FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau
Market Disputes Resolution Division
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By E-mail and First-Class Mail

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Re: *BellSouth Telecommunications, LLC d/b/a AT&T Alabama v. Alabama Power Company*, Proceeding No. 19-119, Bureau ID No. EB-19-MD-002,

Dear Counsel:

We stay this proceeding so that the parties may submit their dispute to arbitration. We also request that the parties keep us informed of the status of their arbitration.

Background

Plaintiff BellSouth Telecommunications, LLC d/b/a AT&T Alabama (AT&T) is an incumbent local exchange carrier (LEC) providing telecommunications and other services. Defendant Alabama Power Company (Alabama Power) is an electric utility company.[1] In 1978, Alabama Power and AT&T entered into an agreement establishing the rates, terms and conditions under which each would attach its facilities and equipment to the other's utility poles in Alabama (Joint Use Agreement).[2] The Joint Use Agreement contains a mandatory arbitration clause:

> It is the purpose of this Agreement to provide ways and means for settling controversies and disputes which may arise in connection with the joint use of poles. Any differences of opinion between the district representatives of the parties as to the intent of the Agreement and any differences which are not covered by the terms hereof, shall be referred through channels to the General Manager-Facility Services of [AT&T] and the Manager-Distribution of [Alabama Power] for decision. When differences cannot amicably be settled by the parties hereto, the matters in dispute shall be submitted to arbitration in accordance with standard arbitration procedures as prescribed by the National Academy of Arbitrators.[3]

In the *2011 Pole Attachment Order*, the Commission concluded that the rates, terms and conditions under which an incumbent LEC attaches to a utility's poles are subject to the "just and

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[1] *See* Pole Attachment Complaint, Proceeding No. 19-119, Bureau ID No. EB-19-MD-002 (filed Apr. 22, 2019) (Complaint) at 3, paras. 2-3.

[2] The parties amended the Joint Use Agreement in 1994 but made no change to the arbitration clause. *See* Complaint at 3, para. 3.

[3] Complaint Exh. 1 (Joint Use Agreement) at 5, Art. XVIII.

reasonable" standard of section 224(b) of the Telecommunications Act of 1934, as amended (Act).[4] In the *2018 Pole Attachment Order*, the Commission "established a presumption that, for newly-negotiated and newly-renewed pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated [competitive LEC or cable operator]."[5]

On April 22, 2019, AT&T filed the instant Complaint under section 224(b) of the Act, alleging that the rate Alabama Power charges AT&T under the Joint Use Agreement violates the *2011 and 2018 Pole Attachment Orders*. In its answer to the Complaint, Alabama Power urges that "AT&T's complaint should be dismissed or stayed given that the issues raised by AT&T are subject to a mandatory arbitration provision."[6]

Discussion

This proceeding should be stayed so that the parties may arbitrate their dispute. The Joint Use Agreement's arbitration clause states that it applies to disputes "which may arise in connection with" the parties' joint use of each other's poles, "differences as to the intent of the Agreement," and to matters arising under, but not addressed by, the Agreement. Thus, the arbitration clause unquestionably applies to this proceeding, because AT&T alleges that the Joint Use Agreement is unlawful. Further, the clause is governed by the Federal Arbitration Act, which provides that "a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable."[7]

The Supreme Court has stressed that, under the Arbitration Act, arbitration provisions must be enforced "even when the claims at issue are federal statutory claims, unless the [Arbitration Act's] mandate has been overridden by a contrary congressional command."[8] The "mere involvement of an

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[4] *See Implementation of Section 224 of the Act, A National Broadband Plan for Our Future,* Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (*2011 Pole Attachment Order*) at 5327-38, paras. 199-220. Section 224(b)(1) of the Act states in part, "[T]he Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. § 224(b)(1).

[5] *Accelerating Wireline Broadband Development by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (*2018 Pole Attachment Order*) at 64, para. 123. *See id.* at *e.g.*, 67, para. 127 n.475 (defining "a new or newly-renewed pole attachment agreement").

[6] Alabama Power Company's Answer and Affirmative Defenses to AT&T's Pole Attachment Complaint, Proceeding No. 19-119, Bureau ID No. EB-19-MD-002 (filed June 21, 2019) at 6, para. 4 n.8.

[7] 9 U.S.C. § 2. *See* 9 U.S.C. § 1 *et seq.* (Arbitration Act). *See also Frontier Communications of the Carolinas LLC v. Duke Energy Carolinas, LLC*, slip. op. 2014 WL 4055827 (E.D. N.C. 2014) (Arbitration Act requires that complaint be dismissed in favor of arbitration where dispute is whether a joint use agreement complies with the *2011 Pole Attachment Order*, and the parties agreed to arbitrate "matters pertaining to this agreement").

[8] *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012) (internal quotations and citations omitted). *See Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 1652 (1991) ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the [Arbitration Act] . . . . '[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'") (internal quotations and citations omitted); *Assoc. of Am. Railroads v. Surface Transp. Bd.*, 162 F.3d 101, 107 (D.C. Cir. 1998) (refusing "to 'mandate that the [agency] adjudicate disputes that it properly determines to be arbitrable'") (quoting *Bhd. of Locomotive Eng'rs v. ICC*, 808 F.2d 1570, 1579 n.75 (D.C. Cir. 1987).

administrative agency in the enforcement of a statute is not sufficient to preclude arbitration."[9] Indeed, the Commission has encouraged arbitration of section 224 disputes[10] and has enforced a mandatory arbitration clause in a joint use agreement.[11]

AT&T argues that the arbitration clause does not apply to its Complaint because the parties executed the Joint Use Agreement before the *2011 and 2018 Pole Attachment Orders* were released:

> [This] is a dispute about the meaning and application of the statutory 'just and reasonable' rate requirement to the [Joint Use Agreement] and its rate provision. Indeed, the statutory right did not exist when the [Joint Use Agreement] was entered, and so could not have been within the drafters' intent. And it cannot be the case that Alabama Power's obligation to abide by the 2011 and 2018 [*Pole Attachment*] *Orders* . . . is 'not covered by its terms' and thus, a matter for arbitration, simply because those *Orders* post-dated the [Joint Use Agreement].[12]

AT&T's argument is unpersuasive. The arbitration clause clearly applies to the present controversy. The clause is broad, requiring arbitration of disputes "aris[ing] in connection with" the parties' use of each other's poles, as well as matters arising out of, but not addressed by the Agreement ("differences . . . which are not covered by the terms hereof"). In any event, even if there were any doubt as to whether the arbitration clause applied, that doubt should be resolved in favor of arbitration. "The [Arbitration Act] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."[13]

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[9] *Gilmer*, 111 S.Ct. at 1653 (noting that "[t]he Securities Exchange Commission is heavily involved in the enforcement of the Securities Exchange Act of 1934 and the Securities Act of 1933, but claims under both of these statutes may be subject to compulsory arbitration.") (citations omitted).

Ignoring *Gilmer* and its progeny, AT&T argues that *U.S. Telecom* establishes that the Commission, not an arbitration panel, must decide whether the Joint Use Agreement violates the Commission's 2011 and 2018 *Orders*. *See* Pole Attachment Complaint Reply, Proceeding No. 19-119, Bureau ID No. EB-19-MD-002 (filed July 19, 2019) (Reply) at 37 n.201 (citing *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)). But *U.S. Telecom* holds only that the Commission may not subdelegate its duties under 251(d)(2) of the Act, 47 U.S.C. § 251(d)(2), to outside entities such as state utility commissions. *Id.* at 565-569. The case did not involve an arbitration clause or the Arbitration Act. Moreover, AT&T and Florida Power, not the Commission, delegated the duty to resolve this dispute to the National Academy of Arbitrators.

[10] *See 2011 Pole Attachment Order*, 25 FCC Rcd at 5287, para. 105 ("[W] e believe it is desirable for parties to include dispute resolution procedures in their pole attachment agreements . . . . [I]t would be reasonable for parties to agree to . . . an arbitrator . . . to resolve disputes.").

[11] *See Frontier Communications of the Carolinas LLC v. Duke Energy Carolinas LLC*, Letter-ruling, Docket No. 14-214, File No. EB-14-MD-001, (Mar. 16, 2016). *See also Broadview Networks, Inc. v. Verizon Tele. Cos.*, Memorandum Opinion and Order, 19 FCC Rcd 22216 (Chief, Enf. Bur. 2004) (deferring, in favor of arbitration, a complaint proceeding in which the plaintiff alleged violations of an interconnection agreement entered under 47 U.S.C. § 251).

[12] Reply at 36.

[13] *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 n.8 (1995) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)); *Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989) ("[I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act ... due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration."). *See Finegold, Alexander + Assoc's, Inc. v. Setty & Assocs, Ltd.*, 81 F.3d 206 (D.C. Cir. 1996) ("'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'")(citations omitted); *Oldroyd v. Elmira Sav. Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998) (courts construe

The cases cited by AT&T are unavailing. AT&T notes that the court in *Larsen v. Citibank* declared that parties cannot be compelled to arbitrate "in the absence of clear agreement to do so."[14] But that case turned on whether the plaintiff had in fact consented to the inclusion of an arbitration clause in the parties' contract; the court was describing Ohio's law of contract formation, not federal law governing arbitration clauses. AT&T cites *Koullas v. Ramsey* for the proposition that the language of an arbitration clause should not be "'stretch[ed] to apply to matters that were not contemplated by the parties when they entered the contract.'"[15] The arbitration clause at issue was in a contract for the sale of a company's stock and applied to disputes "arising under this agreement;" the court found that the clause did not apply to an action brought by one party to the contract against the other for breach of fiduciary duty while serving as director of the company. The dispute in *Koullas* did not "aris[e] under" the agreement because the complaint could be "resolved without a reference to or construction of the contract itself."[16] Here, however, resolution of AT&T's Complaint will require extensive analysis of the Agreement's rates, terms and conditions.[17] Therefore, our decision to stay this proceeding does not "stretch" the language of the Joint Use Agreement's arbitration clause, because the clause clearly encompasses the instant dispute.

Thus, AT&T's arguments are unsuccessful, and we stay this proceeding so that the parties may arbitrate their dispute.

This letter ruling is issued pursuant to sections 1, 4(i), 4(j), and 224 of the Act, 47 U.S.C. §§ 151, 154(i), 154(j), 224, section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, and sections 1.3, 1.720-1.740 and 1.1401-1425 of the Commission's Rules, 47 CFR §§ 1.720-1.740, 1.1401-1425, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 CFR §§ 0.111, 0.311.

FEDERAL COMMUNICATIONS COMMISSION

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arbitration clauses as broadly as possible and resolve any doubts concerning the scope of arbitrable issues in favor of arbitration); *David L. Threlkeld & Co., Inc. v. Mettalgesellschaft Ltd.*, 923 F.2d 245, 250-51 (2d Cir. 1991) ("[W]e are mindful of the Supreme Court's directive with respect to broad arbitration clauses: '[I]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of purpose to exclude the claim from arbitration can prevail.'") (quoting *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986).

[14] *See* Reply at 37 n.201 (citing *Larsen v. Citibank, FSB*, 871 F.3d 1295, 1302 (11th Cir. 2017)).

[15] Reply at 36 n.200 (citing *Koullas v. Ramsey*, 683 So.2d 415, 417 (Ala. 1996)).

[16] *Koullas*, 683 So.2d at 418.

[17] *See 2011 Pole Attachment Order* at 5333-38, paras. 214-220; *2018 Pole Attachment Order* at 64-69, paras. 123-29 (determining whether an incumbent LEC's pole attachment rate is "just and reasonable" requires a comparison of the incumbent's joint use agreement with the agreements under which cable operators and competitive LECs to attach to the utility's poles); Complaint at 7-24, paras. 13-40 (arguing that Alabama Power cannot show that the Joint Use Agreement provides any net benefits not provided in Alabama Power's agreements with its other attachers).