

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	Proceeding No. 20-214
	)	Bureau ID No. EB-20-MD-002
BellSouth Telecommunications, LLC	)	
d/b/a AT&T Florida,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
Florida Power & Light Company,	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 16, 2021**

**Released: August 16, 2021**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. This Memorandum Opinion and Order addresses the second of two related complaints that BellSouth Telecommunications, LLC d/b/a AT&T Florida (AT&T), an incumbent local exchange carrier (LEC) in Florida, filed against Florida Power & Light Company (FPL), an electric utility. In its First Complaint,<sup>1</sup> which is still pending before the Commission, AT&T alleged that the rate it pays to attach its facilities to FPL’s poles under the parties’ joint use agreement (JUA) is unjust and unreasonable within the meaning of Section 224(b)(1) of the Telecommunications Act of 1934, as amended (Act).<sup>2</sup> In this Second Complaint, AT&T alleges that two clauses in the JUA—a Payment Default Clause and a pole Abandonment Clause—and FPL’s implementation of those clauses are unjust and unreasonable within the meaning of Section 224(b)(1).<sup>3</sup> We dismiss AT&T’s Payment Default Clause claim with prejudice because we find that AT&T violated the Commission’s rules by failing to assert the claim in its First Complaint. We deny in part AT&T’s Abandonment Clause claim. Although we find that, properly construed, the clause is not unjust and unreasonable, we conclude that FPL’s practices with respect to the clause were unjust and unreasonable.

**II. BACKGROUND**

**A. Legal Background**

2. Section 224(b)(1) of the Act requires the Commission to “regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.”<sup>4</sup>

<sup>1</sup> See Pole Attachment Complaint, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (filed July 1, 2019); Amended Pole Attachment Complaint (filed July 12, 2019) (First Complaint).

<sup>2</sup> 47 U.S.C. § 224(b)(1).

<sup>3</sup> See Pole Attachment Complaint, Proceeding No. 20-214, Bureau ID No. EB-20-MD-002 (filed July 6, 2020) (Second Complaint). See also *id.* at Exh. 1 (JUA) at sections 9.1 (Abandonment Clause), 12.3 (Payment Default Clause).

<sup>4</sup> 47 U.S.C. § 224(b)(1).

In the *2011 Pole Attachment Order*, the Commission concluded for the first time that Section 224(b)(1) authorizes it to regulate pole attachment agreements between incumbent LECs and other utilities.<sup>5</sup> Where the incumbent LEC was a party to a joint use agreement entered into before the *2011 Pole Attachment Order*, the Commission explained that it would review the agreement only if the incumbent LEC could show that “it genuinely lacks the ability to terminate [the] existing agreement and obtain a new arrangement.”<sup>6</sup> The Commission did not specify the rate that would apply to such agreements. However, it did state that, if a joint use agreement was entered into after the *2011 Pole Attachment Order*, and the incumbent LEC established that the agreement did not materially advantage it in relation to the utility’s competitive LEC or cable company attachers, the incumbent LEC should pay the same rate as those attachers. Conversely, the Commission further found that, if the agreement provided the incumbent LEC material advantages over other attachers, the incumbent LEC should pay a higher rate than those attachers.<sup>7</sup>

3. The Commission subsequently modified the framework for reviewing joint use agreements between incumbent LECs and utilities. In the *2018 Pole Attachment Order*, the Commission established a rebuttable presumption, effective March 11, 2019, that an incumbent LEC that is a party to a joint use agreement entered into or “newly-renewed” after that Order is “similarly situated” to the utility’s competitive LEC attachers. In those circumstances, the Commission said, the incumbent LEC is entitled to the same attachment rate.<sup>8</sup>

## **B. Factual Background**

4. AT&T and FPL entered into the JUA in 1975 and amended it in 2007 to include a mandatory dispute resolution process that culminates in non-binding mediation. The JUA prohibits the parties from commencing litigation until sixty days after the first day of the mediation.<sup>9</sup>

5. In March 2018, FPL submitted an invoice for approximately \$9 million for the 2017 pole rental year, which ended December 31, 2017.<sup>10</sup> AT&T refused to pay, arguing that it was entitled to a lower rate under the *2011* and *2018 Pole Attachment Orders*.<sup>11</sup>

6. In August 2018, FPL notified AT&T that it was in default under the JUA and initiated the JUA’s dispute resolution process.<sup>12</sup> Pursuant to that process, the parties met in December 2018 to discuss resolution of their dispute.<sup>13</sup> On March 25, 2019, FPL sent AT&T a Notice of Termination stating that, pursuant to the JUA’s Payment Default Clause, it was immediately terminating AT&T’s right to attach to FPL’s existing poles and, pursuant to a different JUA clause, was terminating AT&T’s right to attach to

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<sup>5</sup> See *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (*2011 Pole Attachment Order*) at 5328, para. 203, *aff’d Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 1183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013).

<sup>6</sup> *2011 Pole Attachment Order*, 26 FCC Rcd at 5334, para. 216.

<sup>7</sup> *Id.* at 5336, paras. 217-18.

<sup>8</sup> See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Development*, Third Report and Order, 33 FCC Rcd 7705 (2018) (*2018 Pole Attachment Order*) at 7769, para. 126; 47 CFR § 1.1413(b).

<sup>9</sup> See Second Complaint Exh. 1 (JUA) at sections 1, 13A.

<sup>10</sup> See Second Complaint Exh. 2.

<sup>11</sup> See Second Complaint Exh. 5 (Email from K. Hitchcock, AT&T, to T. Kennedy, FPL, sent Aug. 21, 2018).

<sup>12</sup> See Second Complaint Exh. 6 (Letter from M. Jarro, FPL, to M. Karno, AT&T, dated Aug. 31, 2018).

<sup>13</sup> See Second Complaint Exh. 11 (Letter from M. Jarro, FPL, to D. Miller, AT&T, dated Jan. 8, 2019).

new FPL poles effective August 26, 2019.<sup>14</sup> On May 1, 2019, the parties conducted a half-day mediation that was unsuccessful.<sup>15</sup>

7. On July 1, 2019, AT&T filed its First Complaint, alleging that the attachment rate under the JUA is unjust and unreasonable and seeking a reduced rate under the *2011 and 2018 Pole Attachment Orders*. On the same day, it paid the principal amount of the 2017 invoice.<sup>16</sup> In its Answer, FPL argued that it had lawfully terminated AT&T's right to attach to FPL's existing poles effective March 25, 2019.<sup>17</sup>

8. Also on the same day, FPL filed a complaint in Florida state court alleging that AT&T was in breach of the JUA, asserting that FPL's Notice of Termination was valid, and asking the court to declare AT&T a trespasser on FPL's poles. AT&T removed the case to the United States District Court for the Southern District of Florida, which stayed the proceeding under the doctrine of primary jurisdiction.<sup>18</sup>

9. On May 20, 2020, we issued the *Bureau Order*, granting the First Complaint in part and finding that AT&T was entitled to a lower rate under the *2011 Pole Attachment Order*.<sup>19</sup> The *Bureau Order* stayed the First Complaint as to the period after December 31, 2018, because, *inter alia*, FPL's Notice of Termination purported to end AT&T's right to attach to existing FPL poles on March 25, 2019, and AT&T admitted that the Notice terminated its right to attach to new FPL poles. "The validity of the Notice of Termination insofar as it applies to existing joint use poles is squarely before the district court and is purely a matter of state contract law, as AT&T does not argue that the [Payment Default Clause] is unjust or unreasonable under Section 224 of the Act."<sup>20</sup>

10. After the *Bureau Order* found that the effect of the Notice of Termination was a question of state law to be decided by the Florida district court, FPL asked the district court to lift its stay, noting that the Commission had "expressly declined to address the contractual issues that remain pending" before the court.<sup>21</sup> In opposing FPL's motion, AT&T admitted that it had not challenged the Notice of Termination as unjust and unreasonable in the First Complaint proceeding.<sup>22</sup> The district court declined to lift its stay.<sup>23</sup>

11. On July 6, 2020, AT&T filed the Second Complaint. Count I challenges the Payment Default Clause—that is, the provision FPL invoked in its Notice of Termination—as unjust and

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<sup>14</sup> See Second Complaint Exhs. A (Miller Aff.) at 3, para. 8, 23 (Notice of Termination).

<sup>15</sup> See Second Complaint Exh. A (Miller Aff.) at 7, para. 16.

<sup>16</sup> *Id.* at 8, para. 19.

<sup>17</sup> See Amended Answer, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006 (filed Mar. 6, 2020) (First Answer) at 38-39 (Affirmative Defense M).

<sup>18</sup> See Second Complaint Exhs. 28, 31.

<sup>19</sup> See *BellSouth Telecomm'ns, LLC v. Florida Power & Light Co.*, Memorandum Opinion and Order, 35 FCC Rcd 5321 (EB 2020) (*Bureau Order*).

<sup>20</sup> *Bureau Order*, 35 FCC Rcd at 5326, para. 10 n.32.

<sup>21</sup> Plaintiff's Motion to Lift Stay and Request for Scheduling Conference, *Florida Power & Light Company v. BellSouth Telecommunications, LLC d/b/a AT&T Florida*, Case No. 9:19-CV-81043-Rosenberg/Reinhart (S.D. Fla. filed June 15, 2020).

<sup>22</sup> See Notice of Filing, *Florida Power & Light Company v. BellSouth Telecommunications, LLC d/b/a AT&T Florida*, Case No. 9:19-CV-81043-Rosenberg/Reinhart (filed July 6, 2020).

<sup>23</sup> See Order Denying Without Prejudice Plaintiff's Motion to Lift Stay, *Florida Power & Light Company v. BellSouth Telecommunications, LLC d/b/a AT&T Florida*, Case No. 9:19-CV-81043-Rosenberg/Reinhart (S.D. Fla. filed July 13, 2020).

unreasonable.<sup>24</sup> Count II challenges the JUA’s Abandonment Clause, under which one party may abandon its JUA poles to the other.<sup>25</sup> AT&T requests that the Commission amend both provisions “effective consistent with the applicable statute of limitations” and “order FPL to cease and desist from its . . . imposition of unjust and unreasonable pole attachment terms and conditions on AT&T.”<sup>26</sup>

12. Subsequently, in the *Second Bureau Order*, we resolved the parties’ remaining disputes in the First Complaint proceeding for the period ending December 31, 2018. Because AT&T had filed Count I of the Second Complaint, we further stayed the First Complaint proceeding for the period after December 31, 2018. The *Second Bureau Order* explained, “Resolution of AT&T’s post-2018 claims turns on the validity of FPL’s Notice of Termination.”<sup>27</sup>

### III. DISCUSSION

#### A. We Dismiss with Prejudice AT&T’s Challenge to the Payment Default Clause

13. Section 4(j) of the Act empowers the Commission to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”<sup>28</sup> The United States Supreme Court has interpreted section 4(j) as “‘explicitly and by implication’ delegating to the Commission power to resolve ‘subordinate questions of procedure . . . (such as) the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another’s proceedings, and similar questions.’”<sup>29</sup> The statute does not “merely confer power to promulgate rules generally applicable to all Commission proceedings, . . . it also delegates broad discretion to prescribe rules for specific investigations . . . and to make ad hoc procedural rulings in specific instances.”<sup>30</sup> To effectuate this discretion, the Commission adopted rule 1.735, which dovetails with the statute.<sup>31</sup> For the reasons explained below and exercising our discretion under section 4(j) and rule 1.735, we find that AT&T improperly brought its challenge to the Payment Default Clause in the Second Complaint. We therefore dismiss Count I of the Second Complaint with prejudice.

14. In the First Complaint, in which AT&T alleged that the JUA rate was unjust and unreasonable under Section 224(b)(1), AT&T argued that it was not in default under the Payment Default Clause and that the Notice of Termination was therefore ineffective.<sup>32</sup> This argument was central to AT&T’s affirmative case for the period after the Notice of Termination, because AT&T bore the burden

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<sup>24</sup> See Second Complaint at 32, para. 58.

<sup>25</sup> See Second Complaint at 33, para. 59.

<sup>26</sup> See Second Complaint at 32-33, paras. 56-59.

<sup>27</sup> *BellSouth Telecomm’s, LLC v. Florida Power & Light Co.*, Memorandum Opinion and Order, 36 FCC Rcd 253, 255, para. 8. (EB 2021) (*Second Bureau Order*).

<sup>28</sup> 47 U.S.C. § 154(j).

<sup>29</sup> *FCC v. Schreiber*, 381 U.S. 279, 289 (1965) (*Schreiber*) (citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (*Pottsville*)).

<sup>30</sup> *Schreiber*, 381 U.S. at 289 (citing *FCC v. WJR, The Goodwill Station*, 337 U.S. 265, 282 (1949), *Norwegian Nitrogen Products Co. v. U.S.*, 288 U.S. 294, 321-22 (1932), *Pottsville*, 309 U.S. at 138). In resolving a formal complaint, the Commission exercises an investigative function. See 47 U.S.C. § 208(b) (“If . . . there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.”).

<sup>31</sup> 47 CFR § 1.735 (“The Commission may issue such orders and conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice.”).

<sup>32</sup> See First Complaint at 6-7, para. 12, 10, para. 17, and 16-17, paras 26-27.

of establishing a right under the JUA to attach to FPL's poles.<sup>33</sup> In addition, in order to show (as required under the *2011 Pole Attachment Order*) that it “genuinely lack[ed] the ability” to obtain a lower rate through negotiations, AT&T contended that the Notice of Termination was “gamesmanship” by FPL aimed at deterring AT&T from seeking a lower rate.<sup>34</sup> AT&T also cited the Notice of Termination to establish that the JUA was “newly-renewed” within the meaning of the *2018 Pole Attachment Order*.<sup>35</sup> AT&T made these arguments, all of which were central to its affirmative case, under ordinary principles of contract law, but did not assert that the Payment Default Clause or the Notice of Termination were unjust and unreasonable under section 224(b)(1).

15. In its Answer, FPL argued that AT&T was indeed in default under the Payment Default Clause, that the Notice of Termination ended AT&T's right to attach to existing poles on March 25, 2019, and that AT&T's claim for a lower rate after that date was therefore moot.<sup>36</sup> FPL's Answer clearly demanded AT&T to raise any and all defenses that it had to those claims. But in its Reply, AT&T made no mention of its current view that the Payment Default Clause and Notice of Termination are not just and reasonable.<sup>37</sup> The Bureau decided the First Complaint on the facts and the law presented to it. AT&T does not argue that the provision under which FPL gave notice is unjust or unreasonable under section 224 of the Act.<sup>38</sup>

16. After release of the *Bureau Order*, and more than a year after the First Complaint was filed, AT&T filed this Second Complaint. In Count I, AT&T alleges for the first time that the Payment Default Clause is an unjust and unreasonable term, and the Notice of Termination an unreasonable practice, under Section 224(b)(1). AT&T asks the Commission to order FPL to “cease and desist” from enforcing the Payment Default Clause and to amend the clause retroactively.<sup>39</sup> Thus, AT&T seeks to have the Commission find the Notice of Termination ineffective—regardless of whether it was valid under state law.

17. AT&T's decision not to bring its challenge to the Payment Default Clause earlier contravenes the Commission's rules governing complaints filed under Section 224. The Commission has explained that the “parties' initial pleadings should contain *every* allegation, fact, argument, affidavit, and supporting paper that the parties can muster at that time.”<sup>40</sup> Thus, Commission rule 1.721(b) states: “*All* matters concerning a claim, defense or requested remedy . . . should be pleaded fully . . .”<sup>41</sup> Rule 1.721(i) provides that “[s]pecific reference shall be made to any tariff or contract provision relied on in support of a claim or defense,” and rule 1.721(p) prohibits “[a]mendments or supplements to complaints to add new

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<sup>33</sup> See *Arkansas Cable Telecomm. Assoc'n v. Entergy Arkansas*, Hearing Designation Order, 21 FCC Rcd 2158, 2167 (EB 2006).

<sup>34</sup> First Complaint at 17, para. 27. See *id.* at 15, para. 24 (citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5336, para. 216).

<sup>35</sup> See First Complaint at 5-6, paras. 11-12.

<sup>36</sup> See First Answer at 6, paras. 11-12, 38-39 (Affirmative Defense M).

<sup>37</sup> See generally Amended Reply Legal Analysis in Support of Pole Attachment Complaint, Proceeding No.19-187, Bureau ID No. EB-19-MD-006 (filed Mar. 30, 2020) (First Reply).

<sup>38</sup> *Bureau Order*, 35 FCC Rcd at 5326, para. 10 n.32.

<sup>39</sup> See Second Complaint at 31, para. 51, 32, paras. 56-58.

<sup>40</sup> *Implementation of the Telecommunications Act of 1996*, Order on Reconsideration, 16 FCC Rcd 5681, 5695 para. 32 (2001). See *id.* at 5695 (heading) (“The parties' initial pleadings must contain all of the parties' supporting facts, legal arguments, and documentation”) (initial caps removed, emphasis added).

<sup>41</sup> 47 CFR § 1.721(b) (emphasis added).

claims or requests for relief.”<sup>42</sup> Rule 1.722(d) requires complainants to identify each alleged violation of law in a separate count.<sup>43</sup>

18. The facts that form the basis for AT&T’s First Complaint and Count I are not only inextricably linked, but identical. AT&T’s First Complaint depends on the existence of AT&T’s right to attach under the JUA, and therefore depends in part on the effect of the Notice of Termination.<sup>44</sup> All relevant facts in Count I were known to AT&T when it filed the First Complaint. Consequently, AT&T should have alleged in its First Complaint that FPL’s invocation of the Payment Default Clause in the Notice of Termination was an unjust and unreasonable practice.

19. Moreover, Commission rule 1.728 states that the reply “shall contain statements of relevant, material facts and legal arguments that respond to the factual allegations and legal arguments made by the defendant.”<sup>45</sup> FPL asserted in its Answer to the First Complaint (even asserting an affirmative defense) that AT&T had violated the Payment Default Clause, that the Notice of Termination ended AT&T’s right to attach on March 25, 2019, and that AT&T’s claim for a lower rate after that date was therefore moot.<sup>46</sup> Inexplicably, AT&T did not assert in its Reply that the Payment Default Clause was an unjust and unreasonable term, or that the Notice of Termination was an unjust and unreasonable practice, under section 224(b)(1).

20. AT&T argues that we are obligated to address the merits of Count I of the Second Complaint because section 224(b)(1) states that the Commission “shall regulate the rates, terms and conditions of pole attachment agreements.”<sup>47</sup> But section 224(b)(1) also obligates the Commission to “adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions,”<sup>48</sup> and as explained above, section 4(j) of the Act and Commission rule 1.735 empower the Commission to “conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice.”<sup>49</sup>

21. This is not a case where AT&T brought a second suit relying on newly-discovered evidence. FPL sent the Notice of Termination to AT&T more than three months before AT&T filed the First Complaint. Nor is this an instance where—in consultation with Division Staff—a party brings a formal complaint and holds related claims in abeyance in a separate complaint case. Here, AT&T failed to challenge a contract provision that was the subject of a contemporaneous dispute with FPL, that was

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<sup>42</sup> See 47 CFR §§ 1.721(i), (p).

<sup>43</sup> 47 CFR § 1.722(d).

<sup>44</sup> Compare, e.g., Second Complaint Exh. A (Miller Aff.) and Exhs. 1-2, 4-9, 11-14, 16, 23-28 with First Complaint Exh. B (Miller Aff.) and Exhs. 1-2, 4-6, 7-10, 13-15, 17-18, 23-29; see also First Answer at 3, para. 6.

<sup>45</sup> 47 CFR § 1.728(a). AT&T has participated in Commission proceedings in which the complainant made new allegations on reply, and the defendant was permitted to file a sur-reply. See, e.g., *Level3 Comm’ns v. AT&T, Inc.*, Memorandum Opinion and Order, 33 FCC Rcd 2388, 2392, para. 9 n.29 (2018); *AT&T Mobility v. Iowa Wireless Services*, Order of Dismissal, 31 FCC Rcd 8991, para. 4 n.4 (MDRD 2016).

<sup>46</sup> See First Answer at 38-39 (Affirmative Defense M); 47 CFR § 1.728(b) (“Failure to reply to an affirmative defense shall be deemed an admission of such affirmative defense”).

<sup>47</sup> See Reply Legal Analysis in Support of Pole Attachment Complaint, Proceeding No. 20-214, Bureau ID No. EB-20-MD-002 (filed Dec. 4, 2020) (Second Reply Legal Analysis) at 4-5 (quoting 47 U.S.C. § 224(b)(1)) (emphasis added).

<sup>48</sup> 47 U.S.C. § 224(b)(1).

<sup>49</sup> 47 U.S.C. § 4(j); 47 CFR § 1.735(b). See *Schreiber*, 381 U.S. at 289 (Section 4(j) “delegates broad discretion to . . . make ad hoc procedural rulings in specific instances”) (citing *Pottsville*, 309 U.S. 134, 138 (1940) (under section 4(j), “the subordinate questions of procedure in ascertaining the public interest . . . were explicitly and by implication left to the Commission’s own devising”).

clearly relevant to the issues raised in the First Complaint, and that FPL raised as a defense in its Answer to the First Complaint. As a result, the resources of the Commission and FPL have been wasted. We reviewed the facts in the First Complaint proceeding and issued a ruling based on the pleadings and the record before us. AT&T had ample opportunity to raise its claim in a timely manner but did not.

22. Dismissing Count I of the Second Complaint is consistent with the doctrine against claim splitting.<sup>50</sup> A party splits its claims when it files two separate complaints and a valid, final decision on the first complaint would extinguish the second complaint under claim preclusion.<sup>51</sup> The doctrine enables the tribunal to manage its docket to avoid prejudice to the parties and waste of tribunal resources.<sup>52</sup> In this case, the prejudice to FPL would be considerable. Moreover, permitting Count I to proceed would waste the Commission's resources.<sup>53</sup> We will not allow that result.

23. AT&T argues that a final judgment on the First Complaint would not extinguish Count I of the Second Complaint and, thus, it should not be dismissed. According to AT&T, the First Complaint and Count I "involve different statutory violations that may be resolved separately" because the First Complaint challenges the JUA rate, while Count I of the Second Complaint challenges a JUA term and condition.<sup>54</sup> However, it is the operative *facts* that are relevant to a claim preclusion analysis, and the operative facts underlying the two complaints are identical.<sup>55</sup> AT&T argues that Count I relies on the "unknowable" fact that FPL would not settle even after AT&T paid the 2017 invoice and the *Bureau Order* found that AT&T was entitled to a lower rate.<sup>56</sup> But AT&T did not pay the 2017 invoice until after FPL had terminated AT&T's access rights, and AT&T understands that settlement is never a certainty. AT&T knowingly took a risk that FPL might terminate its rights to attach pursuant to the plain language of the JUA. It is not the Commission's job to protect private litigants from risks they knowingly undertake.<sup>57</sup>

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<sup>50</sup> See Respondent Florida Power & Light Company's Brief in Support of Its Answer to the Complaint of Bellsouth Telecommunications, LLC, DB/A AT&T Florida, Proceeding No. 20-214, Bureau ID No. EB-20-MD-002 (filed Oct. 21, 2020) (Second Answer Legal Analysis) at 17 ("AT&T here has done everything the doctrine against claim splitting prohibits, [and] . . . it did so with unabashed opportunism, filing a split-claim follow-on suit soon after reading a footnote in the [*Bureau*] *Order* and while Complaint I remains pending."); Answer of Florida Power & Light Company, Proceeding No. 20-214, Bureau ID No. EB-EB-20-MD-002 (filed Oct. 21, 2020) (Second Answer) at 1, 13-21 (citing *Vanover v. NCO Financial Servs.*, 857 F.3d 833 (11<sup>th</sup> Cir. 2017); *Dorsey v. Jacobson Holman PLLC*, 764 F. Supp. 2d 209, 212 (D.D.C. 2011), *aff'd* 476 Fed. Appx. 861 (D.C. Cir. 2012)).

<sup>51</sup> *E.g.*, *Vanover*, 857 F.3d at 841.

<sup>52</sup> *Vanover*, 857 F.3d at 843 ("[T]he objective of the claim-splitting doctrine [is] to promote judicial economy and shield parties from vexatious and duplicative litigation while empowering the district court to manage its docket.").

<sup>53</sup> See *Katz v. Gerardi*, 655 F.3d 1212, 1218-19 (10<sup>th</sup> Cir. 2011) ("If the party challenging a second suit on the basis of claim splitting had to wait until the first was final, the [claim splitting] rule would be meaningless. The second, duplicative suit would forge ahead until the first suit became final, all the while wasting judicial resources.").

<sup>54</sup> Second Reply Legal Analysis at 4.

<sup>55</sup> See Restatement (Second) of Judgments § 24 cmt. c (heading) (a "[t]ransaction may be single despite different harms, substantive theories, measures or kinds of relief").

<sup>56</sup> AT&T's Reply to FPL's Answer, Proceeding No. 20-214, Bureau ID No. EB-20-MD-002 (filed Dec. 4, 2020) (Second Reply) at 4, para. 5; Second Reply Legal Analysis at 2-3.

<sup>57</sup> AT&T cites *Horia v. Nationwide Credit & Collection*, 944 F.3d 970 (7<sup>th</sup> Cir. 2019). Second Reply Legal Analysis at 4 n.11. But that case is distinguishable because there was no contractual relationship between the parties, whereas AT&T's claim arises out of the JUA. *Cf.*, *Trustmark Ins. v. ESLU, Inc.*, 299 F.3d 1265 (11<sup>th</sup> Cir. 2002).

24. AT&T suggests that we consolidate the First Complaint and Count I of the Second Complaint.<sup>58</sup> We decline. Consolidation would, in effect, allow AT&T to amend its pleadings in the First Complaint proceeding to add Count I after the case was decided, thereby circumventing rules 1.721 and 1.728. Thus, on these facts, we will not consolidate the First Complaint and Count I of the Second Complaint.

25. If FPL sought to raise a new defense to AT&T's First Complaint after we released the *Bureau Order*, based on facts that FPL knew at the time it filed its Answer, we would summarily dismiss that effort as an abuse of process. The same reasoning applies here. Accordingly, we dismiss AT&T's complaint with prejudice. AT&T can still pursue in federal court any defenses it may have under state law.

### **B. We Grant in Part AT&T's Challenge to the Abandonment Clause**

26. In December 2018, FPL sent AT&T a "Notice of Abandonment" stating that it would, in sixty days, abandon to AT&T approximately 11,000 wood poles that FPL had replaced with concrete poles and on which, according to the National Joint Use Notification System, AT&T was the last remaining attacher.<sup>59</sup> FPL's Notice invoked the JUA's Abandonment Clause, which provides that, if the owner of a JUA pole gives not less than sixty days' written notice of intention to abandon a pole to the other party (the attacher), and the attacher has not removed its attachments from the pole within the time allotted, the attacher becomes the owner of the pole and must pay the prior owner for it.<sup>60</sup> In Count II of this Second Complaint, AT&T alleges that the Abandonment Clause is an unjust and unreasonable term, and the Notice of Abandonment an unreasonable practice, within the meaning of Section 224(b)(1). AT&T also asks the Commission to amend the Abandonment Clause retroactively.<sup>61</sup>

27. AT&T asserts that the Abandonment Clause applies only in limited circumstances and does not apply to the 11,000 poles in FPL's Notice of Abandonment, because those poles were *replaced*. AT&T states:

A pole abandonment occurs in the relatively rare situation when a pole owner removes its facilities from a single pole (or pole line) because it no longer needs a pole in that location – the pole owner will no longer serve customers from that pole or is going to serve customers by underground means instead. In that situation, this JUA . . . requires the pole owner to notify the other joint user . . . and allows that other joint user to decide whether it would like to continue to use the pole. . . . Pole replacements, in contrast, happen regularly when an existing pole is being replaced for one of several reasons, after which all companies with facilities attached to the pole (including the pole owner) transfer their facilities to the replacement pole . . .<sup>62</sup>

28. FPL disagrees, arguing that the Abandonment Clause places no limit on the kind or

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<sup>58</sup> See Second Reply Legal Analysis at 4-5.

<sup>59</sup> See Second Complaint Exh. 10. The National Joint Use Notification System tracks the attacher who should next transfer its attachments from a replaced pole to a new pole. See Second Complaint Exh. B (Peters Aff.) at 5, para. 11.

<sup>60</sup> See Second Complaint Exh. 1 (JUA) at Art. IX.

<sup>61</sup> See Second Complaint at 32-33, paras. 56-57, 59.

<sup>62</sup> Second Complaint Exh. B (Peters Aff.) at 3-4, paras. 6-7. While we agree with AT&T that the Abandonment Clause does not apply to replaced poles, we do not agree with AT&T's assertion, see Second Complaint at 26, para. 42, that only one pole at a time may be abandoned. See Second Complaint Exh. 1 (JUA) at ATT00054 (Exh. C, Notice of Abandonment, providing that "[t]he *poles* listed below are being abandoned . . .") (emphasis added).

number of poles that may be abandoned. FPL notes that the clause states, “If the [pole] Owner desires at any time to abandon any jointly used pole [it may do so on not less than sixty days’ notice] . . . .”<sup>63</sup> Therefore, according to FPL, it properly invoked the clause with respect to the 11,000 wood poles it replaced with concrete poles.<sup>64</sup>

29. FPL’s analysis is incorrect for three reasons. First, it ignores the parties’ course of performance.<sup>65</sup> Before FPL’s Abandonment Notice, neither party had ever invoked the Abandonment Clause to abandon replaced poles. Instead, the parties applied the clause only in the limited circumstances described by AT&T.<sup>66</sup>

30. Second, FPL’s construction of the Abandonment Clause would render the clause unreasonable.<sup>67</sup> Poles are replaced for many reasons: a stronger pole is required; the pole has reached the end of its useful life; the pole has been damaged by a natural event or, for example, in a car accident; a taller pole is needed to accommodate additional attachments; the pole has to be relocated, for example to accommodate a road widening.<sup>68</sup> An attacher would rarely, if ever, want to purchase a pole that has been replaced because replaced poles can no longer be used. In addition, state and local authorities almost certainly would not allow an attacher to remain on a pole that has been replaced, as most jurisdictions forbid duplicate poles.<sup>69</sup> If FPL’s construction were correct, a party who did not transfer or remove its attachments from the pole within sixty days would have to purchase a useless pole from its owner and then have to pay to remove and dispose of it. So construed, the Abandonment Clause serves as a kind of penalty that is imposed if the attacher fails to transfer its attachments fast enough. But the sixty-day deadline is too short and too definite a deadline for the imposition of such severe consequences. Pole replacements are regular occurrences and can involve large numbers of poles, as FPL’s replacement of 11,000 poles establishes. The transfer process is complex and often at the mercy of factors beyond the control of either party. For example, a municipality may take months to issue a permit, or severe weather may slow the process.<sup>70</sup> As a result, we do not believe that the parties intended the Abandonment Clause to apply to replacement poles.

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<sup>63</sup> Second Answer at 79-80 (quoting the Abandonment Clause) (emphasis added by FPL).

<sup>64</sup> See Second Answer at 79-81, 85-87.

<sup>65</sup> See Restatement (Second) of Contracts § 202 cmt. g (1981) (“The parties to an agreement know best what they meant, and their action under it is often the best evidence of their meaning.”); *Hirsch v. Jupiter Golf Club*, 232 F. Supp. 3d 1243, 1252 (S.D. Fla. 2017) (applying Florida law). While the JUA does not contain a choice-of-law clause, and the parties did not cite case law in support of their positions, Florida law likely applies.

<sup>66</sup> See Second Complaint at 26, para. 42, Exh. B (Peters Aff.) at 14, para. 29 (“no other electric utility has attempted to . . . abandon thousands of *replaced* poles that must be removed and discarded”) (emphasis in original); Second Answer at 22, para. 42, Exh. B (Allain Decl.) at 4, para. 17 (“For the past twenty years, AT&T has been abandoning its poles to FPL after converting its facilities, e.g., undergrounding or relocating.”).

<sup>67</sup> See Restatement (Second) of Contracts § 203 cmt. c (“it is assumed that each term of an agreement has a reasonable rather than an unreasonable meaning”), *id.* at § 202 cmt. b (in interpreting an agreement, “the court seeks to put itself in the position [the parties] occupied at the time the contract was made. When the parties have adopted as writing, . . . interpretation is directed to the meaning of that writing in the light of the circumstances . . . .”); *Fla. State Turnpike Assoc’n v. Industrial Construction Co.*, 133 So. 2d 115, 116-117 (Fla. 2d DCA 1961).

<sup>68</sup> See Second Complaint Exh. B (Peters Aff.) at 4, para. 8, 8, para. 16; Second Answer at 71-74 (describing Florida’s storm hardening program, under which FPL is replacing wood with concrete poles).

<sup>69</sup> See Second Complaint Exh. B (Peters Aff.) at 4, para. 8.

<sup>70</sup> See Second Complaint Exh. B (Peters Aff.) at 4-5, paras. 9-10. The process of transferring attachments to replaced poles is so complex that the Commission, in fashioning more streamlined rules for the make-ready process, excluded pole replacements both from its self-help provisions and from one-touch make ready. “[P]ole replacements can be complicated to execute and are more likely to cause service outages or facilities damage. Given

(continued....)

31. Third, and finally, FPL's construction of the Abandonment Clause is incorrect because it reads the clause in isolation.<sup>71</sup> The JUA specifically addresses the parties' obligation to transfer their attachments to replacement poles, and provides a remedy for failure to comply with that obligation, elsewhere in the agreement. Article III of the JUA states that "each party shall . . . transfer . . . its own attachments . . . , and shall at all times perform such work *promptly*."<sup>72</sup> Further, this provision better reflects the complexity of the transfer process than the Abandonment Clause's brief and inflexible sixty-day deadline. In addition, Article XII (headed "Defaults") provides remedies for the situation in which a party fails to meet its obligations under the agreement. Under that Article, FPL could have, after giving sixty days' written notice of AT&T's failure to transfer its facilities to the replacement pole promptly, suspended AT&T's right to attach to new poles until AT&T completed the transfer. Alternatively, FPL could have transferred AT&T's equipment itself and then sent AT&T a bill for its costs.<sup>73</sup> Thus, for these reasons, FPL misconstrues the Abandonment Clause and was not entitled to issue the Notice of Abandonment.

32. We grant AT&T's claim that FPL engaged in unjust and unreasonable practices. FPL sent its Notice of Abandonment even though contrary to the terms of the JUA and posted signs measuring approximately 8-1/2 x 11 inches on 5,230 of the ostensibly "abandoned" poles listed in the Notice that stated, "This pole is the property of AT&T" and "Contact AT&T for removal." These signs could have caused consumer confusion, and we direct FPL to remove any that remain.

33. We deny AT&T's request that we amend the Abandonment Clause.<sup>74</sup> AT&T's proposed amendment would simply add language stating its understanding of the clause "[f]or the avoidance of doubt."<sup>75</sup> Because we agree with AT&T's reading of the clause, we do not find that it is unjust and unreasonable, and so deny AT&T's request that we amend it.

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the particularly disruptive nature of this work, we make clear that pole replacements are not eligible for self-help." *2018 Pole Attachment Order*, 33 FCC Rcd 7705 at 7754, para. 101.

<sup>71</sup> See Restatement (Second) of Contracts § 202 ("A writing is interpreted as a whole . . ."); *Hillsborough Cnty Aviation Authority v. Cone Bros. Contracting*, 285 So. 2d 619 (Fla. Dist. Ct. App. 1972).

<sup>72</sup> Second Complaint Exh. 1 (JUA) at ATT00034, Article III, § 3.3 (emphasis added). FPL notes that Article II begins, "Except as herein otherwise expressly provided . . ." Second Answer at 81. However, because there is no conflict between Article III and the Abandonment Clause, this language is not relevant to our analysis.

<sup>73</sup> See Second Complaint Exh. 1 (JUA) at ATT00044-45, Article XII, § 12.1, 12.2.

<sup>74</sup> FPL does not convince us that Count II of the Second Complaint is claim splitting. See Second Answer at 13-20. AT&T could not have included Count II in the First Complaint because, under the JUA's dispute resolution provisions, the parties had to wait sixty days following the first day of mediation to initiate litigation, which was after AT&T filed the First Complaint. See Second Complaint Exh. A (Miller Aff.) at 10, para. 24; *Conservation Law Found'n v. Longwood Venues & Destinations*, 415 F. Supp. 3d 240, 242-243 (D. Mass. 2019).

<sup>75</sup> See Second Complaint at 33, para 59 (requesting that the Abandonment Clause be revised to add language stating, "For the avoidance of doubt, [pole] Owner shall only abandon a jointly used pole when Owner has elected to remove its attachments from the jointly used pole and will not replace or relocate such attachment on a replaced or relocated pole.").

**IV. ORDERING CLAUSE**

34. Accordingly, **IT IS HEREBY ORDERED**, pursuant to sections 4(i), 4(j) and 224 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), and 224, and sections 0.111, 0.311, 1.720-1.740, 1.1401, 1.1407, and 1.1413 of the Commission's rules, 47 CFR §§ 0.111, 0.311, 1.720-1.740, 1.1401, 1.1407 and 1.1413, that this Second Complaint is **DISMISSED WITH PREJUDICE IN PART, DENIED IN PART, and GRANTED IN PART**, and this proceeding is **TERMINATED**.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold  
Chief  
Enforcement Bureau