

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

REDACTED

COMMISSION
CLERK

2022 JAN 14 AM 10: 22

RECEIVED-FPSC

**BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA’S
OPPOSITION TO FPL’S MOTION FOR LEAVE TO FILE A SUR-REPLY**

The Commission should deny FPL’s motion to file a sur-reply. Although styled as a motion to respond to a sentence in AT&T’s reply, FPL in fact improperly seeks to challenge a finding in the Enforcement Bureau’s *January 2021 Rate Order* months after the September 2021 deadline for review expired.¹ There is no good cause to waive FPL’s deadline, let alone delay this case with additional briefing on an issue decided nearly a year ago.²

FPL’s motion does, however, provide an additional reason to promptly grant AT&T’s Application for Review and require FPL to provide the pole attachment rent reductions that are central to the Commission’s work to reduce infrastructure costs and promote broadband deployment. FPL admits it has *not* refunded the pole attachment rent it unlawfully collected from AT&T despite a *January 2021 Rate Order* finding that “AT&T is entitled to a refund for

¹ The Enforcement Bureau issued 3 *Rate Orders* in this case and postponed the deadline for seeking reconsideration or review until it issued the third in August 2021. Mem. Op. and Order, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (¶ 4) (EB Aug. 16, 2021) (“*Aug. 2021 Rate Order*”); see also 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*”).

² See, e.g., *In the Matter of Centro Cultural de Mexico en el Condado de Orange*, 31 FCC Rcd 838 (2016) (citing *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008)).

PUBLIC VERSION

the period beginning July 1, 2014.”³ FPL asks the Commission for leave to file a sur-reply so it can try to make these ordered refunds disappear. But this is not *Alice in Wonderland*. When the Enforcement Bureau ordered FPL to refund unlawfully collected amounts to AT&T, the Enforcement Bureau meant what it said.

FPL previously asked the Commission to “affirm [the *Rate Orders*] in their entirety.”⁴ The *Rate Orders* decided FPL must pay refunds *and* decided how the refunds must be calculated in this case; the refund calculation must use the “lower rate” required by law for AT&T’s use of FPL’s poles⁵ and must reflect “a proportionate reduction in FPL’s rate” for its use of AT&T’s poles.⁶

AT&T calculated refunds as directed. As FPL concedes, AT&T based them “on a proportionate reduction from the Joint Use Agreement (‘JUA’) rate[s],” meaning AT&T “calculated the percentage difference between the JUA rate for its attachments to FPL’s poles and the rate [required by the *Rate Orders*]” and “reduced the JUA rate for FPL’s attachments to AT&T’s poles by that percentage.”⁷ But FPL wants more. In its view, FPL wants to cut the rate it pays for use of AT&T’s poles in half, while continuing to charge AT&T rates that approximate or *exceed* the JUA rates that the Enforcement Bureau properly declared “unjust and unreasonable.” Using the 2018 rental year as an example, FPL claims that the rate AT&T pays should increase by 2.3% while the rate FPL pays should decrease by 55.5%:

³ *Jan. 2021 Rate Order*, 36 FCC Rcd at 258 (¶ 15).

⁴ FPL’s Opp’n to AT&T’s Application for Review at 3, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (Oct. 29, 2021).

⁵ *May 2020 Rate Order*, 35 FCC Rcd at 5327-28 (¶ 13).

⁶ *Jan. 2021 Rate Order*, 36 FCC Rcd at 255 (¶ 6 n.17).

⁷ *See* Mot. Ex. A ¶ 15.

PUBLIC VERSION

2018 Rental Year	AT&T's per pole rate for use of 1 foot of space on FPL's poles	FPL's per pole rate for use of 10.5 feet of space on AT&T's poles
JUA rate ⁸	\$ [REDACTED]	\$ [REDACTED]
Post-Order Rate (per FPL) ⁹	\$ [REDACTED]	\$ [REDACTED]
Percent change	2.3% increase	55.5% decrease

The Enforcement Bureau correctly rejected FPL's mathematical gamesmanship. Aware that the inaccurately described "proportional rates" FPL now seeks¹⁰ would effectively eliminate the rent reductions required by law,¹¹ the Enforcement Bureau rejected them in favor of refunds calculated using "a proportionate reduction in FPL's rate."¹² That the Enforcement Bureau reached a case-specific conclusion in this case is no surprise. The Commission "decline[d] ... to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis."¹³

There is thus no reason to accept FPL's sur-reply and its untimely request to revise the way refunds must be calculated under the *Rate Orders*. The Commission should deny FPL's motion for leave to file a sur-reply,¹⁴ end the gamesmanship that has already postponed the

⁸ *May 2020 Rate Order*, 35 FCC Rcd at 5327 (¶ 13).

⁹ As FPL notes, the parties exchanged rate calculations after the Enforcement Bureau issued the *January 2021 Rate Order*. See Mot. Ex. A ¶ 15 n.22. AT&T disagrees with each of the rates FPL claims results from the *Rate Orders* and continues to seek confidential treatment of all pole attachment rates, whether discussed or ordered, in this case as is customary in the industry.

¹⁰ The rates FPL describes as "proportional rates" are not the "proportionate rates" referenced in the Commission's *Pole Attachment Order*, which described a "proportionate rate ... as the same rate per foot of occupied space." See *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240, 5337 (¶ 218 n.662) (2011) ("*Pole Attachment Order*"). For 2018 rent, FPL wants to charge AT&T \$ [REDACTED] for 1 foot of space, while paying AT&T \$ [REDACTED] for 10.5 feet of space.

¹¹ See Mot. Ex. A ¶¶ 16 n.24.

¹² *Jan. 2021 Rate Order*, 36 FCC Rcd at 255 (¶ 6 n.17) (emphasis added).

¹³ *Pole Attachment Order*, 26 FCC Rcd at 5334 (¶ 214).

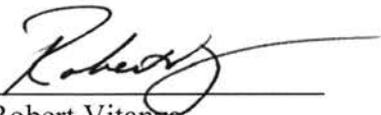
¹⁴ If the Commission grants FPL's motion, it should give AT&T the opportunity to file a sur-sur-reply to respond to the new argument in FPL's sur-reply.

PUBLIC VERSION

implementation of the Commission's rate reforms, and promptly grant AT&T's Application for Review to provide the full relief needed to further the Commission's competition and deployment goals.

Christopher S. Huther
Claire J. Evans
Frank Scaduto
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
(202) 719-7000
chuther@wiley.law
cevens@wiley.law
fscaduto@wiley.law

Dated: January 10, 2022

By: 
Robert Vitanza
David J. Chorzempa
David Lawson
AT&T SERVICES, INC.
1120 20th Street NW, Suite 1000
Washington, DC 20036
(214) 757-3357

*Attorneys for BellSouth Telecommunications,
LLC d/b/a AT&T Florida*

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2022, I caused a copy of the foregoing Opposition to FPL's Motion for Leave to File a Sur-Reply to be served on the following (service method indicated):

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9050 Junction Drive
Annapolis Junction, MD 20701
(confidential version by hand delivery; public version by ECFS)

Charles A. Zdebski
Robert J. Gastner
Cody T. Murphey
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, NW, 12th Floor
Washington, DC 20006
(confidential and public versions by email)

Rosemary H. McEnery
Lisa B. Griffin
Lia B. Royle
Federal Communications Commission
Enforcement Bureau
Market Disputes Resolution Division
445 12th Street, SW
Washington, DC 20554
(confidential and public versions by email)

Joseph Ianno, Jr.
Maria Jose Moncada
Charles Bennett
Florida Power and Light Company
700 Universe Boulevard
Juno Beach, FL 33408
(confidential and public versions by overnight delivery)

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(public version by overnight delivery)

Kimberly D. Bose, Secretary
Nathaniel J. Davis, Sr., Deputy Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426
(public by overnight delivery)



Frank Scaduto