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**CONFIDENTIALITY REQUEST**

November 24, 2020

**BY HAND**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
9050 Junction Drive  
Annapolis Junction, MD 20701

Re: *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*,  
Proceeding Number 20-273, Bureau ID Number EB-20-MD-003

Dear Ms. Dortch:

On behalf of BellSouth Telecommunications, LLC d/b/a AT&T Florida (“AT&T”), enclosed for filing is the confidential version of AT&T’s Reply Legal Analysis in Support of AT&T’s Pole Attachment Complaint against Duke Energy Florida, LLC (“Duke Florida”), along with Reply Affidavits in support thereof. Also enclosed for filing is the confidential version of AT&T’s Reply to Duke Florida’s Answer. The public versions of the Reply Legal Analysis, Reply Affidavits, and Reply to Duke Florida’s Answer are being filed electronically via the Commission’s Electronic Comment Filing System, as required by Section 1.734(b) of the Commission’s rules, 47 C.F.R. § 1.734(b).

Pursuant to Sections 0.459(a) and 1.731(a) of the Commission’s rules,<sup>1</sup> AT&T requests permanent confidential treatment of certain information concerning pole attachment rental rates, rental amounts, and rate calculation inputs, AT&T’s operational deployment in Florida, and settlement offers and supporting calculations that is marked with a red box in the Reply Legal Analysis, Reply Affidavits, and Reply to the Answer (the “Marked Confidential Rate, Operational, and Settlement Information”).<sup>2</sup> AT&T requests temporary confidential treatment of additional information in the Reply Legal Analysis, Reply Affidavits, and Reply to the Answer that is also marked with a red box because Duke Florida may consider the information confidential (the “Marked Duke Florida Information”).<sup>3</sup> AT&T does not oppose public disclosure of the Marked

<sup>1</sup> 47 C.F.R. §§ 0.459(a), 1.731(a).

<sup>2</sup> See Reply Legal Analysis at 1, 2, 7, 8, 11, 13, 14, 16, 18, 21, 22, 23, 24, 25, 26, 28, 29; Reply Ex. A (Reply Affidavit of Daniel P. Rhinehart (Nov. 23, 2020) (“Rhinehart Reply Aff.”)) ¶¶ 2, 4, 5, 11, 12, 15, 17, 18, 22, 28 & Exs. R-5 to R-7; Reply Ex. B (Reply Affidavit of Dianne W. Miller (Nov. 20, 2020) (“Miller Reply Aff.”)) ¶ 5; Reply Ex. C (Reply Affidavit of Mark Peters (Nov. 23, 2020) (“Peters Reply Aff.”)) ¶¶ 11, 16, 18, 20, 22, 23, 25, 27, 29, 34, 35; Reply Ex. D (Reply Affidavit of Timothy R. Davis (Nov. 20, 2020) (“Davis Reply Aff.”)) ¶¶ 9, 10, 11, 14 & Ex. D-1; Reply Ex. D (Reply Affidavit of Christian M. Dippon, Ph.D. (Nov. 23, 2020) (“Dippon Reply Aff.”)) ¶¶ 4, 9, 10, 11, 12, 13, 14, 15, 19, 23, 24, 27, 34, 35, 36, 37, 41, 46, 47, 53, 61, 63, 65, 66, 68, 69, 70; Reply to Answer ¶¶ 1, 7, 8, 9, 10, 11, 12, 20, 22, 25, 27, Denial of Affirmative Defense 8.

<sup>3</sup> The Marked Duke Florida Information concerns Duke Florida’s pole attachment license agreements and pole costs. See Reply Legal Analysis at 12, 20; Reply Ex. A (Rhinehart Reply Aff.) ¶ 31; Reply Ex. B

Duke Florida Information, but requests that it be maintained in confidence until Duke Florida has an opportunity to submit its own Request for Confidential Treatment if appropriate.

The Marked Confidential Rate, Operational, and Settlement Information should be withheld from public inspection under Subsection 0.457(d) of the Rules and FOIA Exemption 4, which protect "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from public inspection.<sup>4</sup> Where information "relates to business or trade, it is 'commercial' as that term is used in Exemption 4."<sup>5</sup> Last year, the Supreme Court held Exception 4 "[a]t least" applies to "commercial or financial information [that] is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy," although the Court did not "reach the issue of whether government assurances of privacy were necessary."<sup>6</sup> The Marked Confidential Rate, Operational, and Settlement Information falls well within this standard.<sup>7</sup> It is confidential commercial information that AT&T treats as confidential and it is being submitted with the understanding that it, like similar information submitted in previous complaint proceedings, will be provided confidential treatment.

In accordance with Section 0.459, this request is supported by the following:

(1) Identification of the specific information for which confidential treatment is sought:

Confidential treatment is sought for information concerning pole attachment rental rates, rental amounts, and rate calculation inputs, including information that, if paired with public information, would disclose the rates.<sup>8</sup> Confidential treatment is also sought for certain AT&T operational information about its deployment in Florida, including alleged operational benefits AT&T enjoys under its Joint Use Agreement with Duke Florida.<sup>9</sup> Confidential treatment is sought for a third category of information concerning settlement offers and supporting calculations, which evidence rate negotiation strategy and contain

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(Miller Reply Aff.) ¶ 4; Reply Ex. C (Peters Reply Aff.) ¶¶ 6, 8, 33; Reply Ex. D (Davis Reply Aff.) ¶ 12; Reply Ex. E (Dippon Reply Aff.) ¶¶ 48, 54; Reply to Answer ¶ 15.

<sup>4</sup> 5 U.S.C. § 552(b)(4); 47 C.F.R. 0.457(d).

<sup>5</sup> *In the Matter of Michael J. Marcus on Request for Inspection of Records*, 27 FCC Rcd 11558, 11562 (¶ 10) (2012) (citing *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) and *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 319-20 (D.C. Cir. 2006)).

<sup>6</sup> Order on Reconsideration, *In the Matter of Am. Broadband & Telecommunications Co.*, 2020 WL 1872491, at \*2 & n.22 (FCC Apr. 13, 2020) ("*Am. Broadband Order*") (quoting *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363, 2366 (2019)).

<sup>7</sup> As the Commission recently recognized, the Supreme Court overruled longstanding lower court precedent requiring a showing of substantial competitive harm to qualify for FOIA Exception 4. See *id.* (citing *Food Mktg. Inst.*, 139 S. Ct. at 2364-65). Section 0.459(b) of the Commission's rules, however, still requires a showing of substantial competitive harm. While the showing cannot be required to qualify for confidential treatment, this request nonetheless addresses all requirements of Section 0.459(b).

<sup>8</sup> See Reply Legal Analysis at 1, 2, 7, 8, 10, 11, 18, 21, 22, 23, 24, 28, 29; Reply Ex. A (Rhinehart Reply Aff.) ¶¶ 2, 4, 5, 11, 12, 15, 17, 18, 28 & Exs. R-5 to R-6; Reply Ex. B (Miller Reply Aff.) ¶ 5; Reply Ex. C (Peters Reply Aff.) ¶¶ 11, 18, 20, 22, 23, 25, 29, 34; Reply Ex. E (Dippon Reply Aff.) ¶¶ 4, 9, 10, 11, 12, 13, 14, 15, 19, 23, 24, 27, 34, 35, 36, 37, 53, 61, 63, 65; Reply to Answer ¶¶ 1, 8, 9, 12, 20, 22, 25, Denial of Affirmative Defense 8.

<sup>9</sup> See Reply Legal Analysis at 13, 14, 16; Reply Ex. C (Peters Reply Aff.) ¶ 27; Reply Ex. D (Davis Reply Aff.) ¶ 9, 10, 11, 14 & Ex. D-1; Reply Ex. E (Dippon Reply Aff.) ¶¶ 41, 46, 47, 66, 68, 69, 70.

material protected by Federal Rule of Evidence 408 and State law equivalents.<sup>10</sup> The specific information is marked with red boxes in the Pole Attachment Complaint and Exhibits and referred to in this request as the “Marked Confidential Rate, Operational, and Settlement Information.”

- (2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission: The Marked Confidential Rate, Operational, and Settlement Information is being submitted in connection with AT&T’s Reply in support of its Pole Attachment Complaint seeking just and reasonable terms and conditions for use of Duke Florida’s utility poles.
- (3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged: The Marked Confidential Rate, Operational, and Settlement Information is commercial information protected by Section 0.457(d). The Commission has broadly defined commercial information, stating that “[c]ommercial’ is broader than information regarding basic commercial operations, such as sales and profits; it includes information about work performed for the purpose of conducting a business’s commercial operations.”<sup>11</sup> The Marked Confidential Rate, Operational, and Settlement Information falls within this definition because it concerns the rates, terms, and conditions that apply to AT&T’s use of Duke Florida’s poles and operational information about AT&T’s deployment in Florida. The Commission has shielded similar information from public disclosure in the past, recognizing that the rates, terms, and conditions of an attachers’ agreements in a pole attachment proceeding constitute “sensitive commercial information” that, if released, would competitively disadvantage that attacher.<sup>12</sup> The Commission has also recognized the importance of protecting “operational or technical data ... that is not routinely available for public inspection and that would customarily be guarded from competitors”<sup>13</sup> Further, the Commission has protected settlement information to “avoid unnecessary disclosure of information that might put its regulatees at a competitive disadvantage.”<sup>14</sup>
- (4) Explanation of the degree to which the information concerns a service that is subject to competition: The Marked Confidential Rate, Operational, and Settlement Information

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<sup>10</sup> See Reply Legal Analysis at 25, 26; Reply Ex. A (Rhinehart Reply Aff.) ¶ 22 & Ex. R-7; Reply Ex. C (Peters Reply Aff.) ¶¶ 16, 35; Reply to Answer ¶¶ 7, 11, 27.

<sup>11</sup> Memorandum Opinion and Order, *Southern Company Request for Waiver of Section 90.629 of the Commission’s Rules*, 14 FCC Rcd 1851, 1860 (1998) (citing *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)).

<sup>12</sup> *Marcus Cable Assocs. v. Tex. Util. Elec. Co.*, 12 FCC Rcd 10362 (¶¶ 36-37) (1997); see also *Verizon Md. LLC v. The Potomac Edison Co.*, Memorandum Opinion and Order ¶¶ 12, 13, 20, 33, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (Nov. 23, 2020); *BellSouth Telecommunications, LLC d/b/a AT&T Fla. v. Fla. Power & Light Co.*, No. EB-19-MD-006, 2020 WL 2568977, at \*3-4 (¶¶ 6-8) (May 20, 2020).

<sup>13</sup> See *Mindel De La Torre*, 2016 WL 7129682, at \*1-2 (OHMSV June 30, 2016).

<sup>14</sup> *Wireless Telecommunications Bureau Mobility Div. Approves Settlement Agreement & Dismissed Application for Review*, 19 FCC Rcd 8532, 8533 (2004); see also *In the Matter of Comptel*, 27 FCC Rcd 7705, 7713-14 (2012) (“The Commission previously has protected confidential commercial information provided in settlement documents under Exemption 4.”); *In the Matter of Worldcom, Inc.*, 18 FCC Rcd 26338, 26340 (2003) (“We have reviewed each settlement agreement and find that each contains competitively sensitive, highly confidential financial and commercial information that is not of the type customarily disclosed to the public.”).

relates to the rates, terms, and conditions for AT&T's use of Duke Florida's poles to provide telecommunications and other services in a highly competitive market.

- (5) Explanation of how disclosure of the information could result in substantial competitive harm: AT&T could suffer substantial competitive harm if the Marked Confidential Rate, Operational, and Settlement Information is disclosed to competitors and electric utilities that could use the information to AT&T's disadvantage.
- (6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure: AT&T does not release the Marked Confidential Rate, Operational, and Settlement Information to the public in the normal course of business and does not widely distribute the information internally.
- (7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties: AT&T has not released the Marked Confidential Rate, Operational, and Settlement Information to the public and seeks to maintain the confidentiality of the Marked Confidential Rate, Operational, and Settlement Information and similar information exchanged with electric utilities.
- (8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure: AT&T respectfully requests that the Commission provide confidential treatment to the Marked Confidential Rate, Operational, and Settlement Information and withhold such information from public inspection indefinitely. AT&T would not, in the normal course of business, provide the Marked Confidential Rate, Operational, and Settlement Information to the public at any time.
- (9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted: Public disclosure of the Marked Confidential Rate, Operational, and Settlement Information would not further the public interest. The Commission has authority to release "confidential information when, after balancing the factors favoring disclosure and non-disclosure, [the Commission] find[s] it in the public interest to do so,"<sup>15</sup> but this balance strongly favors non-disclosure here. Release of the information "would not serve the FOIA's core purpose," which is "to allow the public to learn about the operations of the government."<sup>16</sup> Instead, disclosure would "contribute primarily to an understanding of the operations and activities of [private parties]."<sup>17</sup> In addition, because "competitive harms [may] arise from the disclosure to a company's competitors of proprietary information," the information should be maintained in confidence.<sup>18</sup>

For the foregoing reasons, AT&T requests that the Commission give confidential treatment to the Marked Confidential Rate, Operational, and Settlement Information and withhold it from public inspection.

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<sup>15</sup> See *Am. Broadband Order*, 2020 WL 1872491, at \*3.

<sup>16</sup> *In the Matter of Nat'l Ass'n of Broadcasters U.S. Elecs., Inc.*, 24 FCC Rcd 12320, 12326-27 (¶¶ 13-15) (2009) (emphasis in original).

<sup>17</sup> *Id.* at 12327 (¶ 15) (emphasis added).

<sup>18</sup> *Am. Broadband Order*, 2020 WL 1872491, at \*4.

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Best regards,



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