ECKERT SEAMANS
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006

TEL 202 659 6600
FAX 202 659 6699
www.eckertseamans.com

Charles A. Zdebski
202-659-6605
czdebski@eckertseamans.com

July 3, 2020

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Proceeding Number 19-187, Bureau ID Number EB-19-MD-006

Dear Ms. Dortch:

Florida Power & Light Company ("FPL"), pursuant to 47 C.F.R. Section 0.459(d)(1), hereby submits its response in opposition to the confidentiality request of BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T") as to portions of FPL's June 8, 2020 settlement proposal letter (the "Letter") filed with the Commission as an exhibit to the parties' June 19, 2020 Joint Status Report (the "Report").

The Commission issued an order in this matter on May 20, 2020 (the "Order") directing FPL and AT&T "to confer in light of this order to attempt to resolve their remaining disputes and [] to report their progress to Commission staff within thirty days." Pursuant to the Order, FPL transmitted the Letter to AT&T. AT&T responded on June 19, 2020, by indicating in the Report, which included a copy of the Letter as an exhibit, that AT&T would not pursue further settlement discussions with FPL. Also in the Report, AT&T purported to designate as confidential certain portions of the Letter, including statements that FPL was offering to apply the old telecom rate as a benchmark consistent with the FCC's order, FPL's own data, including the outcome of FPL's field audit, the resulting FCC formula inputs and FPL's own calculation of the old telecom rate. There is no basis for AT&T to treat any of the foregoing as confidential and proprietary to AT&T. FPL requested on June 30, 2020 that AT&T agree to withdraw its requested confidentiality designations, but AT&T refused. FPL now requests that the Commission declare that none of the material in the letter for which AT&T seeks confidential treatment is actually confidential.

The Commission's rules and the Freedom of Information Act ("FOIA") essentially establish a presumption in favor of public disclosure of materials filed with the Commission, presumably because disclosure and transparency are in the public interest. As AT&T notes, this presumption serves FOIA's core purpose, which is "to allow the public to learn about the operations of the government." Therefore, FOIA and the Commission's Rule require the party seeking confidentiality to establish an exemption to the presumption. Rule 0.459(d)(2)

expressly places the burden on AT&T to establish "by a preponderance of the evidence that non-disclosure is consistent with the provisions of " FOIA. AT&T does not and cannot carry this burden for the material at issue. The portions of the Letter AT&T purported to designate as confidential are either paraphrases of public passages in the Commission's May 20, 2020 order, the results of FPL's own field audit or FPL's own rate calculations based on those results. In addition, because AT&T dismissed the contents of the Letter out of hand as not even meriting further settlement discussion, it is even harder to understand why AT&T would consider portions of the Letter confidential.

AT&T's purported justifications for confidential treatment are without merit. First, AT&T states that the material should be treated as confidential "trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . . " The material does not, however, constitute any trade secret or commercial or financial information belonging to AT&T. The factual information in the settlement offer is based on publicly available information which belongs to FPL. FPL has concluded that there is no valid basis at this time to treat the proper calculation of the old telecom rate as confidential and withhold such calculation from public access, as AT&T apparently desires to do. As AT&T notes, the exception to FOIA on which it relies 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 . . . ." Therefore, if any party has the right to claim confidentiality, it is FPL, and FPL neither believes it has the right to do so nor desires to do so.

Second, to the extent that AT&T claims that the material should be treated as confidential because it is part of a settlement offer, its position is without merit. Under the generally accepted principles of Federal Rule of Evidence 408, settlement offers are not "confidential;" they are inadmissible as evidence "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction . . . ." There is no general confidentiality privilege protecting settlement offers. And here, FPL does not seek to admit the offer as evidence at trial, use it to establish the amount of a claim or to impeach. There is no jury and the FCC already has access to the information. The only issue is whether a settlement offer is generally excepted from public disclosure. It is not and, moreover, it is FPL's offer and FPL has no issue with it being accessible to the public.

In addition, and to be clear, the Letter is merely an *offer*, and a *rejected offer* at that. Were it a final settlement document, AT&T's concerns that disclosure might affect its future negotiating ability might possibly have some merit. Disclosure of a mere offer that AT&T scoffed at, however, could not possibly harm AT&T's future negotiating ability.

Third, several of AT&T's explanations under Commission Rule 0.459(b) are misguided. In particular, AT&T's arguments as to the following indicia of confidentiality fail to support AT&T's claim:

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged: AT&T makes the naked assertion that FPL's proposed calculation of the old telecom rate is commercial or financial information the disclosure of which would competitively disadvantage A&T in joint use rate negotiations with other electric utilities. Again, the information at issue is: (1) FPL's; (2) publicly available; (3) a straightforward calculation of old telecom rate; (4) provided in compliance with the Order's directive to use the old telecom rate as a benchmark; and, (5) a settlement proposal, not final settlement documents. Indeed, as AT&T walked away from the negotiating table, declaring FPL's proposal as unworthy of further discussion, it is difficult to imagine how disclosing FPL's proposal would harm AT&T with other electric utilities.

(4) Explanation of the degree to which the information concerns a service that is subject to competition: While AT&T may operate in a competitive market, there is no "competition" for the old telecom rate FPL seeks to charge AT&T. FPL simply provides a rate calculation pursuant to the FCC's formula, based on publicly available data and consistent with the Order's instruction to use the old telecom rate as a benchmark.

(5) Explanation of how disclosure of the information could result in substantial competitive harm: Disclosing FPL's proposed old telecom rate to AT&T's competitors would not harm AT&T because it would not affect either the rate the competitors pay or the rate to which AT&T may be entitled under the Order. Those rates are simply regulatory facts. Disclosing FPL's proposed old telecom rate to other electric utilities would also not harm AT&T. Disclosure would not affect the other electric utilities' actual rates nor would it give them negotiating leverage. At most, other electric utilities would know a rate that AT&T refuses to discuss.

(7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties: FPL's calculation of the old telecom rate was done based on publicly available data and pursuant to the Order's directive to use the old telecom rate as a benchmark.

(8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure: AT&T's request to treat FPL's settlement proposal as confidential "indefinitely" illustrates the unreasonableness of AT&T's request. FPL's proper calculation of the old telecom rate based on publicly available data in 2020 could have no bearing upon another electric utility's proper calculation of the old telecom rate in, say, 2023.

(9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted: Rule 0.459 and FOIA essentially establish a presumption that the public is entitled to access to materials filed with the Commission. The burden under the regulations is therefore expressly on AT&T to establish that nondisclosure is consistent with FOIA, not on FPL to establish that disclosure is in the public interest. AT&T's approach is therefore exactly backwards. In all events, public disclosure of the information at issue would further the public interest in understanding the Commission's directive to joint use parties such as FPL and AT&T to use the old telecom rate

as a benchmark for their rates. AT&T wants to keep the Commission's publicly designated benchmark a secret from the public, for no good and valid reason. Disclosure would reveal nothing about AT&T, but only reveal FPL's proper calculation of the old telecom rate using publicly available data in compliance with the Order. Indeed, disclosure of the information could well help other joint use parties understand, calculate and agree upon the proper approach to the old telecom rate.

FPL requests that, for the foregoing reasons, the Commission conclude that AT&T has not met its burden of establishing that the designated material is confidential, subject to an exemption under FOIA and entitled to be withheld from public disclosure.

Sincerely,

/s/
Charles A. Zdebski

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 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):

Christopher S. Huther, Esq.
Claire J. Evans, Esq.
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006
chuther@wileyrein.com
cevans@wileyrein.com
(Via e-mail)
Attorneys for BellSouth Telecommunications, LLC

Robert Vitanza
Gary Phillips
David Lawson
AT&T Services, Inc.
1120 20th Street NW, Suite 1000
Washington, DC 20036
(Via U.S. Mail)

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554
(Via Hand Delivery)

Kimberly D. Bose, Secretary
Nathaniel J. Davis, Sr., Deputy Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(Via Hand Delivery)

Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399
(Via U.S. Mail)

/s/ Robert J. Gastner
Robert J. Gastner