order*"); Mem. Op. and Order, 35 FCC Rcd 5321 (EB 2020) ("*May 2020 Rate Order*"), and 1 *Terms and Conditions Order*, *see* Mem. Op. and Order, Proceeding No. 20-214, Bureau ID No. EB-20-MD-002 (EB Aug. 16, 2021).

The Commission should revise the 4 *Bureau Orders* in these cases because they are incompatible with its competition and broadband deployment goals. The 3 *Rate Orders* perpetuate an unjustified rate disparity by setting pole attachment rates for AT&T as high as $[redacted] per pole when AT&T's competitors pay FPL a "just, reasonable, and fully compensatory" rate of about $[redacted] to $[redacted] to use the same poles.[2] The *Terms and Conditions Order* compounds this error by withholding decision on FPL's ongoing unreasonable effort to eject AT&T from over 425,000 poles due to an alleged late payment of pole rentals the *Rate Orders* declared unlawful.

FPL fails to confront the errors AT&T identified in the *Bureau Orders*, choosing instead to mischaracterize precedent and make sanctimonious claims that AT&T's network should be dismantled due to litigation risks AT&T did not take. The Commission should not be fooled. AT&T complied with the law when it filed its well-grounded complaints. FPL, in contrast, continues to resist the FCC's decade-long effort to reduce infrastructure costs. It has been 18 months since the *May 2020 Rate Order* declared FPL's pole attachment rates unlawfully high and 10 months since the *Jan 2021 Rate Order* required FPL to refund AT&T's overpayments. FPL refuses to do so. Instead, FPL invoiced even higher rates (up to $[redacted] per pole)[3] and claimed AT&T must build a duplicative network of over 425,000 poles (were that even possible) because AT&T questioned FPL's unlawful invoices before paying them. The Commission should intervene without delay to protect the communications network and force FPL to comply with the law.

I. The Commission Should Eliminate the Rate Disparity Created by the *Rate Orders*.

FPL's arguments confirm the need to eliminate the rate disparity the *Rate Orders*

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[2] App. for Review at 3; *Implementation of Section 224 of the Act*, 26 FCC Rcd 5240, 5299 (¶ 137) (2011) ("*2011 Order*"); *May 2020 Rate Order*, 35 FCC Rcd at 5327 (¶ 13).

[3] In a recent invoice, FPL claimed the *Rate Orders* justify charging AT&T $[redacted] per pole for 2019 and $[redacted] per pole for 2020, rates that far exceed the unjust and unreasonable JUA rates the *Rate Orders* invalidated. *See May 2020 Rate Order*, 35 FCC Rcd at 5323-24 (¶ 6).

perpetuate.[4] *First*, FPL corroborates that the *Rate Orders* should have presumed the just and reasonable rate for AT&T is the same new telecom rate guaranteed AT&T's competitors (about $[redacted] to $[redacted] per pole) by attaching the letter in which it placed the parties' joint use agreement ("JUA") in evergreen status *after* the presumption took effect.[5] The presumption, therefore, should have applied to this entire "complaint proceeding challenging pole attachment rates" and simplified its resolution.[6]

Second, FPL defends the *Rate Orders* by incorrectly claiming that the Commission found ILECs should pay more than the new telecom rate because immutable characteristics of ILECs are net material advantages.[7] Not so. The Commission found in 2011 that ILECs should pay "the same rate" as their competitors when they attach pursuant to materially comparable terms, and added a presumption in 2018 that ILECs *are* "similarly situated" and entitled to the same new telecom rate.[8] The Commission did so despite well-known historical facts about ILECs: for example, they obtain pole access by contract because they do not have the statutory right of access enjoyed by their competitors and they are almost always the lowest attacher on the pole because they were the *only* communications company to attach many decades ago.[9] As a result, net material

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[4] The Commission's authority to correct the *Bureau Orders* is set by rule and is not constrained by an arbitrary and capricious standard as FPL contends. Opp'n at 3 n.5. *But see, e.g.*, 47 C.F.R. § 1.115; *In the Matter of the L.A. Soc. Just. Radio Project*, 31 FCC Rcd 7506, 7508 (¶ 5) (2016).

[5] Opp'n, at 4; *id.*, Ex. A at p.3 (providing notice "pursuant to Article XVI" on March 25, 2019, which means the JUA continues to apply "to all poles jointly used by the parties").

[6] 47 C.F.R. § 1.1413(b); *In re Accelerating Wireline Broadband Deployment*, 33 FCC Rcd 7705, 7770 (¶ 127 n.475) (2018) ("*2018 Order*")) (presumption applies when a JUA is "automatically renewed, extended, or placed in evergreen status" after March 11, 2019).

[7] Opp'n at 6-12. FPL relies on *industry allegations* quoted by the Commission. *Id.* at 6 (citing *2018 Order*'s quoted allegations from Comcast and electric utilities). The Commission did not accept the allegations but referred them to complaint proceedings for consideration based on an evidentiary record. *2018 Order*, 33 FCC Rcd at 7771 (¶ 128); 47 C.F.R. § 1.1413(b).

[8] *See 2018 Order*, 33 FCC Rcd at 7769 (¶ 126); *2011 Order*, 26 FCC Rcd at 5336 (¶ 217).

[9] *See 2018 Order*, 33 FCC Rcd at 7718 (¶ 22); *2011 Order*, 26 FCC Rcd at 5329-30 (¶ 207).

advantages cannot stem from these features of an ILEC's "historic status as an [I]LEC."[10] Otherwise, rates will be based on "the regulatory classification of pole attachers," rather than relevant costs, when the FCC has eliminated such unwarranted rate disparities.[11]

Third, FPL misrepresents the *Rate Orders* when it claims they applied the correct "net material competitive advantage" standard. The *Rate Orders* never even use the word "net" when discussing alleged advantages, nor do they account for costs they find AT&T (unlike its competitors) incurs to provide offsetting "advantages" to FPL for its use of AT&T's poles.[12] The *Rate Orders* also rely on advantages that do not exist in real life (like excess space the *Rate Orders* find AT&T does not use),[13] that cannot exist as a matter of law,[14] and that are not "material" because FPL could not quantify a single cost it incurs because of them.[15]

Fourth, FPL confirms the need to once again clarify the Commission's cost-causer approach to pole attachment rates, as FPL reads the *Rate Orders* to give FPL—the party the *Rate Orders* find has superior bargaining power—a unilateral right to demand the old telecom rate regardless of whether FPL has incurred any relevant costs that would justify it.[16] The Commission

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[10] *BellSouth Telecomm., LLC v. Duke Energy Fla.*, 2021 WL 4170563, at *14 (¶ 42) (EB Aug. 27, 2021) ("*Duke Fla. Order*").

[11] *2018 Order*, 33 FCC Rcd at 7707, 7767 (¶ 3, 123); 2011 *Order*, 26 FCC Rcd at 5242 (¶ 5).

[12] *May 2020 Rate Order*, 35 FCC Rcd at 5329 (¶ 15).

[13] *Id.* at 5327 (¶ 13). FCC rates, however, must be based on space *occupied*. *Id.* at 5330 (¶ 16).

[14] For example, the JUA's allocation of excess pole space to AT&T has been unlawful and unenforceable for 25 years, as FPL previously admitted. Rate Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11). FPL changed its position and now argues that the prohibition on space allocations applies only to ILEC-owned poles. *See* Opp'n at 8. But FCC precedent contains no such limitation. It broadly prohibits the reservation of "space for local exchange service" on all poles because "allowing space to go unused when a cable operator or [CLEC] could make use of it is directly contrary to the goals of Congress" and prohibited by statute. *Implementation of the Local Competition Provisions*, 11 FCC Rcd 15499, 16078 (¶ 1168) (1996).

[15] *See May 2020 Rate Order*, 35 FCC Rcd at 5329-30 (¶ 15) (finding FPL's attempted valuations were incorrect, inflated, and overstated).

[16] Opp'n at 11-14; *see also May 2020 Rate Order*, 35 FCC Rcd at 5331-32 (¶¶ 18-19). The

requires cost-based rates to counteract such an abusive exercise of bargaining power. And so it clarified that the old telecom rate is an *upper bound* on ILEC rates—not an automatically applied rate or even a presumptive rate.[17] FPL's effort to jump straight to the old telecom rate irrespective of its costs would embed, rather than eliminate, the "artificial, non-cost-based differences" in rates that "are bound to distort competition" and frustrate deployment.[18]

Fifth, FPL has no answer for the rate formula input errors AT&T identified, confirming competitively neutral rates for AT&T should be calculated using the same inputs FPL uses to calculate rates for AT&T's competitors on the same poles.[19] FPL charges AT&T's competitors a $[redacted] to $[redacted] per pole rate that is "just, reasonable, and fully compensatory."[20] AT&T should pay rent at those same rates—and not [redacted] of dollars more annually as the *Rate Orders* allow.

II. The Commission Should Protect the Integrity of the Joint Network in Florida.

The Commission should enjoin FPL's unreasonable effort to force AT&T to remove its facilities from over 425,000 poles for an alleged late payment of rent the *Rate Orders* declared unlawful. The *Terms and Conditions Order*'s silence on this issue is unprecedented. The Commission regulates pole attachments because AT&T has "no practical alternative except to utilize available space on [FPL's] existing poles."[21] Yet the Enforcement Bureau failed to protect AT&T's rights to use those very poles in the face of FPL's extraordinarily unreasonable claim that AT&T must rebuild its network because it did not immediately pay FPL's unlawful rates.

Commission did not eliminate FPL's burden to justify its rates when it amended the procedural rules, Opp'n at 12-13, as it has recently enforced that burden, *see Duke Fla. Order* at ¶ 41 & n.148.

[17] *2018 Order*, 33 FCC Rcd at 7771 (¶ 129); *2011 Order*, 26 FCC Rcd at 5336-37 (¶ 218).

[18] *See AEP v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013).

[19] *See* App. for Review at 13-18 (describing errors in the *Rate Orders*' space occupied, average number of attaching entities, and rate of return inputs that FPL does not address in its brief).

[20] *2011 Order*, 26 FCC Rcd at 5299 (¶ 137); *May 2020 Rate Order*, 35 FCC Rcd at 5327 (¶ 13).

[21] *May 2020 Rate Order*, 35 FCC Rcd at 5330 (¶ 15).

The timing of AT&T's payment did not justify the Commission's silence on this issue; AT&T paid in accordance with the JUA's dispute resolution provision, prior industry practice, and Commission precedent clarifying that it is unreasonable to deny pole access (as FPL seeks to do here) because an attacher disputes an invoice before paying it.[22] FPL instead claims that AT&T committed a procedural error that justifies the extraordinary risk the Commission's silence poses to the affordability and availability of communications services in Florida. Not so. The statutory obligation to "hear and resolve" complaints ensures that procedure does not preclude the just and reasonable pole attachment practices guaranteed communications companies and their customers. And there was no procedural error. AT&T filed a complaint in 2019 with the only ripe claim it had at the time—a claim that FPL's rates were unjust and unreasonable. AT&T exercised its right in 2020 to "file a separate complaint" with a new claim when FPL then unreasonably sought to eject AT&T from FPL's poles for an alleged late payment even though FPL had promised not to do so if its exorbitant invoices were paid in full (as AT&T did) and the first *Rate Order* declared its invoices unlawful.[23] AT&T's second complaint was proper and consistent with FCC rules.[24] And, because it alleged a new and substantively different claim, it could not have improperly "split" one claim (even if the "claim splitting doctrine" could apply in a pole attachment proceeding) or required work that would have been avoided had the second claim ripened sooner.

The Commission regulates pole attachments to "minimize 'unnecessary and costly duplication of plant for all pole users.'"[25] It cannot stay silent on FPL's effort to do the opposite. The Commission should revise the *Bureau Orders* and force FPL to comply with the law.

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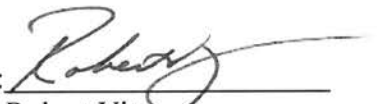
[22] *See MAW Commc'ns v. PPL Elec. Util. Corp.*, 34 FCC Rcd 7145, 7152-53 (¶ 18) (EB 2019).

[23] *RCN Telecomm. Servs. v. PECO Energy Co.*, 16 FCC Rcd 11857, 11858 (¶ 4) (2001).

[24] In contrast, the rules prohibit FPL's preferred approach in which AT&T would have raised the new claim in its pole attachment complaint reply. *See* 47 C.F.R. § 1.721(p).

[25] *See 2011 Order*, 26 FCC Rcd at 5242 (¶ 4) (citation omitted).

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2021, I caused a copy of the foregoing Application for Review Reply to be served on the following (service method indicated):

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