Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

VERIZON FLORIDA LLC,	*	
	*	
Complainant,	*	
	*	Docket No. 15-73
v.	*	File No.: EB-15-MD-002
	*	
FLORIDA POWER & LIGHT COMPANY,	*	
	*	
	*	
Respondent.	*	
	*	

RESPONDENT FLORIDA POWER & LIGHT COMPANY'S
MOTION FOR LEAVE TO FILE RECORD SUPPLEMENT

Pursuant to 47 C.F.R. §§ 1.1411 and 1.1415, Respondent Florida Power & Light Company ("FPL"), by and through its attorneys, respectfully submits this Motion for Leave to File Record Supplement and requests that the Bureau grant FPL leave to submit the attached information for the record in this proceeding. In further support hereof, FPL states as follows:

1. On September 22, 2015, the Commission issued a letter order staying this proceeding pending the resolution of the parties' Florida state court proceeding as to the correct contractual rates owed by Verizon Florida LLC ("Verizon") under the parties' joint use agreement.

2. On October 15, 2015, the Circuit Court for Miami-Dade County, Florida (the "Florida Court") held a summary judgment hearing to decide the parties' civil litigation. At that hearing, the Florida Court entered summary judgment on all counts in favor of FPL and against Verizon, reaching conclusions on numerous issues of fact and law. A copy of the court's summary judgment order is attached as Exhibit A.

3. On October 20, 2015, the Commission lifted its stay in this matter, after being informed by the parties of the state court's grant of summary judgment in FPL's favor.

4. That same day, FPL filed a second state court complaint against Verizon in the Circuit Court for Miami-Dade County, Florida, seeking payment of the more than $3.4 million in fees Verizon has failed to pay under the parties' joint use agreement for calendar years 2013 and 2014. FPL contemporaneously informed the Commission by email of the second state court case.

5. On October 26, 2015, the Florida Court entered a final judgment on the summary judgment order. On November 6, 2015, the Florida Court denied Verizon's Motion for Reconsideration and Rehearing.

6. On November 11, 2015 and December 1, 2015, FPL emailed the Bureau noting the uncertainty created by Verizon's refusal to confirm whether or not it intended to appeal the Florida Court's decisions. Verizon filed a Notice of Appeal with the Florida Court on December 4, 2015, seeking to overturn every adverse ruling against it by the Florida Court.

7. On December 8, 2015, FPL filed with the Commission a Motion for Leave to File and an accompanying Motion to Hold Proceeding in Abeyance pending the resolution of the issues in the Florida state court proceeding.

8. Verizon's Florida state court appeal, FPL's second state court contract action and FPL's Motion to Hold Proceeding Abeyance all remain pending. However, at this time and despite the procedural uncertainty in this matter, FPL believes it must now seek leave to supplement the record evidence in this case and thereby provide certain additional data to create a complete factual record for the Commission. FPL informed the Commission of its intention to

make this filing both prior to filing the Motion to Hold Proceedings in Abeyance, by email dated December 1, 2015, and also in the body of that motion itself.

9. The Commission's rules allow the Commission to "so conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice." 47 C.F.R. § 1.1415.

10. Good cause exists to permit the filing and consideration of additional record evidence in the instant proceeding. First, the Bureau will benefit from the submission of additional evidence for the record in this matter regarding the average number of attaching entities on FPL's poles and the average height of FPL's poles. A complete record will allow the Commission full access to all facts necessary for an informed decision. Neither party has fully addressed the issues of the average number of attaching entities or average pole height in its briefs because the proceeding was focused on whether the joint use agreement rate or the telecommunications rate applied as opposed to whether, if the Commission found that the telecom rate applied, the specific details and methodology of calculating that rate had been fully developed.

11. Without disclosing any confidential communications, it only became apparent at the mediation between the parties at the Commission's offices on September 15 and 16, 2015 that the actual average number of attaching entities and average pole height would be useful data in the proceeding. Neither party had focused on those issues prior to that time.

12. For its part, Verizon simply calculated its preferred version of the telecom rate in its current complaint without mentioning at all the average number of attachers, actual or presumptive. Pole Attachment Complaint, March 13, 2015, EB-15-MD-002 ("Complaint"), 44-47. Verizon's rate witness similarly did not address the average number of attaching entities in this proceeding. *Id.*, Exhibit A, Second Affidavit of Mark S. Calnon, Ph.D. And in the prior

Commission proceeding between the parties, Verizon also did not discuss the average number of attaching entities; instead its witness simply plugged the number "5" into his rate calculation without any rationale or explanation.[1] Verizon's information and data establishing its proffered average number of attaching entities should certainly have been among the detailed list of items that the Commission's rules required Verizon to include in the Complaint for purposes of establishing an accurate telecommunications attachment rate. *See* 47 C.F.R. § 1.104(g)(2).[2] Verizon, however, never made a request to FPL pursuant to 47 C.F.R. § 1.104(g) prior to filing the Complaint or the Prior Complaint.

13. Verizon clearly had strategic reasons for avoiding any mention of the average number of attaching entities in either complaint or the accompanying declarations. To be sure, Verizon had the results of and full access to the most recent (2011/2012) field survey jointly commissioned by FPL and Verizon since shortly after the survey was completed.[3] Verizon has accepted[4] the results of that joint survey, which showed the average number of attachers and contained the information Verizon needed to determine accurately the average pole height.[5] Yet, Verizon omitted providing any relevant facts on the average number of attaching entities in

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[1] Pole Attachment Complaint, *Verizon Fla. LLC v. Fla. Power & Light Co.*, Docket No. 14-216, File No. EB-14-MD-003 (Jan. 31, 2014)("Prior Complaint"); *see also* Pole Attachment Complaint, *Verizon Fla. LLC v. Fla. Power & Light Co.*, Docket No. 15-73, File No. EB-15-MD-002, Related to Docket No. 14-216, File No. EB-14-MD-003 (Mar. 13, 2015)("Complaint"), Exhibit B, Affidavit of Mark S. Calnon, Ph.D., ¶ 9.

[2] "The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable." 47 C.F.R. § 1.1404(g)(2).

[3] Response to Pole Attachment Complaint, *Verizon Fla. LLC v. Fla. Power & Light Co.*, Docket No. 15-73, File No. EB-15-MD-002, Related to Docket No. 14-216, File No. EB-14-MD-003 (June 29, 2015) ("FPL Response"), Ex. C Verizon Florida LLC's Responses to Florida Power and Light Company's Requests for Production of Documents, Response to Request No. 20 (referring to the "2011 pole attachment survey results that FPL provided to Verizon.").

[4] Once the physical surveying is complete, both Verizon and FPL follow an "acceptance" process that includes signing off on hundreds of survey maps. That process was followed for the 2011/2012 survey. The signed survey maps are large in size and stored off-site, so are not attached to this motion. To the extent that Verizon would now challenge the survey results, FPL can retrieve the large maps and submit them as proof that Verizon accepted the results.

[5] Future surveys may also specifically calculate the amount of space being used by joint users and other attachers. This will avoid any argument over the amount of space for which an attacher should be billed and simply allow the parties going forward to use the actual field data for the three variable inputs in the Commission's rate formula.

either of its complaints or replies in two proceedings, choosing instead to use the completely unsubstantiated number of 5 average attachers because it is the Commission's rebuttable presumption.

14. Verizon also chose to ignore the survey data regarding average pole height and instead made unsupported use of the number 41. For this formula input, however, Verizon took the complete opposite legal position. While 5 attaching entities is the Commission's rebuttable presumption as to the average number of attaching entities in an urbanized area, the Commission's rebuttable presumption for average pole height is 37.5, not 41. When it suited Verizon to argue *for the Commission's rebuttable presumption* of 5 attachers and against FPL's factual argument that there were fewer attachers, Verizon argued incorrectly that FPL faced a "heavy burden." However, where it suited Verizon to argue *against the Commission's rebuttable presumption*; *i.e.*, for an average pole height of 41 feet, Verizon did so cavalierly, without regard to the record and undeterred by a supposed "heavy burden." Putting it exactly backwards, Verizon stated that FPL sought to use 37.5 feet "without any survey or other evidence . . . even though Verizon has invited FPL to produce the data that supports its claim."[6] It is Verizon that needs to submit data to rebut the Commission's 37.5 foot presumption. Moreover, FPL provided undisputed testimony that the average height of 41 which Verizon blithely chose to use came not from any data analysis or survey evidence, but from a portion of a 2010 FPL worksheet that identified a sample population of three different sized poles installed in

[6] Reply to Response to Pole Attachment Complaint at 52, *Verizon Fla. LLC v. Fla. Power & Light Co.*, Docket No. 15-73, File No. EB-15-MD-002, Related to Docket No. 14-216, File No. EB-14-MD-003 (November 24, 2015) ("FPL Response"); [6] *see also* Complaint ¶ 100.

a one-year period. The worksheet did not purport to classify the heights for the 67,000 FPL poles to which Verizon is attached.[7]

15. Verizon's refusal to provide data or explanation regarding the average number of attaching entities or pole height is compounded by the fact that it never requested, as required by 47 C.F.R. § 1.1417(d)(1), either prior to filing the Complaint or the Prior Complaint, or during discovery, any information as to how the parties should calculate an average number of attaching entities if the telecom rate applied. The relevant regulations provide:

> (1) **Each utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information upon which the utilities presumptive average number of attachers is based.**
>
> (2) Each utility is required to exercise good faith in establishing and updating its presumptive average number of attachers.
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> (3) **The presumptive average number of attachers may be challenged by an attaching entity by submitting information demonstrating why the utility's presumptive average is incorrect.** The attaching entity should also submit what it believes should be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.

47 C.F.R. § 1.1417(d)(emphasis added). Verizon had the latest survey in hand, but took no affirmative steps either to identify the calculation and basis for FPL's average number of attaching entities or to establish its own average number of attachers.

16. Verizon's replies also did not provide any facts for the record. In its Reply in the Prior Complaint proceeding, Verizon did not mention the average number of attaching entities. Its Reply in the current Complaint proceeding similarly provides no data. Instead, on page 50 and in footnote 296 it merely suggests erroneously that FPL has not offered any evidence and is forever bound to use the number 5 for an average. As to the average pole height, Verizon simply

[7] FPL Response at 43; FPL Response, Ex A 2015 Declaration of Thomas J. Kennedy on Behalf of Defendant Florida Power and Light Company ("2015 Kennedy Decl.") ¶ 33; FPL Response, Ex. A, Attachment 1, 2014 Declaration of Thomas J. Kennedy on Behalf of Defendant Florida Power and Light Company ("2014 Kennedy Decl."), ¶ 39.

repeats the same argument regarding FPL's snapshot of the three pole heights installed in a single, isolated year, despite the uncontroverted testimony of Mr. Kennedy.

17. It was incumbent upon Verizon to request all data supporting the calculation of an average number of attaching entities and pole height, *see* 47 C.F.R. § 1.1417(d)(1), and then contest that average if it wished to establish a different number. *Id.*, § 1.1417(d)(3). In addition, Verizon squarely bears the burden of proof in this proceeding. *Id.*, 1.1409(b). Verizon has not carried it as to either average pole height or as to the average number of attachers. Since receiving the 2011/2012 survey results, Verizon has at all times possessed the data necessary to calculate appropriately the average height and number of attachers, but has willfully chosen to ignore it.

18. The second reason that good cause exists to allow FPL's supplement is that it is indeed an actual *supplement* – FPL, for its part, did supply two pieces of evidence on the relevant issues. In its response to the Prior Complaint, filed on April 4, 2014, FPL provided specific testimony that the average number of attaching entities on its poles is closer to two, rather than five.

> [W]hile Verizon seeks to rebut one presumption under the FCC formula, it ignores other pertinent factors. Verizon has not adjusted the number of attaching entities downward to reflect the fact that it is closer to two, rather than five . . . .

2014 Kennedy Decl., ¶ 40.[8] FPL also provided uncontroverted testimony that the average pole height was not the misleading snapshot of 41 feet used by Verizon, but rather 37.5. 2014 Kennedy Decl., 39.

19. FPL therefore now seeks to provide data that the Commission's processes have identified as useful for the record. Up to this point, neither party has provided a complete record

[8] In FPL's response to the current Complaint, FPL's witness Mr. Kennedy incorporated his declaration in the Prior Complaint proceeding into his declaration in the current Complaint proceeding. 2015 Kennedy Decl., ¶ 7.

for the Commission to properly decide the average number of attaching entities or average pole height, should it in fact wish to reach those issues.

20. The third reason that good cause exists to allow FPL's supplement is that Verizon will suffer no prejudice. The supplement should not cause any delay at all. And even if there were some minor delay in this proceeding, that would mean only that Verizon continues to withhold $6.5 million (and counting) in joint use fees a bit longer. In addition, FPL has no objection should Verizon wish to submit its own relevant data as to the parties' most recent survey as a supplement to the record in this proceeding.

21. Finally, to the extent that Verizon may take any issue with the appropriate process or applicable law, Verizon misunderstands. The only time it mentions the average number of attachers in either Commission proceeding, in footnote 297 of its reply in the current Complaint proceeding, Verizon mischaracterizes both the appropriate process and the case it relies upon. *See Teleport Communic's Atlanta, Inc. v. Georgia Power Co.*, 17 FCC Rcd 19859 (2002). In *Teleport*, the utility never sought to establish an average number of attaching entities within the Commission's framework. Instead, the pole owner directly challenged the lawfulness of the Commission's formula and sought to establish a different formula. As the Commission stated:

> A review of the record reveals that GPC did not make any effort to justify its pole attachment rate using either the Cable Formula, in effect prior to February 8, 2001, or the Telecom Formula, in effect beginning February 8, 2001, in response to the complaint. Instead, GPC substituted its own formula for calculating pole attachment rates. When the Bureau reviewed GPC's filing, it concluded that GPC had not met its burden to calculate a just and reasonable rate using the formulas as promulgated by our orders.

Id., ¶ 12. Georgia Power also provided evidence only as to "the ratio of the number of poles with either a cable or telecommunications attachment to the number of poles with either a cable or telecommunications attachment to the number of poles with both types of attachments. It is

meaningless for the purpose of supporting an average number of attaching entities per pole." *Id.*, ¶ 15.

22. Nowhere did the Commission state that Georgia Power had a "heavy burden" as Verizon suggests. Rather, the Commission emphasized that Georgia Power presented "a component that might be considered to be analogous to the average number of attaching entities component," that totaled less than the Commission's prescribed minimum of two, had no factual support and that related to "a different formula entirely." *Id.*, ¶¶ 16-17. Indeed, the Commission noted how Georgia Power could have resolved the issue: "[H]ad it chosen to do so, GPC had ample opportunity to supplement its response to the complaint in the appropriate way . . . ." *Id.*, ¶ 19.

23. Georgia Power's goal in that case, however, was not to calculate a rate in accordance with the Commission's formula. Georgia Power's goal was to contest the Commission's rate formula and substitute its own; therefore, it did not seek to provide the input and data the Commission indicated it needed. Here, however, FPL seeks to provide information it now believes the Commission sees as relevant and "to supplement its response to the complaint in the appropriate way."

24. In sum, supplementing the record would serve the interests of justice and provide a more thorough and informed basis for a decision in this proceeding. At the end of the day, the Commission seeks to make a comprehensive decision based on a record that is as complete and developed as reasonably possible. Moreover, neither party would be prejudiced by allowing FPL to file the requested record supplement, nor would the Commission's processes by unduly delayed or overburdened.

For the foregoing reasons, FPL respectfully requests that the Commission grant it leave to file the attached record supplement addressing two discrete factual issues: (i) the average number of attaching entities on FPL's poles and (ii) the average height of joint use poles owned by FPL.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2016, I caused a copy of the foregoing Respondent's Motion for Leave to File Record Supplement to be served on the following by hand delivery, U.S. mail or electronic mail (as indicated):

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