

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

In the Matter of)	Proceeding No. 19-187
)	Bureau ID No. EB-19-MD-006
BellSouth Telecommunications, LLC)	
d/b/a AT&T Florida,)	
)	
Complainant,)	
)	
v.)	
)	
Florida Power and Light Company,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Adopted: August 16, 2021

Released: August 16, 2021

By the Chief, Enforcement Bureau:

1. In this Memorandum Opinion and Order, we dismiss without prejudice the remainder of the Complaint filed by BellSouth Telecommunications, LLC d/b/a AT&T Florida (AT&T), an incumbent local exchange carrier (LEC) in Florida, against Florida Power and Light Company (FPL), an electric utility, to the extent that the Complaint seeks a remedy for the period after December 31, 2018.¹ In its Complaint, AT&T alleges that the rate it pays under the parties' joint use agreement (JUA) to attach its facilities to FPL's utility poles is excessive. AT&T seeks relief under the *2011* and *2018 Pole Attachment Orders*, which the Commission issued pursuant to section 224 of the Communications Act of 1934, as amended (Act).² In two prior orders in this proceeding, we found that AT&T was entitled to a reduced rate under the *2011 Pole Attachment Order* for the period ending December 31, 2018, which is the end of the 2018 pole rental year under the JUA, and stayed the proceeding as to later pole rental years.³

2. Our previous orders did not address the post-2018 pole rental years, and therefore did not address AT&T's claim under the *2018 Pole Attachment Order*, which came into effect as to incumbent

¹ See Pole Attachment Complaint, Proceeding No. 19-187 (filed July 1, 2019); Amended Pole Attachment Complaint, Proceeding No. 19-187 (filed July 12, 2019) (Complaint).

² 47 U.S.C. § 224. Section 224(b)(1) 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..." *Id.* See Complaint at 12-18, paras. 20-28 (arguing that AT&T is entitled to a lower rate under *Implementation of Section 224 of the Act*, Report and Order, 26 FCC Rcd 5240 (2011) (*2011 Pole Attachment Order*), *aff'd*, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 1183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013)), and 5-8, paras. 11-13 (arguing that AT&T is entitled to a lower rate under *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Development*, Third Report and Order, 33 FCC Rcd 7705 (2018) (*2018 Pole Attachment Order*)).

³ See *BellSouth Telecommunications, LLC v. Florida Power & Light Co.*, Memorandum Opinion and Order, 35 FCC Rcd 5321 (EB 2020) (*Bureau Order*) (finding AT&T's JUA rate to be excessive under the guidance provided in the *2011 Pole Attachment Order*); *BellSouth Telecommunications, LLC v. Florida Power & Light Co.*, Memorandum Opinion and Order, 36 FCC Rcd 253 (EB 2021) (*Second Bureau Order*) (resolving the parties' disputes as to the proper calculation of AT&T's rate under our finding in the *Bureau Order* and finding that AT&T is entitled to a refund of any overpayments for the period July 1, 2014 to December 31, 2018).

LEC complaints on March 11, 2019, because FPL sent AT&T a Notice of Termination purporting to end AT&T's right to attach to FPL's poles on March 25, 2019.⁴ The effect of the Notice of Termination is at issue in a lawsuit filed by FPL against AT&T that is pending before the United States District Court for the Southern District of Florida.⁵ In our first order in this case, we concluded that the validity of the Notice of Termination should be decided by the court because it "is purely a matter of state contract law, as AT&T does not argue that the provision [of the JUA] under which FPL gave notice is unjust or unreasonable under section 224 of the Act."⁶

3. After we released that order, AT&T filed a second complaint with the Commission against FPL. In its first count, AT&T alleged for the first time that the Payment Default Clause is an unjust and unreasonable term, and the Notice of Termination is an unjust and unreasonable practice, within the meaning of section 224 of the Act.⁷ However, we have dismissed the first count with prejudice.⁸

4. Therefore, we affirm our prior finding in our first order in this proceeding that the effect of the Notice of Termination is a matter of state law to be decided by the district court. Moreover, we conclude that we should dismiss the remainder of the Complaint because the parties' dispute as to the effect of the Notice of Termination must be decided by the federal district court before we proceed further, and we have provided AT&T all the relief to which it is entitled for the period ending December 31, 2018. Our dismissal is without prejudice to allow AT&T to file a new complaint if it presents a valid, final judgment finding that it may attach to FPL's JUA poles after March 25, 2019, or if it shows that it has entered into an agreement with FPL permitting it to attach to FPL's poles after that date. Finally, we incorporate by reference our first two orders in this proceeding, so that any application for review or petition for reconsideration should be of this *Order*.⁹

⁴ See Amended Answer, Proceeding No. 19-187 (filed Mar. 6, 2020) at *e.g.*, 38-39 (Affirm. Def. M). See also Complaint Exh. 1 (JUA) at 12.3 (Payment Default Clause) and Exh 23 (Notice of Termination); *2018 Pole Attachment Order*, 33 FCC Rcd at 7769, para. 126 (2018).

⁵ See *Bureau Order*, 35 FCC Rcd at 5323, para. 9 & n.29 (citing *Florida Power & Light Co. v. BellSouth Telecommunications, LLC*, No. 9:19-cv-81043-RLR (S.D. Fla. 2019)). The district court has stayed the proceeding under the doctrine of primary jurisdiction. See *id.* at para. 9. AT&T admits that the Notice of Termination ended its right to attach to new FPL JUA poles. See *Bureau Order* at 5326, para. 10 n.32.

⁶ See *Bureau Order* at 5326, para. 10 n.32.

⁷ See Pole Attachment Complaint, Proceeding No. 20-214 (filed July 6, 2020) at 32-33, paras. 58-59.

⁸ See *AT&T Florida v. Florida Power & Light Co.*, EB Docket No. 20-214, Memorandum Opinion and Order, DA 21-1002 (EB Aug. 16, 2021) (finding AT&T's claim that the Payment Default Clause and the Notice of Termination are unjust and unreasonable violates the Commission's procedural rules).

⁹ See 47 U.S.C. §§ 155, 405; 47 CFR §§ 1.104, 1.106, 1.115. *Cf.*, Letter-rulings from Rosemary McEnery, FCC, to Chris Huther, Claire Evans and Frank Scaduto, counsel to AT&T, and Charles Zdbeski and Robert Gastner, counsel to FPL, Proceeding No. 19-187 (dated June 5, 2020) (*Bureau Order* is "not immediately reviewable" for purposes of 47 CFR § 1.115) and Lisa Griffin, FCC, to counsel to AT&T and FPL, Proceeding No. 19-187 (dated Feb. 3, 2021) (*Second Bureau Order* "not immediately reviewable" for purposes of 47 CFR § 1.115).

5. Accordingly, **IT IS ORDERED**, pursuant to sections 4(i), 4(j), 155, 224 and 405 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 155, 224, and 405, and sections 0.111, 0.311, 1.104, 1.106, 1.115, 1.1401, 1.1402, 1.1404, 1.1407, and 1.1413 of the Commission's rules, 47 CFR §§ 0.111, 0.311, 1.104, 1.106, 1.115, 1.1401, 1.1402, 1.1404, 1.1407, and 1.1413, that the Complaint is **GRANTED IN PART** in accordance with the *Bureau Order* and the *Second Bureau Order* and **DISMISSED WITHOUT PREJUDICE IN PART** in accordance with this *Order*, and that this proceeding **IS TERMINATED**.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Chief
Enforcement Bureau