

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 FOR EVIDENTIARY HEARING

The Commission should deny FPL's meritless and untimely request for an evidentiary hearing,¹ filed nearly 1 month after the close of briefing and more than 2 months after receiving the reply testimony it now claims requires live testimony.² Under the pole attachment complaint rules, "there are no hearings at which a party may call a witness" because the Commission revised the rules in 2018 to *eliminate evidentiary hearings*.³ FPL asks for an unprecedented exception based on cases that predate the rule change and an admitted desire to have the final

¹ Because FPL uses the term "evidentiary hearing" as synonymous with live testimony, this Opposition will use the same shorthand. But the Commission has rightly rejected the argument "that a hearing based on a written record is somehow less than a 'full' hearing." Report and Order, *Procedural Streamlining of Administrative Hearings*, 35 FCC Rcd 10729, 10734 (¶ 15) (2020) ("*Procedural Streamlining Order*").

² See Letter Order at 2 (Sept. 25, 2020) (setting January 29, 2021 as the expected date when briefing would be complete); Reply (Dec. 4, 2020).

³ *Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, 33 FCC Rcd 7178, 7181 (¶ 8) (2018) ("*Procedural Rules Order*") (citing Verizon Comments at 5).

word.⁴ These are not valid reasons to depart from the rules and impose the cost and delay associated with a live hearing on the Commission and AT&T. This case, like all other pole attachment disputes where legal and factual arguments arise, should be decided on the written record.

FPL argues a hearing is warranted for 3 meritless reasons. *First*, FPL says there should be a hearing because this case involves more than “just crunching numbers.”⁵ So does every other pole attachment complaint.⁶ The Commission nonetheless decided to eliminate hearings for all of them,⁷ having learned through “[t]wo decades of experience with the Section 208 formal complaint rules” that the Commission’s rules “work well in resolving a *wide range of complaints*”⁸ in “proceedings on a written record.”⁹ This case is not the exception. It is not even the unicorn FPL claims it to be.¹⁰ Fewer than 2 years ago, the Enforcement Bureau resolved *MAW Communications* on a written record even though it—like this case—also challenged an electric utility’s unreasonable response to an “alleged non-payment of monies in dispute.”¹¹

⁴ *See, e.g.*, Mot. at 12 n.43. FPL’s desire to have the final word is also evident in its request to file a reply brief in the parties’ discovery dispute. *See* Mot. for Leave to File a Reply (Feb. 19, 2021).

⁵ Mot. at 11; *see also id.* at 1.

⁶ FPL, for example, described the parties’ rate complaint as “complex[],” “requir[ing] affidavits from FPL financial and operational witnesses as well as affidavits from one or more outside economic experts.” *See* FPL Mot. ¶ 8, Proceeding No. 19-187 (July 10, 2019).

⁷ *See Procedural Rules Order*, 33 FCC Rcd at 7212 (Appendix ¶ 15) (removing 47 U.S.C. § 1.1411 (2017), which authorized the Commission to “in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings”).

⁸ *See Procedural Rules Order*, 33 FCC Rcd at 7179 (¶ 4) (emphasis added).

⁹ *Procedural Streamlining Order*, 35 FCC Rcd at 10734 (¶ 15).

¹⁰ Mot. at 2 (“The Commission has rarely, if ever, had a ‘pole attachment’ case like this one.”).

¹¹ *MAW Commc’ns, Inc. v. PPL Elec. Util. Corp.*, 34 FCC Rcd 7145, 7152 (¶ 16) (EB 2019).

Second, FPL claims an evidentiary hearing is needed to protect due process rights.¹² Precedent precludes this argument. The “pole attachment [complaint] process is designed to ... allow all parties to fully express their positions” and gives FPL “ample opportunity to respond in writing to the complaint.”¹³ And here, AT&T consented to FPL’s requested extensions that more than *tripled* FPL’s time to answer AT&T’s Complaint by adding 75 days to FPL’s 30-day Answer deadline.¹⁴ FPL was provided a “meaningful opportunity” to be heard; due process does not require more.¹⁵

Third, FPL argues that a hearing should be scheduled because of “conflicting factual allegations” and “claims regarding credibility of witnesses.”¹⁶ In other words, AT&T’s reply filing did exactly what any reply filing is supposed to do—“respond to the factual allegations and legal arguments made by the defendant.”¹⁷ FPL does not point to a single item in AT&T’s reply testimony that is not directly responsive to FPL’s Answer; instead, it takes umbrage that AT&T

¹² Mot. at 12.

¹³ *Teleport Commc’ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19863, 19867 (¶¶ 9, 22) (2002).

¹⁴ See 47 C.F.R. § 1.726(a) (providing a defendant 30 days to answer a complaint); see also Notice of Complaint (July 9, 2020) (setting an August 7, 2020 Answer deadline); Letter Order (Sept. 25, 2020) (extending FPL’s Answer deadline until October 21, 2020).

¹⁵ See, e.g., *Procedural Streamlining Order*, 35 FCC Rcd at 10734 (¶ 15) (“[T]he suggestion that a hearing based on a written record is somehow less than a ‘full’ hearing is belied by our longstanding practice of conducting hearings in section 208 complaint proceedings on a written record and is at odds with the substantial procedural protections that [are] afforded parties to written hearing proceedings”); see also, e.g., *Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010) (“Due process generally requires a ‘meaningful opportunity’ to be heard This Court has never held that an *in-person evidentiary* hearing is constitutionally required whenever FERC makes decisions. Indeed, we have frequently suggested the opposite.”).

¹⁶ Mot. at 11.

¹⁷ 47 C.F.R. § 1.728(a).

deigned to disagree with FPL at all¹⁸ and did so using reply witnesses with relevant knowledge and experience.¹⁹ If rebutting claims in this manner justifies an evidentiary hearing, every formal complaint case would require such a hearing. Disagreement about both facts and law is endemic to nearly all adversarial proceedings, which is *why they are filed*.²⁰ It does not justify a live hearing.

FPL argues that prior Commission decisions support the need for a hearing “to examine and test the many conflicting allegations ... leveled in [the] case.”²¹ But those decisions, even if relevant, are not controlling because they pre-date the Commission’s decision to eliminate evidentiary hearings from pole attachment complaint proceedings.²² Moreover, the cases FPL cites do not even support the extraordinary hearing FPL seeks, as they either deny a request for an evidentiary hearing²³ or refer the case to a “presiding judge” with instructions to, “if possible, resolve the case on a paper record.”²⁴

¹⁸ See, e.g., Mot. at 2 (complaining that AT&T’s Reply “contradict[s] the specifics of FPL’s testimony”).

¹⁹ See Mot. at 12. FPL’s conclusory claim that AT&T’s “first-time” reply witnesses made “completely new factual allegations” is belied by the reply testimony FPL cites, each of which is directly responsive to allegations made by FPL’s declarants.

²⁰ FPL admits that its witnesses disagreed with AT&T’s witnesses, as is routine in pole attachment complaint proceedings. See Mot. at 11 (alleging that “FPL provided the declarations of Mr. Jarro and Mr. Allain, which ... contradict AT&T’s factual allegations.”).

²¹ Mot. at 2 (quoting *Ark. Cable Telecom. Ass’n v. Entergy Ark., Inc.*, 21 FCC Rcd 2158, 2167 (¶ 19) (2006)); see also Mot. at 7, 8-9.

²² See Mot. at 9 n.33 (conceding in a footnote that “the Commission revised its pole attachment rules in 2018 and deleted the specific reference to requests for an evidentiary hearing”).

²³ See *Knology, Inc. v. Ga. Power Co.*, 18 FCC Rcd 24615, 24640-41 (¶ 58) (2003); *Teleport Commc’ns Atlanta, Inc. v. Ga. Power Co.*, 16 FCC Rcd 20238, 20242 (¶ 10) (2001); see also *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1372 (11th Cir. 2002) (affirming decision to resolve case without a hearing).

²⁴ See *Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co.*, 11 FCC Rcd 11202, 11202 (¶ 1) (1996); *Am. Cablesystems of Fla. v. Fla. Power & Light Co.*, 10 FCC Rcd 10934, 10934 (¶ 1) (1995); *TCA Mgmt. Co. v. Sw. Pub. Serv. Co.*, 10 FCC Rcd 11832, 11832 (¶ 1) (1995); see also *Ark.*

Worse yet, the specific disagreements that FPL argues warrant a hearing do not justify a hearing because they are not relevant, material factual disputes that require an assessment of witness credibility through live testimony. In particular:

1. The Commission need not decide whether FPL acted “in bad faith and contrary to its stated purposes” as FPL contends.²⁵ Instead, the relevant issue is whether the JUA’s default and pole abandonment provisions, and FPL’s implementation of them, are “unjust and unreasonable” in violation of federal law.²⁶ Unjust and unreasonable terms, conditions, and practices remain unjust and unreasonable even if imposed and implemented with the best of intentions.

2. The Commission should not address—let alone hold a hearing about—FPL’s allegations about the maintenance and replacement of *AT&T’s poles*²⁷ because they are *not* relevant to this case about *FPL’s poles*.²⁸ AT&T has challenged FPL’s reliance on the JUA’s default provision to try to eject AT&T from FPL’s poles, and the *only* basis for an ejection demand under the default provision is a “failure to make a money payment obligation.”²⁹ FPL’s

Cable Telecom. Ass’n v. Entergy Ark., Inc., 21 FCC Rcd 2158, 2167 (¶ 19) (2006) and *Fla. Cable Telecom. Ass’n v. Gulf Power Co.*, 19 FCC Rcd 18718, 18721 (¶ 6) (2004) (“The ALJ may, in his discretion, require the parties to submit all or any portion of their case in writing”).

²⁵ Mot. at 9-10.

²⁶ 47 U.S.C. § 224(b).

²⁷ See Mot. at 3-5.

²⁸ See, e.g., AT&T Opp’n to Mot. to Compel at 1-3 (Feb. 12, 2021); Reply Legal Analysis at 17.

²⁹ 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.”) (emphasis added).

allegations about the maintenance and replacement of AT&T's poles—to which FPL will remain attached regardless of the outcome of this case—are an irrelevant side-show.³⁰

3. The Commission does not need to resolve the parties' differing characterizations of their negotiations. FPL wants to investigate its suspicion—which AT&T rebutted—that AT&T “fabricate[d] reasons for the delay in making payment” of disputed invoices.³¹ FPL also complains that AT&T's reply witnesses rebutted FPL's claim that AT&T “refused” to pay an “undisputed amount” during negotiations by explaining that FPL never asked AT&T to pay an “undisputed amount.”³² These disagreements are about side issues that need not be resolved. What is undisputed is that the FCC has determined the rates charged by FPL were unjust and unreasonable, that AT&T asked FPL to substantiate its disputed invoices within a month of receipt, and that AT&T paid the disputed invoices in full at the conclusion of the JUA's mandatory pre-complaint dispute resolution process.³³ It is, therefore, unjust and unreasonable for FPL to take adverse action due to a rate dispute in which AT&T “disputed the reasonableness” of the invoices and “requested further detail substantiating the charges.”³⁴

4. Finally, testimony is not needed to resolve the parties' differing characterizations of AT&T's pole abandonment practices.³⁵ It is undisputed that AT&T has only abandoned poles

³⁰ FPL also fails to explain how a live hearing would better establish “[t]he condition of AT&T's poles in the field” than the written record. *See* Mot. at 4.

³¹ Mot. at 5.

³² *See* Mot. at 5-6. FPL does not argue that it *did* ask for payment of an undisputed amount. It also does not point to testimony stating that it asked for an undisputed payment and declined the opportunity to request sur-reply testimony on the point. *See* Mot. at 12 n.43.

³³ *See* Joint Statement, Stipulated Facts ¶¶ 8, 10, 12, 22, 23 (Jan. 18, 2021); *see also* Compl. Ex. 1 at ATT00056-57 (JUA, Art. XIII A).

³⁴ *See MAW Commc 'ns*, 34 FCC Rcd at 7152-53 (¶ 18).

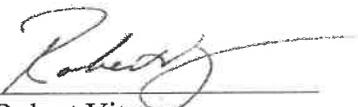
³⁵ Mot. at 6-7.

to FPL where AT&T will no longer serve customers from facilities attached to a pole in that location, but FPL will.³⁶ FPL has asked the Commission to equate AT&T's one-off pole abandonments to FPL's effort to abandon thousands of replaced FPL poles to AT&T even though FPL *will* continue to serve customers from facilities attached to a pole in the same locations.³⁷ FPL provides no reason why additional testimony would be needed to understand and differentiate between these two fundamentally different scenarios.

FPL's motion for an evidentiary hearing thus seeks to impose undue cost, burden, and delay on the Commission and AT&T without any pole attachment complaint rule permitting it or material factual dispute justifying it. The Commission should deny FPL's improper request for an evidentiary hearing.

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³⁶ See Reply Ex. A at ATT00575 (Peters Reply Aff. ¶ 12); Answer Ex. B at FPL00139 (Allain Decl. ¶ 17).

³⁷ See Mot. at 6-7; Answer Ex. B at FPL00139 (Allain Decl. ¶ 17).

RULE 1.721(M) VERIFICATION

I, Robert Vitanza, as signatory to this submission, hereby verify that I have read AT&T's Opposition to FPL's Motion for Evidentiary Hearing and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.



Robert Vitanza

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2021, I caused a copy of the foregoing Opposition to FPL's Motion for Evidentiary Hearing to be served on the following (service method indicated):

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