

**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.)	

ORDER ON REVIEW

Adopted: June 7, 2022

Released: June 8, 2022

By the Commission:

I. INTRODUCTION

1. Pursuant to section 5(c)(4) of the Communications Act of 1934, as amended (Act), we deny an Application for Review¹ filed by BellSouth Telecommunications, LLC d/b/a AT&T Florida (AT&T).² AT&T, an incumbent local exchange carrier (LEC) in Florida, requests review of that part of an Enforcement Bureau (Bureau) order (*Order*)³ that dismissed with prejudice the first count of a complaint filed by AT&T against Florida Power & Light Company (FPL) in the captioned proceeding.⁴ In Count I, AT&T alleged that a Payment Default Clause in the parties' agreement for the joint use of each other's utility poles (JUA), and FPL's practices in implementing that clause, were unjust and

¹ Application for Review of BellSouth Telecommunications, LLC d/b/a AT&T Florida, Proceeding Nos. 19-187 and 20-214, Bureau ID Nos. EB-19-MD-006 and EB-20-MD-002 (filed Sept. 15, 2021) (Application). FPL opposes the Application. See Respondent Florida Power & Light Company's Opposition to the Application for Review of BellSouth Telecommunications, LLC, d/b/a AT&T Florida, Proceeding Nos. 19-187 and 20-214, Bureau ID Nos. EB-19-MD-006 and EB-20-MD-002 (filed Oct. 29, 2021). See also BellSouth Telecommunications, LLC d/b/a AT&T Florida's Reply in Further Support of the Application for Review of Four Bureau Orders, Proceeding Nos. 19-187 and 20-214, Bureau ID Nos. EB-19-MD-006 and EB-20-MD-002 (filed Nov. 18, 2021).

² 47 U.S.C. § 155(c)(4).

³ See *BellSouth Telecomm'ns, LLC d/b/a AT&T Florida v. Florida Power & Light Co.*, Memorandum Opinion and Order, (DA 21-1002) 2021 WL 3674254 (Enf. Bur. Aug. 16, 2021) (*Order*). AT&T's Application seeks review not only of the *Order*, but also of three Enforcement Bureau orders released in a related, earlier-filed, complaint proceeding that AT&T brought against FPL. See Application at 2-18 (challenging aspects of the "rate orders" released in Proceeding No. 19-187). We resolve in a separate order the Application insofar as it pertains to Proceeding No. 19-187.

⁴ Pole Attachment Complaint, Proceeding No. 20-214, Bureau ID No. EB-20-MD-002 (filed July 6, 2020) (Complaint). See Application at 18-25. AT&T does not challenge the *Order* insofar as it resolved the rest of AT&T's Complaint, which alleges at Count II that the JUA's pole abandonment clause is unjust and unreasonable. See Application at 19.

unreasonable within the meaning of section 224(b)(1) of the Act.⁵ After reviewing the record and the arguments raised in connection with the Application, we conclude that the Bureau correctly dismissed Count I with prejudice. Specifically, we concur with the Bureau that AT&T violated the Commission's procedural rules governing complaints filed under section 224(b)(1) by failing to include Count I in its earlier-filed complaint against FPL.

II. BACKGROUND⁶

2. Section 224(b)(1) of the Act states that the Commission “shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.”⁷ The statute further provides that the Commission “shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions.”⁸

3. In March 2018, FPL submitted an invoice to AT&T for the 2017 pole rental year under the JUA.⁹ AT&T refused to pay, arguing that the Commission's *2011* and *2018 Pole Attachment Orders* entitled it to a lower rate.¹⁰ A year later, on March 25, 2019, FPL sent AT&T a Notice of Termination stating that, because AT&T had not paid the invoice, pursuant to the JUA's Payment Default Clause, FPL was terminating AT&T's right to attach to FPL's poles “effective immediately.”¹¹

4. On July 1, 2019, AT&T filed a complaint with the Commission seeking a reduced pole attachment rate under the Commission's *2011* and *2018 Pole Attachment Orders*.¹² On the same day, it paid the principal amount of the 2017 invoice.¹³ Also on the same day, FPL filed a complaint, now pending before the U.S. District Court for the Southern District of Florida, asserting that the Notice of Termination is valid and asking the court to declare AT&T a trespasser on FPL's poles.¹⁴

5. On May 20, 2020, the Bureau issued an order in the Rate Complaint proceeding, finding that AT&T was entitled to a lower attachment rate under the *2011 Pole Attachment Order*.¹⁵ The *Rate Order* did not address AT&T's request for a reduced rate for the period after December 31, 2018, because, among other things, FPL argued in its answer to the Rate Complaint that its Notice of Termination ended AT&T's

⁵ 47 U.S.C. § 224(b). See Complaint at 4-15, paras. 8-25, 30-31, paras. 48-51.

⁶ The *Order* details more fully the background of this proceeding. See *Order*, 2021 WL 3674254 at *1-3, paras. 2-12.

⁷ 47 U.S.C. § 224(b)(1).

⁸ 47 U.S.C. § 224(b)(1).

⁹ See Complaint Exh. 2.

¹⁰ See Complaint Exh. 5. See also *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (*2011 Pole Attachment Order*), *aff'd*, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (*2018 Pole Attachment Order*).

¹¹ See Complaint Exh. A (Miller Aff.) at 3, para. 8, Exh. 1 (JUA) at Section 12.3 (Payment Default Clause), and Exh. 23 (Notice of Termination).

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

¹³ See Complaint Exh. A (Miller Aff.) at 3, para. 19.

¹⁴ See *Florida Power & Light Co. v. BellSouth Telecommunications, LLC d/b/a AT&T Florida*, No. 9:19-cv-81043-RLR (S.D. Fla. 2019), removed from Case. No. 502019 CA 008515XXXXMB (Fla. 15th Cir. Ct.).

¹⁵ See *BellSouth Telecomm'ns, LLC d/b/a AT&T Florida v. Florida Power & Light Co.*, Memorandum Opinion and Order, 35 FCC Rcd 5321 (Enf. Bur. 2020) (*Rate Order*).

right to attach to its poles on March 25, 2019, so that the question of AT&T's right to a lower rate after that date was moot. The *Order* explained that the “validity of the Notice of Termination . . . is squarely before the [Florida] district court and is purely a matter of state contract law, as AT&T does not argue that the provision under which FPL gave notice [i.e., the Payment Default Clause] is unjust or unreasonable under section 224 of the Act.”¹⁶

6. On July 6, 2020, AT&T filed the Complaint instituting this proceeding. Count I of the Complaint alleges that the Payment Default Clause—that is, the provision FPL invoked in its Notice of Termination—is an unjust and unreasonable term, and that the Notice of Termination is an unjust and unreasonable practice, within the meaning of section 224(b)(1) of the Act. AT&T asks the Commission to order FPL to “cease and desist” from enforcing the Notice of Termination.¹⁷

III. DISCUSSION

7. We deny the Application. As the *Order* explains, Count I would have served as a defense, if it had been timely raised, to FPL's assertion in the Rate Complaint proceeding that AT&T's request for a reduced attachment rate was moot after March 25, 2019.¹⁸ Yet, in contravention of the Commission's rules, AT&T waited more than one year to file Count I.¹⁹ By then, the Bureau already had released the *Rate Order*, which—in the absence of any claim that the JUA provision under which the Notice of Termination was issued violated the Act or the Commission's rules—found that the U.S. District Court should decide the effect of the Notice of Termination by resolving the parties' dispute under state contract law.²⁰ Allowing AT&T's Count I to proceed would have prejudiced FPL and wasted the Commission's resources. The *Order* properly dismissed Count I with prejudice.

8. AT&T makes many of the same arguments in its Application that it made before the Bureau. The *Order* thoroughly addressed these arguments, and our review of the record and relevant law establishes that the Bureau's conclusions were correct. Accordingly, our discussion here is brief. First, AT&T asserts that the *Order* “must be consistent with the governing statute” and that section 224(b)(1) of the Act “requires a decision [because it states] that the Commission ‘shall hear and resolve complaints concerning [pole attachment] rates, terms, and conditions’ to ‘provide that such rates, terms, and conditions are just and reasonable.’”²¹ However, section 224(b)(1) obligates the Commission to “adopt procedures necessary and appropriate to hear and resolve [pole attachment] complaints,” and procedural rules aimed at preventing prejudice to the parties or the tribunal can mean that the Commission does not address the merits of a claim.²² Moreover, section 4(j) of the Act and Commission rule 1.735 confer broad discretion on the Commission in the conduct of its proceedings.²³

¹⁶ *Rate Order*, 35 FCC Rcd at 5326, para. 10 n.32.

¹⁷ See Complaint at 32, para. 57.

¹⁸ *Order*, 2021 WL 3674254 at *4, para. 15.

¹⁹ See 47 CFR § 1.721(b) (“All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity.”); 47 CFR § 1.721(i) (“[s]pecific reference shall be made to any . . . contract provision relied on in support of a claim or defense”).

²⁰ See *supra* note 16.

²¹ Application at 20 (citing *FCC v. Schreiber*, 381 U.S. 279, 291 (1965) and adding emphasis).

²² See, e.g., *MAW Commun's, Inc. v. PPL Electric Utilities Corp.*, Memorandum Opinion and Order, 34 FCC Rcd 7145, 7154-55, para. 22 (Enf. Bur. 2019) (refusing to address claims in a pole attachment complaint that certain terms of an attachment agreement were unjust and unreasonable because claims were improperly pled). Thus, AT&T's argument (Application at 23-24) that the Commission's failure to address its claim on the merits will cause it prejudice cannot succeed because AT&T should have filed its claim on a timely basis.

²³ See *Order*, 2021 WL 3674254 at *3, para. 13 (citing 47 U.S.C. § 154(j) and 47 CFR § 1.735).

9. AT&T contends that the *Order*, in applying the claim splitting doctrine, adopts a new rule that has never before applied in a pole attachment complaint proceeding.²⁴ Yet, as the *Order* explains, under the Commission’s rules, AT&T should have filed Count I in the earlier Rate Complaint proceeding.²⁵ AT&T maintains that the Commission’s rules do not bar a plaintiff from filing a second complaint against the same defendant.²⁶ As discussed in the *Order*, however, AT&T waited far too long to file Count I because it was directly relevant to FPL’s arguments regarding the Notice of Termination.²⁷ AT&T posits that the *Order* discourages settlement by “forc[ing] parties to bundle all potential claims to avoid losing any.”²⁸ But, where, as here, the facts in both claims are virtually identical and one claim is a response to the other party’s defense, “bundling” the two claims is likely to advance settlement rather than hinder it.²⁹

10. AT&T protests that it could not have included Count I in the Rate Complaint proceeding because it arises out of facts that took place after AT&T filed the Rate Complaint, namely, FPL’s continued efforts to enforce the Notice of Termination even after AT&T paid the invoice and the *Rate Order* found that the JUA rate was excessive.³⁰ AT&T mischaracterizes Count I. AT&T argued at length in Count I that FPL engaged in an unjust and unreasonable practice by sending the Notice, which stated it was “effective immediately,” before the parties had completed the JUA’s mandatory dispute resolution process. Therefore, the facts out of which Count I arises took place the day FPL sent the Notice of Termination, which was three months before AT&T filed the Rate Complaint.³¹

11. AT&T further argues that, before filing the Rate Complaint, FPL had “threatened to eject AT&T from FPL’s poles *if and only if* AT&T did not pay over \$20 million in disputed pole attachment rental invoices by the end of [the JUA’s] mediation process.”³² According to AT&T, FPL’s statement led AT&T to believe that, because it paid the 2017 invoice “within the time period demanded,” the Notice had become “moot.”³³ AT&T’s argument is not convincing. AT&T knew when it filed the Rate Complaint that FPL intended to enforce the Notice because FPL informed AT&T a week earlier that the

²⁴ See Application at 19, 20.

²⁵ See *Order*, 2021 WL 3674254 at *4, para. 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.”) (citing *Implementation of the Telecommunications Act of 1996*, Order on Reconsideration, 16 FCC Rcd 5681, 5695 (heading) & para. 32 (2001) and 47 CFR §§ 1.721(b), (i) and (p) and 1.722(d)).

²⁶ Application at 22 (citing *RCN Telecom Servs. of Philadelphia, Inc. v. PECO Energy Co. and Excelon Infrastructure Servs. Inc.*, Order, 16 FCC Rcd 11857, 11858, para. 4 (“If a complainant wishes to introduce new issues in a pole attachment proceeding . . . it may file a separate complaint, which will receive its own file number and start the normal pleading cycle”); 47 CFR §§ 1.725(b) and 1.727).

²⁷ See *Order*, 2021 WL 3674254 at *4-5, paras. 17-19; *Id.* at *5, para. 21 (“[This is not] 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.”).

²⁸ Application at 23.

²⁹ See *Order*, 2021 WL 3674254 at *5, para. 18 n.44 (comparing the facts in Rate Complaint with those in the Complaint).

³⁰ See Application at 21.

³¹ See Rate Complaint at 5-8, paras. 9-14, 32, para. 58. Stated differently, we do not believe it is AT&T’s position in the Rate Complaint that the Notice of Termination was just and reasonable at the time it was sent. Yet if, as AT&T argues here, the Rate Complaint alleges that the Notice only became unjust and unreasonable months later—i.e., after AT&T paid the invoice and the Commission released the *Rate Order*—then AT&T effectively admits that the Notice was just and reasonable at the time it was sent.

³² Application at 21 (emphasis in original).

³³ Application at 21 (citing Complaint Exh. 23 (Notice of Termination)).

mediation was “at an impasse” and demanded, pursuant to the Notice, that AT&T begin removing its attachments.³⁴ Further, AT&T knew that it had not satisfied all of FPL’s demands because it paid only the principal amount of the 2017 invoice; yet FPL demanded in the Notice that AT&T also pay interest on the invoice.³⁵ In any event, AT&T was aware immediately upon filing the Rate Complaint that FPL would seek to enforce the Notice of Termination because FPL filed suit on the same day in Florida asking that AT&T be ordered to remove its attachments. In addition, FPL argued in its Answer to the Rate Complaint that AT&T’s request for a lower rate after the date of the Notice was moot because the Notice ended AT&T’s right to attach to FPL’s poles.³⁶ Therefore, AT&T should have, at a minimum, included Count I in its Reply or immediately filed Count I as a separate complaint.

12. Thus, we deny the Application. AT&T should have filed Count I in the First Complaint proceeding or filed a separate complaint within a reasonable time. AT&T’s failure to file Count I in a timely manner means that it must be dismissed in order to avoid prejudice to FPL and the Commission, and to ensure that future litigants are diligent in asserting their claims.

IV. ORDERING CLAUSE

13. Accordingly, **IT IS HEREBY ORDERED**, pursuant to sections 4(i), 4(j), 5(c) and 224(b) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 155(c), and 224(b), and sections 1.115, 1.720-1.740, 1.1401, 1.1404, 1.1406, 1.1407, and 1.1413 of the Commission’s rules, 47 CFR §§ 1.115, 1.720-1.740, 1.1401, 1.1404, 1.1406, 1.1407 and 1.1413, that the Application for Review is **DENIED**, and that this proceeding is **TERMINATED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁴ See Complaint Exhs. 28 (Letter from Dianne Miller, AT&T, to Michael Jarro, FPL, dated May 30, 2019 (noting that FPL declared the mediation “at an impasse” on May 23, 2019)); 27 (Letter from Michael Jarro, FPL, to Dianne Miller, AT&T, dated May 23, 2019) (AT&T must remove its attachments)).

³⁵ See Complaint Exh. 23 (Notice of Termination) at 1. See also *Order*, 2021 WL 3674254 at *6, para. 23 (“settlement is never a certainty”).

³⁶ See *id.* at *4, para. 15.