Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

BELLSOUTH TELECOMMUNICATIONS, LLC, d/b/a AT&T Florida,	)	
	)	Proceeding No. 19-187
Complainant,	)	
	)	Bureau ID No. EB-19-MD-006
v.	)	
FLORIDA POWER & LIGHT COMPANY,	)	
Respondent.	)	

RESPONDENT FLORIDA POWER & LIGHT COMPANY'S
MOTION FOR LEAVE TO AMEND ANSWER

Pursuant to 47 C.F.R. §1.729, Respondent Florida Power & Light Company ("FP&L") hereby moves for leave to amend the Answer previously filed in this proceeding. In support thereof, FP&L states as follows:

1. FP&L filed its Brief in Support of Its Answer to the Amended Complaint ("Brief") and Answer and Affirmative Defenses ("Answer") in this case on September 16, 2019. Subsequent to this filing, it has come to FP&L's attention that despite the clarity of its position on page two and in footnote 83 of its Brief regarding the termination of AT&T's rights under the parties' joint use agreement, paragraph 12 of FPL's Answer was unclear on this issue and could be subject to misinterpretation as contradicting the arguments in FPL's Brief. Therefore, FP&L wishes to amend the Answer to clarify its position before the Commission, ensure that paragraph 12 of its Answer is read consistently with page two and footnote 83 of its Brief and prevent any further potential for confusion.

2. An amended Answer is attached to this motion as Exhibit 1. The clarifications therein impact only paragraph 12 of the Answer, which should be amended as follows:

Original:

> 12. FPL denies its termination of the 1975 JUA placed the agreement into "evergreen status" as that term is used in the *2018 Third Report and Order*. The 1975 JUA is not in evergreen status; it is terminated. In terms of contractual provisions, "evergreen" status refers to an indefinite renewal, pending termination by either party. The contractual language that AT&T mistakenly claims to be an "evergreen" clause is actually a perpetual license, exercisable at the licensee's option. *See* Article XVI of the JUA, attached as Exhibit 1 to AT&T's Complaint. Because FPL lacks the contractual ability to terminate AT&T's license with respect to any existing joint use poles (even for AT&T's failure to provide any payments under the agreement for two years), there can be no "renewal" of the 1975 JUA with respect to existing joint use poles. In this situation (as it relates to AT&T's facilities on FPL's poles), it is FPL—not AT&T—that is "forced" to continue the relationship; AT&T is the only party with a choice in the matter. FPL thus again denies that the *2018 Third Report and Order*'s presumptions apply and that the 1975 JUA is a "newly renewed" agreement under that order.

Amended:

> FPL denies its termination of the 1975 JUA placed the agreement into "evergreen status" as that term is used in the *2018 Third Report and Order*. The 1975 JUA is not in evergreen status; it is terminated. For further explanation, see page two and footnote 83 of FPL's Brief in Support of Its Answer to the Amended Complaint.

3. Although the Commission does not have a specific rule governing FP&L's request, FP&L believes that the Federal Rules of Civil Procedure can be instructive. *See e.g.*, *Premiere Network Servs., Inc.*, 18 F.C.C. Rcd. 11474, 11475 (2003) (noting that the Commission looks to the Federal Rules for guidance in such situations).

4. FED. R. CIV. P. 15(a)(2) governs amendments in this circumstance in the federal court system and provides in part "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."

5. In interpreting this rule, the Supreme Court has stated the following: "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,

undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962).

6. In the instant situation, none of the *Foman* factors are present and leave should be granted. There is no undue delay, bad faith, dilatory motive, failure to cure deficiencies by previous amendments, undue prejudice, or futility of the amendment. *See Mullin v. Balicki*, 875 F.3d 140, 149 (3d Cir. 2017) (identifying these same factors and stating "prejudice to the non-moving party is the touchstone for the denial of an amendment") (internal citation omitted); *see also CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 629 (3d Cir. 2013)("This Court is mindful 'that the pleading philosophy of the Rules counsels in favor of liberally permitting amendments to a [pleading].'").

7. As noted above, FP&L is merely amending its Answer to ensure that the arguments it has presented to the Commission are consistent across its pleadings. In fact, it has deliberately drafted its amendment to not include any additional arguments and simply reference existing arguments in previously filed pleadings of which Complainant Bellsouth Telecommunications, LLC ("AT&T") is already aware.

8. Thus, there will be no prejudice to AT&T. A review of AT&T's pleadings indicates that it will not require any changes as there are no new issues presented by the amendment to the Answer. FPL's support in the proposed Amended Answer that the 1975 JUA is not in evergreen status is the same as the arguments presented in its Brief. Moreover, it is FP&L's understanding that this amendment will not affect the shot clock in this proceeding.[1]

[1] Even if this amendment should somehow affect the shot clock, such a delay would not be sufficient prejudice to deny the amendment as the Commission has the authority to fashion appropriate lawful relief.

9. Moreover, FP&L has not made any previous amendments to its pleadings. AT&T is the only party in this case that was afforded an opportunity to amend its pleadings, an opportunity granted to cure deficiencies in AT&T's arguments and filings. *See* Letter from Lisa B. Griffin to Counsel, Proceeding No. 19-187, Bureau ID Number EB-19-MB-006, (Jul. 8, 2019) (ordering AT&T to amend its Complaint to comply with the Commission's rules).

10. FPL sought AT&T's consent to this motion but AT&T refused to consent.

11. Based on the forgoing, FP&L believes that good cause exists to grant its request and that the Commission should grant it leave to file the Amended Answer attached to this motion as Exhibit 1.

Respectfully submitted,

/s/ Charles A. Zdebski

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2020, 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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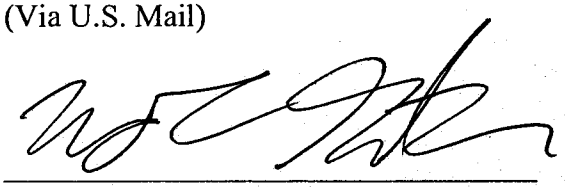

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