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September 15, 2021

VIA ELECTRONIC FILING

Adam J. Teitzman, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: *Proposed Adoption of Rule 25-18.010, F.A.C., Pole Attachment Complaints;*
Docket No. 20210137-PU

Dear Mr. Teitzman:

On behalf of Duke Energy Florida, LLC ("DEF"), please find enclosed for electronic filing in the above-referenced Docket, DEF's Post-Workshop Comments along with Exhibit A.

Thank you for your assistance in this matter. Please feel free to call me at (727) 820-4692 should you have any questions concerning this filing.

Respectfully,

/s/ Dianne M. Triplett

Dianne M. Triplett

DMT/cmw
Enclosures

cc: Adria Harper

IN RE: PROPOSED ADOPTION OF RULE 25-18.010, FLA. ADMIN. CODE,
POLE ATTACHMENT COMPLAINTS

Duke Energy Florida, LLC Post-Workshop Comments

INTRODUCTION

On August 17, 2021, the Commission published proposed Rule 25-18.010, Fla. Admin. Code, Pole Attachment Complaints. Commission staff subsequently hosted a rule development workshop on September 1, 2021, to discuss the proposed rule. Representatives of Duke Energy Florida, LLC (“DEF”), along with other interested stakeholders, participated in the workshop and provided comments on the proposed rule. At the conclusion of the workshop, staff invited interested parties to provide subsequent, written comments. In response to the invitation, DEF offers the following post-workshop comments for Commission consideration.

Section 366.04(8)(g), Fla. Stat., requires the Commission to propose and adopt “procedural rules to administer and implement” its new regulatory authority over pole attachments by January 1, 2022. (Emphasis added). DEF supports the Commission’s interpretation of this mandate as permitting only rules which establish a pole attachment complaint process. DEF also supports the proposed rule, with several minor modifications to address, among other things, procedural issues raised at the September 1, 2021, Rule Development Workshop. DEF further supports a modification to the proposed rule to provide a shorter resolution period for pole access complaints, as urged by several communications stakeholders at the September 1, 2021, rule development workshop. The Commission, though, should reject requests by communications stakeholders to convert these “procedural rules” into substantive rules, especially given the short timeframe for adoption.

I. THE PROPOSED RULE IS PROPERLY LIMITED TO ESTABLISHING A POLE ATTACHMENT COMPLAINT PROCESS.

The mandate in Section 366.04(8)(g), Florida Statutes, is as follows: “The commission shall propose procedural rules to administer and implement this subsection. The rules must be proposed for adoption no later than January 1, 2022....” The reference to “procedural rules” is intended to limit the rulemaking to new rules establishing a complaint process, as such, expanding the scope of the proposed rule beyond its procedural nature would constitute an “invalid exercise of delegated legislative authority” rendering the offending provisions subject to challenge. *See* §120.56(1)(a), Fla. Stat. (“Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.”); § 120.52(8)(b) & (c). Fla. Stat. (stating an “invalid exercise of delegated legislative authority” exists when an “agency has exceeded its grant of rulemaking authority” and/or “[t]he rule enlarges, modifies, or contravenes the specific provisions of law implemented.”).

This plain language interpretation is also supported by two other provisions of the law. First, subsection (8)(f) gives pole owners and attaching entities the right to intervene in the first four formal administrative proceedings under the new law. This indicates that the legislature intends for precedent to be developed on an ad hoc basis, with the benefit of factual records, rather than through an initial set of substantive rules in the absence of any factual record. Second, the other new rulemaking mandate, located within subsection (9)(b), states: “The commission shall adopt rules to administer and implement this subsection. The rules must be proposed for adoption no later than April 1, 2022....” Noticeably absent from this mandate is the term “procedural” as a modifier to the term “rules.”

Given the above, the Commission should reject the request by communications stakeholders to convert the “procedural rule” into a substantive rule. At the September 1, 2021, Rule Development Workshop, Florida Internet & Television (“FIT”) argued that “the rule should 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.” *In the Matter of Proposed Adoption of Rule 25-18.010, F.A., Pole Attachment Complaints*, Docket No. 20210137-PU, Transcript of September 1, 2021, Staff Rule Development Workshop at 12:13-16 (filed Sep. 7, 2021) (the “Workshop Tr.”). Crown Castle and CTIA echoed this same request. *See id.* at 16:17-25. As support for this position, FIT contended: “the statute says that the Commission shall apply the decision and orders of the FCC and the appellate courts to determine just and reasonable rates, terms and conditions, unless the pole owner establishes by competent substantial evidence an alternative cost-based rate that is just and reasonable and in the public interest.” *Id.* at 12:17-23.

Though FIT is correct that the statute says the Commission “shall apply the decisions and order of the Federal Communications Commission,” the preceding sentence in the same subsection of the statute more broadly, and less ambiguously, states: “**Federal Communications Commission precedent is not binding upon the commission in the exercise of its authority under this subsection.**” § 366.04(8)(e), Fla. Stat. (emphasis added). Given this conflict in the statutory language, and given the principles of statutory construction, it is questionable whether the Commission is even required to “apply the decisions and orders” of the FCC, whatever that might mean. Whatever the case, though, the Commission should not predetermine a result at this stage by hardwiring a rate formula into its procedural rule.

To the extent that the reference to “an alternative cost-based rate” in paragraph four of the proposed rule creates ambiguity, as FIT alleges, the solution to this ambiguity within the rule is to

remove paragraph four, as proposed in the red-line attached as Exhibit A. Paragraph four of the proposed rule is not necessary to the operation of the rule, given the statutory language. Further, the proper solution to the issue raised by FIT is not, as FIT suggests, to add substantive—and potentially incorrect—language to the procedural rule. The Commission can and should bring clarity to the ambiguous and/or conflicting portions of Section 366.04(8), Florida Statutes, with the benefit of factual records and legal briefing that will accompany the ensuing complaint proceedings.

II. SUBSECTION (3) SHOULD BE REVISED IN TWO MINOR WAYS: (1) TO ALLOW FOR AN EXTENSION OF TIME TO RESPOND, IF NEEDED; AND (2) TO CLARIFY THAT A RESPONDENT MAY REQUEST AN EVIDENTIARY HEARING.

First, subsection (3) of the proposed rule requires that the “pole owner or attaching entity that is the subject of the complaint” file a response “within 30 calendar days of the date the complaint was served on that party.” At the September 1, 2021, Rule Development Workshop, Commission staff, in response to a question regarding the substantive expectations of a response to a complaint, stated: “I don’t think we were looking at it like a civil litigation type situation. I think what we wanted at that point was any information that you think you want the Commission to know in direct response to what’s being alleged....” Workshop Tr. 9:2-6. Given that the Commission is contemplating a more substantive filing than an answer in civil litigation, 30 days may not be a sufficient response period, depending on the nature of the complaint. DEF, therefore, respectfully requests the ability to request an extension of the response period. Along the same lines, DEF suggests language to clarify the Commission staff’s intent that the response be more substantive. Both of these suggested language revisions are set forth in Exhibit A.

Second, subsection (1)(i) of the proposed rule expressly allows a complainant to request a Section 120.569 or 120.57, Florida Statutes, evidentiary hearing. Subsection (3), which addresses

the response to the complaint, does not expressly allow a respondent to make the same request. The only express right of a respondent to request an evidentiary hearing appears within the context of subsection (4), which pertains to a request (by either party) to establish an “alternative cost-based pole attachment rate.” As set forth above in Section I, subsection (4) should be deleted in its entirety. Though the right of a respondent to request an evidentiary hearing may already be implied within the rule, it should be express.

DEF raised this specific issue at the September 1, 2021, Rule Development Workshop. Commission staff acknowledges that this was a “good point” and invited “suggested language” to consider in this regard. *See* Workshop Tr. at 11:4-8. As set forth in Exhibit A, DEF proposes additional language for subsection (3), which provides that a response shall: “state whether the respondent requests a Section 120.569 or 120.57, Florida Statutes, evidentiary hearing to resolve the complaint.”

III. THE RULE SHOULD INCLUDE A NEW SUBSECTION ESTABLISHING A 180-DAY RESOLUTION PERIOD FOR POLE ACCESS COMPLAINTS.

Subsection (4) of the proposed rule requires final action on a pole attachment complaint within 360 days after the complaint is filed.

No stakeholder objected to a 360-day resolution period for complaints, except with respect to pole access complaints. *See* Workshop Tr. 14:4-7 (FIT stating, “What we would like to do is encourage a shorter time frame for complaints that involve a denial of access.”); *id.* at 17:9-10 (Crown Castle asserting that “pole access complaints should be considered and final action taken within 180 days”); *id.* 17:19-18:4 (CTIA agreeing with FIT and Crown Castle). DEF recognizes the relative urgency of pole access complaints and supports a shorter time period for resolution of such complaints so long as (a) the period is not unreasonably short and (b) a “pole access

complaint” is limited to a complaint alleging a complete denial of access. To that end, DEF proposes the following as a new subsection (5) to the rule:

With respect to pole access complaints, the Commission will take final action on a complaint at a Commission Conference no later than 180 days after the complaint’s filing date as set forth in subsection (2) of this rule. A pole access complaint is a complaint alleging a complete denial of access and does not include a complaint that a pole owner is imposing unreasonable rates, term, or condition that amount to a denial of access.

(Exhibit A).

The 180-day period set forth above was not only specifically referenced by Crown Castle in its remarks at the September 1, 2021, Rule Development Workshop, but also is the time period set forth in the FCC’s pole access complaint rule. *See* 47 C.F.R. § 1.1414(a). The definition within the second sentence of DEF’s proposed addition comes nearly word-for-word from the FCC order adopting the pole access complaint rule. *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, WC Docket 17-84, 32 FCC Rcd 11128, 11132 at ¶ 9 n.21 (Nov. 29, 2017) (“A ‘pole access complaint’ is a complaint filed by a cable television system or a provider of telecommunications service that alleges a complete denial of access to a utility pole. This term does not encompass a complaint alleging that a utility is imposing unreasonable rates, terms, or conditions that amount to a denial of pole access.”) (internal citations omitted).

CONCLUSION

DEF appreciates the opportunity to provide these comments and respectfully reserves the right to provide additional comments pending its review of comments from other parties. DEF supports Staff's ongoing consideration of comments and concerns from interested stakeholders and would also support additional workshop sessions to discuss any such comments or concerns that warrant further conversation.

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 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 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 response with the Commission within 30 calendar days of the date the complaint was served on that party, unless the Commission extends the deadline pursuant to a party's request. The response shall include all information regarding the allegations in the complaint that the respondent believes the Commission should consider in connection with the complaint, including but not limited to whether the respondent 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.~~
- ~~(4) Except as set forth in subsection (5) below, t~~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.

(5) With respect to pole access complaints, the Commission will take final action on a complaint at a Commission Conference no later than 180 days after the complaint's filing date as set forth in subsection (2) of this rule. A pole access complaint is a complaint alleging a complete denial of access and does not include a complaint that a pole owner is imposing unreasonable rates, term, or condition that amount to a denial of access.