

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS,*
LLC D/B/A AT&T FLORIDA *

Complainant, *

v. *

FLORIDA POWER & LIGHT
COMPANY, *

Respondent. *

Proceeding No.: 20-214
Bureau ID Number: EB-20-MD-002

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COMMISSION
CLERK

**MOTION FOR LEAVE
TO FILE A REPLY IN SUPPORT OF MOTION TO COMPEL**

Pursuant to Section 1.729 and Section 1.732(c) of the Federal Communications Commission’s (“Commission”) Rules of Practice and Procedure, 47 C.F.R. §§ 1.729, 1.732(c), Respondent Florida Power & Light Company (“FPL”), by and through its undersigned counsel, respectfully submits this Motion for Leave to File a Reply in Support of FPL’s Motion to Compel in response to the Opposition to FPL’s Motion to Compel (“Opposition”) filed by Complainant BellSouth Telecommunications LLC d/b/a AT&T Florida (“AT&T”) on February 12, 2021. In support thereof, FPL states as follows:

I. BACKGROUND

1. On February 5, 2021, FPL filed its Motion to Compel AT&T’s responses to Interrogatory Nos. 1 through 5 and Interrogatory No. 10 of FPL’s First set of Interrogatories (“Motion to Compel”). FPL’s Interrogatories seek information supporting FPL’s defenses against AT&T’s conclusory assertions that FPL’s actions were unjust and unreasonable. Specifically, the information sought by FPL’s Interrogatory Nos. 1–5 and 10 support FPL’s argument that AT&T

was not maintaining and replacing its joint use poles, which was another important failure by AT&T that was one factor FPL considered in choosing to exercise the termination provisions of the 1975 Joint Use Agreement (“1975 JUA”).

2. On February 12, 2021, AT&T filed its Opposition. AT&T argues in its Opposition that the information pertaining to FPL’s defenses to the Complaint are not relevant, and even if relevant, the information is already available or obtainable by FPL.¹

3. Accordingly, FPL seeks leave to file a Reply in Support of Motion to Compel (“Reply”), which is attached hereto as **Exhibit A**.

II. ARGUMENT

4. Rule 1.3 of the Commission’s Rules provides that “[a]ny provisions of the [Commission’s] rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown.”² Section 1.729(f) gives the Commission staff the authority to direct a party to file an opposition to a motion.³ Additionally, the Commission, under Section 1.732(c), “may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding.”⁴

5. Good cause exists to permit FPL to file its Reply because AT&T’s Opposition raises legal and factual issues that FPL should be permitted to address.⁵ Further, granting FPL leave to file a Reply will promote the public interest by furthering the Commission’s “goal of

¹ AT&T’s Opposition to FPL’s Motion to Compel at 1–4 (“Opposition”).

² 47 C.F.R. § 1.3.

³ See 47 C.F.R. § 1.729(f).

⁴ 47 C.F.R. § 1.732(c).

⁵ See *In the Matter of Petition for Waiver filed by Rural Telephone Service Company Concerning the Definition of “Study Area” Contained in Part 36 Appendix-Glossary of the Commission’s Rules*, AAD 96-38, Memorandum Opinion and Order, 12 FCC Red 785, 786, ¶ 3 (1997) (“Waiver of Commission rules is appropriate only if special circumstances warrant deviation from the general rule and such a deviation will serve the public interest.”).

developing a complete record.”⁶ Additionally, the additional information in FPL’s Reply promotes “a full, fair, and expeditious resolution of the proceeding” because FPL’s Reply addresses AT&T’s mischaracterizations of the standard for a motion to compel discovery, the scope of this proceeding, and its own previous arguments.⁷ The mischaracterizations are identified and addressed in FPL’s Reply.⁸

6. As a result, good cause exists to grant FPL’s Motion for Leave in order to develop a complete record for a full and fair resolution to this proceeding.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Florida Power & Light Company respectfully requests that the Commission grant FPL leave to file a Reply in Support of FPL’s Motion to Compel.

⁶ *AT&T Corp. v. Bell Atlantic-Penn.*, 14 FCC Rcd 556, 602, ¶ 106 (1998) (granting a motion for leave to file a supplemental reply).

⁷ *See* 47 C.F.R. § 1.732(c).

⁸ *See e.g.*, Ex. A (Reply in Support) at 4, 8, 11.

Respectfully submitted,

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RULE 1.721(M) VERIFICATION

I, Cody T. Murphey, as signatory to this Submission, hereby verify that I have read the Motion for Leave and, to the best of my knowledge, information and belief formed after reasonable 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.

/s/ Cody T. Murphey

Cody T. Murphey

Exhibit A

Before the
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BELLSOUTH TELECOMMUNICATIONS,*
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FLORIDA POWER & LIGHT
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RESPONDENT FLORIDA POWER & LIGHT COMPANY'S
REPLY IN SUPPORT OF MOTION TO COMPEL

Respondent Florida Power & Light Company (“FPL”), by and through its attorneys, respectfully submits this Reply in Support of FPL’s Motion to Compel. In further support thereof, FPL states as follows.

I. ARGUMENT

1. AT&T’s Opposition to FPL’s Motion to Compel (“Opposition”) misstates the standard for a motion to compel discovery, the scope of this proceeding, and its own previous arguments.

2. AT&T’s Opposition asserts that the “information sought is not relevant or ‘necessary to the resolution of the dispute.’”¹ AT&T then argues that the information sought is irrelevant because only a monetary default would “terminate the JUA or FPL’s right to use AT&T’s poles.”²

¹ Opposition at 1 (citing 47 C.F.R. § 1.730).

² *Id.* at 2.

3. Thus, AT&T is essentially arguing that the scope of relevant information for this proceeding (and by extension the scope of the proceeding itself) is limited to that which would be relevant to a breach of contract claim. In effect, AT&T is conceding FPL's argument in its Response Brief that AT&T's claims are nothing more than thinly disguised breach of contract claims over which the Commission does not have jurisdiction and which should be dismissed.³

4. In conflict with its Opposition, AT&T has argued elsewhere in this proceeding that its claims are not limited to a simple breach of contract but rather that AT&T believes that the steps that FPL undertook to enforce the obligations of the parties' JUA were "unjust and unreasonable."⁴

5. Moreover, AT&T's claims do not simply attack the language of the parties' joint-use agreement (nor could they).⁵ Likewise, AT&T's claims do not rely simply on FPL's actions.

³ FPL Br. in Support at 21–26. AT&T's argument is also substantively incorrect in that the parties' JUA allows a non-breaching party to cure a non-monetary default and then bill the other party for the expenses incurred. Compl., Ex. 1 (1975 JUA § 12.2) at ATT00045. Once the breaching party fails to compensate the non-breaching party for the expenses incurred, the non-monetary default becomes a monetary default and a potential basis for termination of the agreement. Compl., Ex. 1 (1975 JUA §§ 12.2, 12.3) at ATT00045. FPL provides examples of just such a situation in its pleadings. FPL Answer, Ex. B (Allain Decl. ¶ 22) at FPL00142; *see also* FPL Br. in Support at 57–60.

⁴ AT&T Reply Legal Analysis at 5–7.

⁵ The statute of limitations long ago ran on any facial attack on the language of the Joint-Use Agreement ("JUA"). FPL's understanding has always been that AT&T's complaint only included two counts that challenged the JUA's language "as applied." FPL does not believe that there are any facial challenges to the language of the JUA properly before the Commission nor could there be. A challenge to language of a contract itself accrues at the time of formation. *See e.g., Yerkovich v. MCA, Inc.*, 11 F. Supp. 2d 1167, 1173 (C.D. Cal. 1997), *aff'd*, 211 F.3d 1276 (9th Cir. 2000) ("An unconscionability claim accrues at the moment when the allegedly unconscionable contract is formed."); *Bruning v. Nationstar Mortg., L.L.C.*, No. 3:17-CV-0802-M-BK, 2018 WL 1135417, at *3 (N.D. Tex. Feb. 8, 2018), report and recommendation adopted sub nom. *Bruning v. Nationstar Mortg., L.L.C.*, No. 3:17-CV-0802-M, 2018 WL 1083621 (N.D. Tex. Feb. 28, 2018) ("It is not disputed that Plaintiff entered into the Loan Agreement in 2007; thus, his claim began to accrue at that time.") (internal citation omitted); *Tucson Elec. Power Co. v. Westinghouse Elec. Corp.*, 597 F. Supp. 1102, 1104–05 (D. Ariz. 1984) ("Based on this policy and the dictates of the statute it must be concluded that the issue of unconscionability accrues for statute of limitations purposes at the time the contract is entered."). To the extent, that AT&T asserts that the Commission's 2011 imbued it with the right to seek the relief it is now seeking then the statute of limitations with respect to the enforcement of that right would have begun to run as of the effective date of that order. *See e.g., Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1548–49 (9th Cir. 1989) (holding that a contractual claim that arises in part due to a change in law accrues as of the effective date of the law in question).

Rather, AT&T's claims require that FPL acted in bad faith and contrary to its stated purposes.⁶ Both parties agree that FPL has certain safety and reliability obligations as a result of Florida's storm hardening legislation and regulations.⁷ In FPL's view, it was simply acting to meet these state-mandated safety and reliability obligations.⁸ AT&T engaged in a variety of behaviors over a period of several years that led FPL to believe that AT&T simply was no longer a reliable joint use partner, and that AT&T's ongoing failures to meet its contractual obligations represented a growing impediment to FPL's ability to continue to meet its storm hardening obligations.⁹ For its part, AT&T has countered that FPL's stated explanations for its actions are a ruse and that FPL's real (and hidden) intent was: 1) to pressure AT&T to settle the earlier complaint proceeding it had initiated against FPL at the Commission; and 2) to shift various costs onto AT&T (despite the fact that AT&T admits that FPL would be reimbursed by Florida for these costs regardless).¹⁰

6. As explained in its Motion to Compel, the discovery requests at issue seek to reveal what (if any) basis AT&T has to question FPL's stated motives in seeking to terminate the parties' relationship.¹¹ If AT&T's internal records tended to support the statements that AT&T's

⁶ Compl. ¶ 21 ("FPL's reliance on the 60-day deadline was thus a transparent ploy to foist its pole removal and disposal costs on AT&T.").

⁷ Joint Statement ¶¶ 32–35.

⁸ *See, e.g.*, Answer, Ex. A (Jarro Decl. ¶ 35) at FPL00007 ("Delivering safe and reliable service to customers is FPL's first priority and its fundamental obligation as a public utility."); Answer, Ex. B (Allain Decl. ¶¶ 19–29) at FPL00140–46.

⁹ *See generally* FPL Br. in Support at 42–63; Answer, Ex. A (Jarro Decl. ¶¶ 34–46) at FPL00007–09; Answer, Ex. B (Allain Decl. ¶¶ 19–29) at FPL00140–46 (providing testimony on "AT&T's poor performance and irresponsible construction practices associated with the operation and maintenance of their own pole infrastructure").

¹⁰ *See e.g.*, Compl. ¶ 19. ("FPL's Notice of Abandonment for those 11,142 replaced poles was a transparent effort to try to increase the pressure on AT&T during the rate negotiations by converting the "prompt" standard that applies to transfers from replaced poles into a strict 60-day deadline that applies to abandoned poles (including running over the Winter holidays) with exorbitant cost consequences if it was not met."); Compl. (Miller Aff. ¶ 10) at ATT00005 ("At the time, I thought FPL's threats to limit AT&T's pole access were posturing—pure negotiation tactics designed to increase pressure on AT&T. I also thought FPL would try to negotiate a resolution of the rate issues using the JUA's mandatory precomplaint dispute resolution process and that its pole access threats would be resolved at the same time.").

¹¹ *See* FPL Mot. to Compel at 3–9.

declarants have made under oath in this proceeding that AT&T has sufficient policies and procedures in place to adequately maintain its pole infrastructure, one would think that AT&T would be happy to turn over such materials.

7. One key aspect to FPL's defense to AT&T's claim that FPL's motives in terminating the parties' relationship were in bad faith is the overall past and present relationship of the parties. AT&T had a long history of failing to inspect, maintain, and replace its poles and make timely pole transfers.¹² These combined failures and failure to make any joint use payments for an extended period of time led to FPL's very reasonable conclusion that AT&T was simply not a reliable joint-use partner and that parties' current contractual arrangement should not continue.

8. The Opposition also misstates the scope of discovery applicable to this proceeding. Generally, the Commission looks to the Federal Rules of Civil Procedure ("FRCP") for guidance.¹³ The relevant rule governing the scope of discovery in federal proceedings is FRCP 26 which has recently changed and now states:

Parties may obtain discovery regarding any nonprivileged matter **that is relevant to any party's claim or defense** and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.¹⁴

¹² See FPL Br. in Support at 57–63; Answer, Ex. A (Jarro Decl. ¶¶ 34–46) at FPL00007–09; Answer, Ex. B (Allain Decl. ¶¶ 19–29) at FPL00140–46.

¹³ See e.g., *Premiere Network Servs., Inc. v. Southwestern Bell Tel. Co.*, 18 FCC Rcd. 11474, 11475, ¶ 4 (2003) (noting that the Federal Rules of Civil Procedure "although not controlling" are "instructive"); *APCC Servs, Inc. v. TS Interactive, Inc.*, 17 FCC Rcd. 25523, 22526–27, ¶ 7 (2002) (examining the Federal Rules of Civil Procedure for guidance).

¹⁴ Fed. R. Civ. P. 26(b)(1) (emphasis added).

The Commission's rules are similar in scope and provide for inquiry into matters "related to the material facts in dispute in the proceeding."¹⁵ As noted above, AT&T has argued that FPL abandoned a large number of poles and terminated the parties' agreement solely in order to put pressure on AT&T to settle the parties' rate dispute on favorable terms. FPL has countered that its actions instead stem from years of frustration with AT&T's failures across a wide spectrum of matters. FPL is thus entitled to discovery under the relevant standards on matters directly related to this defense.

9. It is ludicrous and in fact all but confirms FPL's position that AT&T not only cannot readily point to policies, practices and information regarding its pole inspection, maintenance and replacement operations, but that it actively opposes producing such material.

10. For example, the Opposition claims that a response to Interrogatory No. 5 (*i.e.* "Identify and fully describe the average age of all joint use poles owned by AT&T and subject to the 1975 JUA.") would "require a field review of over 213,000 joint use poles."¹⁶ This argument confirms FPL's assertions that AT&T is not maintaining its pole infrastructure and responsibly replacing poles as they age.¹⁷ A responsible pole owner would be able retrieve such information easily. Either AT&T does not know which poles it should be retiring due to age and safety concerns, or it knows exactly what the age and condition of its pole infrastructure is but also knows that the revelation of this information would be damning to its case.

¹⁵ 47 C.F.R. § 1.730; *see also In the Matter of Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 8 FCC Red. 2614, 2620–21, ¶ 38 (1993) (recognizing that "the legitimate purpose of discovery as a means by which a party can gather the factual information necessary to advance its case. Without relevance as a standard, discovery would truly become a "fishing expedition."").

¹⁶ Opposition at 4.

¹⁷ *See* FPL Br. in Support at 60 (AT&T's failure to maintain and replace critical infrastructure, and to act with "a reasonable level of responsibility" as to pole maintenance, thus became the second factor in FPL's decision to exercise its termination rights under the 1975 JUA."); Answer, Ex. A (Jarro Decl. ¶¶ 35–40) at FPL00007–08; Answer, Ex. B (Allain Decl. ¶¶ 22–23) at FPL00142–43; Answer, Ex. A (Jarro Decl.), Ex. 7 (Notice of Default) at FPL00061.

11. Likewise, the Opposition argues that AT&T has already provided responsive materials and evidentiary support with its Reply.¹⁸ However, the materials that it cites for the most part merely reiterate its legal arguments that the scope of this proceeding should be limited to a breach of contract claim (thus duplicating the parties' ongoing litigation in Florida).¹⁹

12. The referenced materials also arguably provide factual support for the proposition that AT&T does sometimes replace poles.²⁰ However, FPL does not dispute that AT&T does on occasion replace poles. FPL is instead asserting that that AT&T does not have procedures in place to systematically identify and replace poles as they age or otherwise fail.²¹ In response, AT&T has simply pointed to the raw number of poles it has replaced at certain points of time without providing any context as to whether that number of replacements was sufficient to ensure the health of AT&T's Florida infrastructure. This response gives lie to AT&T's assertion that the context FPL is seeking through its discovery requests is available through publicly available information (*i.e.* the NJUNS system).²² Moreover, AT&T's steadfast refusal to provide such basic information again effectively confirms FPL's conclusion that AT&T is not a responsible joint-use partner.

II. CONCLUSION

WHEREFORE, for the forgoing reasons, the reasons contained in its Motion for Leave filed contemporaneously herewith, and the reasons detailed in its previously filed Motion to Compel, Florida Power & Light Company respectfully requests that the Commission: (i) grant it

¹⁸ Opposition at 3, n. 7 (citing Reply Legal Analysis at 17, 21–23).

¹⁹ See AT&T Reply Legal Analysis at 17.

²⁰ See *id.* at 21–23.

²¹ Answer, Ex. A (Jarro Decl. ¶¶ 35–40) at FPL00007–08.

²² Opposition at 3–4.

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I, Cody T. Murphey, as signatory to this Submission, hereby verify that I have read the Reply in Support and, to the best of my knowledge, information and belief formed after reasonable 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.

/s/ Cody T. Murphey

Cody T. Murphey

