FILED 3/2/2021
DOCUMENT NO. 02531-2021
FPSC - COMMISSION CLERK

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

RECEIVED-FPSC
2021 MAR -2 AM 11:17
COMMISSION
CLERK

AT&T'S OPPOSITION TO FPL'S MOTION FOR LEAVE TO FILE A REPLY BRIEF IN SUPPORT OF ITS MOTION TO COMPEL

The Commission should deny FPL's motion because "[n]o reply may be filed to an opposition to a motion, except under direction of Commission staff."[1] Commission staff did not direct FPL's reply brief and should not accept it now. FPL has failed to identify any "good cause" that would justify a departure from the rules. FPL's motion is grounded in a conclusory and unfounded allegation that AT&T's opposition brief "mischaracterizes" the law and AT&T's prior arguments.[2] It does not. But regardless, FPL's disagreement with and mischaracterization of AT&T's arguments is not "good cause" to file a reply brief. Were that enough, the rules would authorize endless pleas and a reply brief for every motion in every case.

FPL does not seek to justify the filing of a reply brief by pointing to some new legal issue AT&T raised in its Opposition that FPL could not have anticipated or addressed earlier. Nor could it, as AT&T's arguments are on all-fours with the arguments it made in its December 4,

[1] 47 C.F.R. § 1.729(f).

[2] Motion for Leave ¶ 5.

2020 Reply.[3] Instead, FPL argues the reply brief justifies itself.[4] But that is not the standard. It is incumbent on FPL to identify the "good cause" for a departure from the rules—not ask the Commission to scour an unauthorized filing to find a basis to allow it. Any review should end at the motion. The time for briefing is past.[5]

Yet, even a cursory review of FPL's proposed reply brief compels finding it is not warranted. FPL moved to compel discovery *about AT&T's poles* in a case that is *about FPL's poles*. FPL should not be given leave to use its discovery motion as an end-run around the Commission's pleading rules, using it to argue substance rather than discovery long after its Answer was due.

FPL's reply brief reads like a supplement to FPL's Answer, retreading old ground and distorting AT&T's arguments. FPL, for example, repeats its meritless jurisdictional argument[6] and tries incorrectly to characterize this case as a breach-of-contract dispute.[7] FPL also re-argues the improperly heightened standard of review it prefers, claiming that the Commission should require proof "that FPL acted in bad faith and contrary to its stated purpose"[8] when the law

---

[3] *Compare, e.g.*, AT&T Opp'n at 1-2 *with* Reply Legal Analysis at 17 (arguing allegations about maintenance of AT&T's poles is not relevant) *and* AT&T Opp'n at 5 *with* Reply Legal Analysis at 32-33 (arguing an unclean hands defense does not exist and, if it did, is meritless).

[4] *See* Motion for Leave ¶ 5.

[5] Letter Order at 2 (Sept. 25, 2020) (setting January 29, 2021 as the expected date when briefing would be complete).

[6] *Compare* Proposed Reply Br. ¶ 3 *with* Answer ¶ 4; *see also* Reply Legal Analysis at 5-7.

[7] FPL misquotes AT&T's Opposition brief when it states that AT&T argued that "only a monetary default would 'terminate the JUA.'" Proposed Reply Br. ¶ 2. To reiterate, a monetary default *never terminates* the JUA—*only* the defaulting party's right "to attach to the poles involved in the default." *See* Compl. Ex. 1 at ATT00045 (JUA, § 12.3). And so, as AT&T argued, "[e]ven 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. It would not terminate the JUA or FPL's right to use AT&T's poles." AT&T Opp'n at 2.

[8] *See* Proposed Reply Br. ¶ 5; *id.* ¶¶ 6-7.

prohibits "unjust and unreasonable" terms, conditions, and practices however motivated or articulated. And FPL asks the Commission to read concessions into AT&T's discovery objections, claiming that the lodging of a relevance objection is equivalent to an admission on the merits.[9] This is absurd. Even FPL agrees there is no obligation to produce information that is not relevant "to the material facts in dispute in the proceeding," for "[w]ithout relevance, discovery would truly become a 'fishing expedition.'"[10] And the information FPL has sought *about AT&T's poles* is by definition irrelevant to resolution of this case *about FPL's poles*. FPL cannot turn irrelevant operational gripes into relevant discovery by characterizing them as a "defense."[11]

The Commission should deny FPL's motion for leave to file a reply brief.

---

[9] *Id.* ¶¶ 8-12.

[10] *Id.* ¶ 8 n.15 (quoting 47 C.F.R. § 1.730; *In the Matter of Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 8 FCC Rcd 2614, 2621 (¶ 38) (1993)). AT&T objected for other reasons as well, such as because certain information is already available to FPL. *See* 47 C.F.R. § 1.730(b). Contrary to FPL's argument, AT&T's standard recordkeeping practice—under which pole ownership records are not segmented by electric utility service area—does not undermine AT&T's status as a responsible pole owner. *See* Proposed Reply Br. ¶ 10.

[11] *See* Proposed Reply Br. ¶ 8.

Respectfully submitted,

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

Christopher S. Huther
Claire J. Evans
Frank Scaduto
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevans@wiley.law
fscaduto@wiley.law

Dated: February 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2021, I caused a copy of the foregoing AT&T's Opposition to FPL's Motion for Leave to File a Reply in Support of Its Motion to Compel 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
(by ECFS)

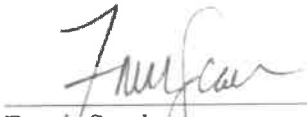
Charles A. Zdebski
Robert J. Gastner
Cody T. Murphey
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, NW, 12th Floor
Washington, DC 20006
(by email)

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
(by email)

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

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

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



Frank Scaduto