BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed Adoption of Rule 25-18.010, F.A.C., Pole Attachment Complaints	Docket No. 20210137-PU Filed: September 15, 2021

FLORIDA POWER & LIGHT COMPANY'S INITIAL COMMENTS

Florida Power & Light Company ("FPL") , representing the merged and consolidated operations of FPL and the former Gulf Power Company ("Gulf"),[1] submits these comments in support of the Florida Public Service Commission's ("the Commission") proposed pole attachment complaint rule, 25-18.010. FPL supports the framework of the proposed rule and only offers these comments to address three important issues:

(1) the Commission should clarify that respondents in a complaint proceeding may also request an evidentiary hearing irrespective of the form of relief requested;

(2) the Commission should add language establishing that any complainant must certify to the Commission that it is and will continue abiding by the unchallenged rates, terms or provisions of the applicable pole attachment agreement;

Attached as Exhibit A (in legislative format) are FPL's suggested edits to proposed Rule 25-18.010.

and;

(3) the Commission should reject Florida Internet and Television Association's ("FIT"), Crown Castle's and CTIA's request in the Staff Rule Development Workshop to establish the FCC pole attachment rate as the default rate in subsection (4) of the proposed rule (the "FIT request").

COMMENTS

1. **The Commission should clarify that respondents may request an evidentiary hearing irrespective of the form of relief they request.**

FPL requests the Commission clarify that all parties may request an evidentiary hearing, even if the requested relief does not concern an alternative cost-based rate. In subsection 1(i), the draft rule

[1] Effective January 1, 2021, Gulf and FPL were legally merged with FPL being the surviving entity.

allows complainants to choose whether to request an evidentiary hearing in their complaint, regardless of the form of relief sought. *See* 25-18.010(1)(i) ("A complaint…must contain (i) [a] statement of the relief requested, including whether a Section 120.569 and 120.57, Florida Statutes, evidentiary hearing is being requested to resolve the complaint;"). The ability of respondents to request an evidentiary hearing is not articulated equally. Subsections (3) and (4) of the draft rule could be interpreted to allow parties to request an evidentiary hearing only if they seek to establish an alternative cost-based attachment rate.[2] FPL requests the Commission clarify that a party's right to request an evidentiary hearing is not conditioned on the relief requested being an alternative cost-based attachment rate. There are many aspects to a pole attachment agreement beyond the rate, and parties should be able to request an evidentiary hearing regardless of their requested relief. To accomplish this, FPL proposes the following changes to subsection (3), mirroring the language in subsection (1)(i):

> (3) The pole owner or attaching entity that is the subject of the complaint must file its <u>initial</u> response with the Commission within 30 calendar days of the date the complaint was served on that party. <u>The pole owner or attaching entity must also indicate whether it requests a Section 120.569 and 120.57, Florida Statutes, evidentiary hearing to resolve the complaint.</u>[3]

(underscore indicates FPL's suggested amendment).

[2] Subsections (3) and (4) of the draft rule read as follows:

(3) The pole owner or attaching entity that is the subject of the complaint must file its response with the Commission within 30 calendar days of the date the complaint was served on that party.
(4) If the pole owner or attaching entity intends to ask the Commission to establish an alternative cost-based attachment rate in a Section 120.569 and 120.57, Florida Statutes, evidentiary proceeding, it must provide the methodology with the complaint or with the response.

[3] FPL requests this minor revision to ensure that respondents may have more substantive responses to the complaint following the "initial" response, which is consistent with the Commission's stated intent at the September 1, 2021 workshop.

2. The Commission should require complainants to plead compliance with all unchallenged or undisputed provisions of the applicable attachment agreement.

In subsection 1(a)-(j), the draft rule appropriately sets out the pleading requirements for a pole attachment complaint. FPL requests the Commission also require, as a pleading requirement, a certification from the complainant (whether pole owner or attaching entity) that it is in compliance with all unchallenged or undisputed provisions of the applicable agreement. FPL believes this will help ensure the parties narrow the scope of the complaint to only those provisions truly at issue and ensure that all pre-complaint efforts to resolve the dispute are as fruitful as possible.

For example, if there is a dispute between an attacher and pole owner over the just and reasonableness of rate provisions in an attachment agreement, then the attacher should be required to include a statement as to whether the attacher has paid the pole owner an amount based upon the rate the attacher argues is just and reasonable. Often, in these types of disputes, attachers withhold the entire amount of an outstanding rental payment rather than just the difference between the amount the attacher contends is owed and the amount the pole owner contends is owed.

FPL requests the Commission help eliminate this unfair practice and expedite dispute resolution by requiring complaining parties to certify, as part of their complaint, that they are in compliance with all undisputed terms and provisions of the applicable attachment agreement. Specifically, this would include certification that any undisputed portion of a rate term or provision has been paid in full. To accomplish this, FPL suggests the Commission include the following language as a new subsection (1)(j) and move the existing subsection (1)(j) to a new subsection (1)(k). The revised subsections, with the newly proposed language underlined, would read:

> (j) <u>A verified statement by an authorized representative of the complainant, attached to the complaint, describing and identifying the pole attachment rates reflected in the existing agreement between the complainant and the respondent; the amount of such contractual pole attachment rate(s) that is not in dispute; and confirmation as to whether the attaching entity has paid the pole owner in full for the amount of the pole attachment rate(s) that is not in dispute prior to the filing of the complaint</u>.

(k) A certificate of service that copies of the complaint have been furnished by email to the party or parties identified in paragraph (1)(d) of this rule.

3. The Commission should reject any request to make an FCC pole attachment rate methodology the default rate.

To be clear, FPL takes no issue with the draft language of subsection (4) in the proposed rule. But, at the Commission's September 1, 2021 workshop, a few entities asked the Commission to edit subsection (4) to "expressly reference the FCC rate formula so that it's clear that the alternative reference in paragraph four of the draft is an alternative to the FCC formula."[4] This proposal exceeds the authority granted by the Legislature which limits this rule to *procedural requirements only* and because the proposal purports to establish the FCC rate formula as an existing contractual rate, a default Commission-approved rate, and/or a rebuttably presumptive rate, the authority for any of which is absent from the statute. In fact, it is contrary to the enabling statute.

The Commission should reject the request because it is an effort to make the FCC pole attachment rate formula the Florida pole attachment rate formula. This proposal is not procedural but rather a substantive, significant edit. It is unsupported by SB1944 for multiple reasons and disregards the fact that many existing (and future) pole attachment agreements in this state do not apply the FCC rate formula at all.

a. The proposed edit wrongfully assumes the rate in every pole attachment agreement subject to the Commission's new jurisdiction is the FCC pole attachment rate.

In order for the FIT request to make practical sense in the Commission's new jurisdiction (putting aside the statutory infirmities), all pole attachment agreements subject to the Commission's new jurisdiction would have to already utilize the FCC pole attachment rate. Otherwise, there would be no need to offer evidence justifying an "alternative rate" (at least as FIT, Crown Caste and CTIA

[4] In addition to being improper, FIT's proposed edit offers little practical guidance as it does not identify which FCC rate formula will apply. There are multiple FCC rates (e.g., "the Old Telecom Rate", "the New Telecom Rate" or "Cable Rate"), each of which are applied to different types of attachers.

define it). But the assumption FIT makes by proposing its preferred edit is false – not all agreements subject to the Commission's new jurisdiction utilize the FCC rate.

In fact, even prior to SB1944, the FCC did not regulate a large class of pole attachment agreements in this state, and a number of pole attachment agreements now governed by the Commission do not utilize the FCC rate. FIT's proposed edit is problematic for that class of agreements because the effect of the edit is to (1) rewrite the rate provision in existing agreements and (2) establish the rate provision in agreements yet to be negotiated. Not only is that inconsistent with SB1944's call for voluntarily negotiated agreements, but also the proposed edit actually violates both Section 366.97(4)(b), F.S. (part of the newly enacted SB1944), which prohibits any interpretation of SB1944 from impairing existing contracts, and Section 10 of the Florida Constitution ("No bill of attainder, ex post facto law or law impairing the obligations of contracts shall be passed.").

Under Section 366.04(8)(a), F.S., the Commission's new jurisdiction includes rates, terms and conditions for attachments to "streetlight fixtures" and "attachments to poles owned by a public utility." This jurisdiction is broader than the FCC's jurisdiction. In states where the FCC has jurisdiction, the FCC rate formula does not apply to all attachment agreements. For instance, cable and telecommunications attachments to streetlight poles are outside the FCC's jurisdiction, and FCC rates are inapplicable. Likewise, multiple "unregulated" entities also make "attachments to poles owned by a public utility" as referenced in Section 366.04(8)(a), F.S., and their attachments and agreements are not governed by FCC rules and do not utilize an FCC rate methodology. Additionally, joint use agreements, which are a distinct subset of pole attachment agreements almost universally between incumbent local exchange carriers and electric utilities, rarely utilize the FCC rate because their terms (and the contractual benefits mutually bestowed by the parties) are so different from the

terms of pole attachment agreements between competitive local exchange carriers or cable providers and electric utilities.

If FIT's proposed edit were to be accepted, existing agreements not utilizing the FCC rate would effectively be required to do so. The Commission should reject FIT's proposed edit and allow arm's-length negotiated agreements to remain and continue. It should consider the appropriate rate on a case-by-case, agreement-by-agreement basis.

b. The proposed edit is not supported by SB1944.

The FIT proposed edit is not supported by SB1944 for three reasons. First, despite representations made at the workshop, SB1944 does not state that the FCC rate formula is the default rate formula. In fact, SB1944 does not require the Commission to ever apply the FCC rate formula. See § 366.04(8)(e), F.S. ("Federal Communications Commission precedent is not binding upon the commission in the exercise of its authority under this subsection."). Instead, when the Florida Legislature amended Section. 366.04, F.S. by enacting SB1944, it expressly declared that the Commission, not the FCC, would decide what rates should be utilized. Section 366.04(8)(f), F.S. ("These initial four proceedings are intended to provide commission precedent <u>on the establishment of pole attachment rates by the commission</u> and help guide negotiations toward voluntary pole attachment agreements.") (emphasis added).

At no point did the Florida Legislature state that the FCC rate formula "shall" or "must" be the rate formula in pole attachment agreements in this state. If that were the intent of SB1944, the Florida Legislature was fully capable of making it clear. After all, they expressly incorporated the access rights provision from the Pole Attachments Act. Section 366.04(8)(d), F.S. ("A party's right to nondiscriminatory access to a pole under this subsection is identical to the rights afforded under 47

U.S.C. §224(f)(1).").[5] The Commission "must give the statutory language its plain and ordinary meaning, and is not at liberty to add words that were not placed there by the Legislature." *Exposito v. State*, 891 So. 2d 525, 528 (Fla. 2004). Any effort to expressly reference the FCC rate formula in a procedural rule about threshold complaint requirements is an after-the-fact effort to rewrite SB1944, is contrary to the Florida Legislature's articulated intent in SB1944, and should be rejected.

Second, ever-mindful of the fact that the Commission would be establishing new, non-FCC precedent over pole attachment rates, terms and conditions, the Florida Legislature authorized all interested parties intervenor status "in the first four administrative proceedings conducted to determine pole attachment rates." Section 366.04(8)(f), F.S. The purpose of this grant of expanded intervenor status was to afford the Commission and all interested parties the benefit of a fully developed record in deciding cases of first impression under the Commission's new jurisdiction. FIT's proposed edit is entirely inconsistent with the Florida Legislature's intent for the Commission to determine pole attachment rates and would render the value of the expanded intervention in the first four complaint proceedings meaningless.

Third, in multiple places in SB1944, the Florida Legislature expressed its desire for voluntary negotiation of pole attachment agreements, including rates.[6] Requesting, as FIT did, that the Commission "expressly reference the FCC rate formula so that it's clear that the alternative reference in paragraph four of the draft is an alternative to the FCC formula" undermines the Legislature's

[5] *Compare* Section 337.401(15)(f)(3), F.S. (where Florida adopted a rate other than the FCC rate for certain attachments).

[6] See Section 366.04(8)(c), F.S. ("It is the intent of the Legislature to encourage parties to enter into voluntary pole attachment agreements, and this subsection may not be construed to prevent parties from voluntarily entering into pole attachment agreements without commission approval."); Section 366.97(4)(a), F.S. ("It is the intent of the Legislature to encourage parties to enter into such voluntary agreements without commission approval.").

preference for voluntary negotiation. The Florida Legislature was fully capable of directing the Commission to establish the FCC rate as the default pole attachment rate. It did not do so.

CONCLUSION

FPL requests the Commission adopt FPL's proposed edit to subsections (1)(j)/(k) and subsection (3) and reject the proposed edit to subsection (4) which would establish the FCC rate as a default.

Respectfully submitted,

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EXHIBIT A

25-18.010 Pole Attachment Complaints

(1) A complaint filed with the Commission by a pole owner or attaching entity pursuant to Section 366.04(8), Florida Statutes, must contain:

(a) The name, address, email address, and telephone number of the complainant or complainant's attorney or qualified representative;

(b) A statement describing the facts that give rise to the complaint;

(c) A statement of the rules and laws governing the complaint;

(d) Names of the party or parties against whom the complaint is filed;

(e) An explanation of previous steps taken to reach an agreement on the issue;

(f) A copy of the pole attachment agreement, if applicable, and identification of the pole attachment rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments that is the subject matter of the complaint;

(g) A statement of the issues to be resolved;

(h) If applicable, the dollar amount in dispute;

(i) A statement of the relief requested, including whether a Section 120.569 and 120.57, Florida Statutes, evidentiary hearing is being requested to resolve the complaint; and

(j) A verified statement by an authorized representative of the complainant, attached to the complaint, describing and identifying the pole attachment rates reflected in the existing agreement between the complainant and the respondent; the amount of such contractual pole attachment rate(s) that is not in dispute; and confirmation as to whether the attaching entity has paid the pole owner in full for the amount of the pole attachment rate(s) that is not in dispute prior to the filing of the complaint.

~~(j)~~ (k) A certificate of service that copies of the complaint have been furnished by email to the party or parties identified in paragraph (1)(d) of this rule.

(2) The filing date for the complaint is the date that a complaint is filed with the

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Commission Clerk containing all required information set forth in subsection (1) of this rule.

(3) The pole owner or attaching entity that is the subject of the complaint must file its initial response with the Commission within 30 calendar days of the date the complaint was served on that party. The pole owner or attaching entity must also indicate whether it requests a Section 120.569 and 120.57, Florida Statutes, evidentiary hearing to resolve the complaint.

(4) If the pole owner or attaching entity intends to ask the Commission to establish an alternative cost-based pole attachment rate in a Section 120.569 and 120.57, Florida Statutes, evidentiary proceeding, it must provide the methodology with the complaint or with the response.

(5) The Commission will take final action on a complaint at a Commission Conference no later than 360 days after the complaint's filing date as set forth in subsection (2) of this rule.

Rulemaking Authority 350.127(2), 366.04(8)(g) FS. Law Implemented 366.04(8) FS. History-New_____

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