

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. 20-214
Bureau ID No. EB-20-MD-002

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AT&T'S OPPOSITION TO FPL'S MOTION TO COMPEL

The Commission should deny FPL's motion to compel, which seeks extensive and irrelevant information about (1) the inspection, replacement, and age of *AT&T's poles* and (2) non-party billing and payment practices. This information does not bear on the "just and reasonable" terms and conditions required for AT&T's use of *FPL's poles* under 47 U.S.C. § 224(b), and so is not permissible discovery under 47 C.F.R. § 1.730.

A. Interrogatories 1-5 Seek Irrelevant Information About AT&T's Poles.

The Commission should deny FPL's motion to compel responses to interrogatories 1-5, which seek extensive and irrelevant operational information about the inspection, replacement, and age of AT&T's poles.

First, the operational information sought is not relevant or "necessary to the resolution of the dispute."¹ Count I of AT&T's Complaint challenges FPL's attempt to eject AT&T from over 425,000 FPL-owned poles under the default provision in the parties' joint use agreement

¹ 47 C.F.R. § 1.730(b).

(“JUA”), which allows one party to eject the other party from joint use poles *only* for “failure to meet a money payment obligation.”² This count rises or falls based on the reasonableness of the default provision and FPL’s use of the default provision to demand removal of AT&T facilities from *FPL’s poles*. The exhaustive operational information sought by FPL about *AT&T’s poles* has nothing to do with those issues. Even if the JUA’s default provision were reasonable and reasonably applied by FPL (it is neither), it would still only terminate AT&T’s right to attach to FPL’s poles.³ It would *not* terminate the JUA or FPL’s right to use AT&T’s poles. There is no valid reason to expand this case with discovery about *AT&T’s poles*.

FPL argues that it should be able to conduct a broadscale investigation of AT&T’s pole inspection and replacement practices because FPL *also* alleged that AT&T defaulted on its pole *maintenance obligation* under the JUA.⁴ But default of a pole maintenance obligation does not equate to the default of a monetary payment obligation needed to justify an ejection demand.⁵ Thus, FPL’s allegations pertaining to AT&T’s pole maintenance obligation and the information FPL seeks pertaining to that obligation are not relevant to the question before the Commission. The operational issues are a sideshow that is “beyond the scope of permissible inquiry.”⁶

² Compl. Ex. 1 at ATT00045 (JUA, § 12.3) (“If the default giving rise to a suspension of rights involves the failure to meet a money payment obligation hereunder, and such suspension shall continue for a period of sixty (60) days, then the party not in default may forthwith terminate the rights of the other party to attach to the poles involved in the default.”).

³ *Id.* at ATT00045 (JUA, § 12.3) (“... the party not in default may terminate the rights of the other party to attach to the poles involved in the default.”).

⁴ See Mot. to Compel at 3. FPL notes that it also alleged that AT&T failed to promptly transfer facilities to FPL’s replacement poles, *see id.*, but does not—and cannot—explain how an allegation about the replacement of *FPL’s poles* justifies discovery about the replacement of *AT&T’s poles*.

⁵ See Compl. Ex. 1 at ATT00045 (JUA, Art. XII).

⁶ 47 C.F.R. § 1.730(a).

Contrary to FPL's claim, AT&T's repudiation of FPL's operational criticisms⁷ does not make information about those criticisms relevant to this dispute.⁸ AT&T had every right to correct the record, even if it did not need to do so to prevail on Count I. That does not open AT&T up to discovery on FPL's operational claims, which remain not "necessary to the resolution of the dispute" over FPL's ejectment demand.⁹ If it were otherwise, defendants in every case would make irrelevant allegations solely to justify discovery.¹⁰ FPL's attempt to extract discovery from AT&T by doing just that is not permitted by the Commission's rules.¹¹

Second, the vast majority of the operational information FPL seeks is not discoverable because it is already available to or obtainable by FPL.¹² With interrogatories 1-4, FPL asks AT&T to provide information about the timing of AT&T's inspection and replacement of AT&T poles since 2011—while also claiming that it already knows when AT&T's poles were inspected

⁷ See, e.g., Reply Legal Analysis at 17, 21-23. FPL mischaracterizes AT&T's repudiation as conclusory, see Mot. to Compel at 1, 3-4, 7-8, when AT&T's arguments were supported by sworn testimony, specific examples from the field, and operational data establishing AT&T's diligence. FPL also misleadingly truncates a sentence from AT&T's testimony and misstates the record when it argues that a pole replaced in 2018 was somehow "in service for six additional years." See Mot. to Compel at 5, 6. *But see* Reply Ex. D at ATT00622, ATT00624-625 (Ellzey Reply Aff. ¶¶ 6, 9-10).

⁸ See Mot. to Compel at 3-4 (arguing discovery is "relevant to the material facts in dispute in this proceeding") (quoting 47 C.F.R. 1.730(a)). Although FPL challenges AT&T's "use of the phrase 'not relevant to, or likely to lead to the discovery of, admissible evidence'" in its objections, see *id.* at 4 n.12, that is the standard the Commission has applied in discovery disputes, see, e.g., *In the Matter of Allnet Commc'n Servs., Inc.*, 7 FCC Rcd 4881 (1992).

⁹ 47 C.F.R. § 1.730(b).

¹⁰ AT&T's Reply was emphatic that FPL's operational arguments are irrelevant "because they are not valid grounds for FPL to terminate AT&T's access to FPL's poles under the JUA's default provision." See, e.g., Reply Legal Analysis at 17; see also *id.* at 1, 14.

¹¹ 47 C.F.R. § 1.730.

¹² 47 C.F.R. § 1.730(b) (interrogatories must seek information that is "not available from any other source").

and when they were replaced.¹³ Indeed, FPL is attached to the relevant poles, must transfer its facilities when they are replaced, and has access to the electronic notification system (NJUNS) used to manage the pole replacement process.¹⁴ With interrogatory 5, FPL asks AT&T to provide information about the age of the poles it shares with FPL, a question that would require a field review of over 213,000 joint use poles to determine their birthmark—an undertaking that FPL (not AT&T) should perform if FPL desires that information. The Commission should, therefore, deny FPL’s request for responses to interrogatories 1-5 for the same reason the Enforcement Bureau denied similar requests where the movant already had “access to the information ... it seeks”¹⁵ or could obtain the information “through its own field study” of the relevant poles.¹⁶

B. Interrogatory 10 Seeks Irrelevant Information About Non-Party Billing and Payment Practices.

The Commission should deny FPL’s motion to compel a response to interrogatory 10, which seeks extensive and irrelevant information about billing and payment practices involving different utilities, operating under different agreements, and under different regulatory schemes.

First, FPL has not shown how information about invoices issued to AT&T by different pole owners and AT&T’s practices paying those invoices under different agreements are relevant or “necessary to the resolution of the dispute” as required.¹⁷ FPL argues that it should be

¹³ See, e.g., Mot. to Compel at 5, 7-8.

¹⁴ See, e.g., Compl. Ex. A at ATT00023 (Peters Aff. ¶ 20); Reply Ex. D at ATT00623 (Ellzey Reply Aff. ¶ 7).

¹⁵ See Order at 2, *MAW Commc’ns, Inc. v. PPL Electric Utilities Corp.*, Proceeding No. 19-29, Bureau ID No. EB-19-MD-001 (June 13, 2019).

¹⁶ See Order at 3, *Verizon Md. LLC v. The Potomac Edison Co.*, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (May 22, 2020).

¹⁷ 47 C.F.R. § 1.730(b).

provided the discovery because it “questioned AT&T’s motives and behavior during the parties’ negotiations” and “raised an affirmative defense of ‘unclean hands’ on AT&T’s part.”¹⁸ As discussed above, merely making an allegation (or responding to one) does not make information about the matter alleged relevant. Also, as FPL is well aware, there is no “unclean hands” defense in pole attachment complaint proceedings.¹⁹ And even if there were, the defense would fail as a matter of law. AT&T is statutorily entitled to “just and reasonable” rates for use of FPL’s poles; that AT&T challenged the unlawful rental rates FPL charged before paying them as provided by the dispute resolution provision of their joint use agreement “is of no consequence.”²⁰ Discovery is not needed for the Commission to *again* reject FPL’s meritless unclean hands defense.²¹

¹⁸ Mot. to Compel at 9.

¹⁹ See *BellSouth Telecommunications, LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, 35 FCC Rcd 5321, 5331 (EB 2020) (“*FPL 2020 Order*”) (“FPL’s remaining defenses lack merit.”); see also, e.g., *Marzec v. Power*, 15 FCC Rcd 4475, 4480, n.35 (2000) (“[T]he Commission has expressed doubt that the unclean hands defense is available in [formal complaint] proceedings.”).

²⁰ See *Qwest Commc’ns Co. v. Sancom, Inc.*, 28 FCC Rcd 1982, 1993-94 (¶ 27) (2013) (“We also are unpersuaded by Sancom’s argument that Qwest has ‘unclean hands,’ in that Qwest did not first pay Sancom amounts owing under the Tariff. Even if this defense were available in a section 208 formal complaint proceeding, it would fail in this case. As discussed above, Sancom unlawfully charged Qwest for tariffed switched access services. Accordingly, Qwest cannot have violated any alleged equitable principle by failing to pay the charges before disputing them.”); see also *AT&T Servs. Inc. v. Great Lakes Comet, Inc.*, 30 FCC Rcd 2586, 2597 (¶ 36) (2015) (“[T]he doctrines of waiver, estoppel, laches, and ratification do not preclude AT&T from challenging [the] rates AT&T is entitled to receive Defendants’ services at rates no higher than what the Commission has determined to be just and reasonable. pThat AT&T ordered and paid for Defendants’ services for a period of time, therefore, is of no consequence.”).

²¹ See *FPL 2020 Order*, 35 FCC Rcd at 5331 (“FPL’s remaining defenses lack merit.”); see also Answer, Affirmative Defense A, *BellSouth Telecommunications, LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (Sept. 1, 2019) (asserting an “unclean hands” defense).

Second, interrogatory 10 goes far “beyond the scope of permissible inquiry related to the material facts in dispute in this proceeding.”²² This case seeks just and reasonable pole attachment terms, conditions, and practices *for AT&T Florida’s use of FPL’s poles*. FPL, however, “sees no reason” to limit its discovery to AT&T Florida, so asks for information about its non-party affiliates operating nationwide, regardless of their regulatory classification, and despite the fact that they did *not* participate in the negotiations FPL relies on for its improper “unclean hands” defense.²³ FPL also would not agree to limit its request to investor-owned electric utilities, stating only that the “nature or regulatory classification” of the entity “should not matter.”²⁴ But the Commission’s jurisdiction necessarily matters, and it is limited to the investor-owned utilities that are subject to the just and reasonable requirement of federal law.

The expansive fishing expedition FPL proposes is particularly absurd given FPL’s refusal to produce any third-party information in response to AT&T’s discovery requests.²⁵ AT&T challenged FPL’s implementation of the JUA’s pole abandonment provision, arguing that it is unjust and unreasonable as compared to FPL’s prior practice with respect to AT&T, FPL’s current practice with respect to other attachers, and industry practice. FPL has refused to inform that relevant question, claiming that “[w]hether and how [it] approached pole abandonment

²² 47 C.F.R. § 1.730(a).

²³ *See* Mot. to Compel at 9-11; *see also* FPL Interrog., Definition 1 (defining AT&T as “BellSouth Telecommunications, LLC d/b/a AT&T Florida, including all other persons acting or purporting to act on its behalf, including all directors, officers, employees, managers, shareholders, general partners, limited partners, parents, subsidiaries, whether wholly or partially owned, affiliates, divisions, predecessors and successors-in-interest or other affiliated company or business, or agents, including consultants and any other persons working for or on behalf of any of the foregoing.”).

²⁴ Mot. to Compel at 11.

²⁵ *See* Opp. to AT&T Mot. to Compel at 3.

provisions and processes with third parties has no bearing on ... the present dispute.²⁶ Yet when FPL's discovery is involved, it argues AT&T must produce information about itself, its affiliates, and scores of non-party electric utilities to inform an "unclean hands" defense the Enforcement Bureau already rejected.²⁷ The Commission should deny FPL's two-faced effort to impose extraordinarily broad and irrelevant discovery on AT&T, while denying the tailored information AT&T sought to address reasonableness question that this case squarely presents.

* * *

For the foregoing reasons, the Commission should deny FPL's motion to compel in its entirety.

Respectfully submitted,

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Dated: February 12, 2021

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²⁶ *Id.*

²⁷ *See FPL 2020 Order*, 35 FCC Rcd at 5331.

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2021, I caused a copy of the foregoing Opposition to FPL's Motion to Compel to be served on the following (service method indicated):

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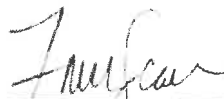
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