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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 20210137-PU

Proposed adoption of Rule
25-18.010, F.A.C., Pole
Attachment Complaints.

_____ /

PROCEEDINGS: COMMISSION CONFERENCE AGENDA
ITEM NO. 2

COMMISSIONERS
PARTICIPATING: CHAIRMAN ANDREW GILES FAY
COMMISSIONER ART GRAHAM
COMMISSIONER GARY CLARK
COMMISSIONER MIKE LA ROSA
COMMISSIONER GABRIELLA PASSIDOMO

DATE: Tuesday, February 1, 2022

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: DEBRA R. KRICK
Court Reporter and
Notary Public in and for
the State of Florida at Large

PREMIER REPORTING
112 W. 5TH AVENUE
TALLAHASSEE, FLORIDA
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1 P R O C E E D I N G S

2 CHAIRMAN FAY: Commissioners, next we will
3 move on to Item 2, which is a rule that we will
4 have a little more discussion, I think similar to
5 the rule hearing that we had the other day.

6 With that, I wanted to give our folks a minute
7 to set up, but we will have Ms. Cowdery present the
8 item, and then we have got a number of parties who
9 would like to address the Commission. I will allow
10 them to do so, and then this is importantly,
11 Commissioners, I will allow you the opportunity to
12 ask questions of the interested persons that are
13 before us.

14 With that said, you are also inclined to ask
15 for responses from the specific interested parties
16 if your question is targeted to them, so make sure
17 you let us know who your question is being
18 addressed to.

19 With that, I think we've got everybody almost
20 set up.

21 Ms. Cowdery, when you are ready, you can
22 provide a summary of the item.

23 MS. COWDERY: Good morning, Commissioners.

24 Kathryn Cowdery with the Office of General Counsel.

25 Item No. 2 is a rule hearing to address

1 whether the Commission should make any changes to
2 proposed Rule 25-18.010, which is the pole
3 attachment complaint rule.

4 As some background on this item. 2021
5 Legislature granted the Commission the authority to
6 regulate and enforce rates, charges, terms and
7 conditions of pole attachments, and required the
8 Commission to propose procedural rules to
9 administer and implement the authority by January
10 1st, 2022. The Commission proposed the rule on
11 November 4th, 2021. Thus, meeting the requirements
12 of the statute.

13 As allowed under Chapter 120.54, Florida
14 Internet and Television Association and four of its
15 five members filed a joint request for a hearing on
16 the proposed pole attachment complaints rule, and
17 suggested changes to some of the rule language that
18 identifies the information that must be filed with
19 a complaint and a response.

20 In order to address the concerns of the
21 petitioners, and having considered comments
22 received from stakeholders during this rule-making
23 proceeding, staff is recommending that changes be
24 made to the language of the proposed rule that give
25 more detail as to the information that must be

1 filed with the complaint in the response.

2 These recommended changes do not change the
3 intent of the proposed rule language, which is to
4 identify, for the staff and the Commission,
5 information that must be included in a complaint
6 and in a response under Section 366.048, Florida
7 Statutes.

8 Further, staff believes that these recommended
9 changes are consistent with the Commission's
10 authority and the directions given by the
11 Legislature to adopt a procedural rule to
12 administer and implement Section 366.048, Florida
13 Statutes.

14 The purpose of this rule hearing is for the
15 Commission to decide whether to make changes to
16 proposed Rule 25-18.010. Although, this is an
17 agenda item, it is also a hearing on the proposed
18 rule pursuant to 120.54(3)(c)1.

19 At this hearing, affected persons may present
20 evidence and argument on the issues Your Honored
21 consideration under consideration, and ask
22 questions of staff.

23 The following person's are here to address the
24 Commission:

25 Floyd Self, representing petitioners Florida

1 Internet and Television Association, Atlantic
2 Broadband Miami, LLC, Charter Communications, Inc.,
3 Comcast Cable Communications, LLC, and Cox
4 Communications Gulf Coast, LLC.

5 Maria Moncada representing FPL.

6 Jeff Wahlen representing TECO.

7 Stephanie Cuello and Matt Bernier representing
8 Duke Energy.

9 And Jon Moyle representing AT&T. And Tracy
10 Hatch representing AT&T also I see.

11 Staff is available to respond to questions or
12 comments on the rule.

13 CHAIRMAN FAY: Great. Thank you for that
14 summary, Ms. Cowdery.

15 For the interested persons, I will start on
16 the left here with you, Ms. Moncada, and then I
17 will allow each to -- or each interested persons to
18 address the Commission.

19 I will ask that you be mindful of the time
20 since we do have a number of folks here today to
21 speak, and just make sure your comments are related
22 to the rule at issue.

23 With that -- oh, in recognition as interested
24 persons, you are also allowed to ask staff
25 questions at that time. So if you choose to do so,

1 please just let me know, and then we will allow you
2 to have a direct line for those questions.

3 With that, Ms. Moncada, I will allow you to
4 address the Commission.

5 MS. MONCADA: Good morning, Chairman Fay and
6 Commissioners. Thank you. I will be brief.

7 FPL supports the staff recommendation to make
8 the edits to subsections (1)(f) and (4)(b) of the
9 proposed pole attachments complaints rule as is
10 laid out in Attachment A to the staff
11 recommendation.

12 The proposed edits keep intact the statutory
13 intent of Section 366.04(8) of the Florida Statutes
14 regarding the applicability of FCC rules and
15 orders, as well as a party's statutory right to
16 rebut the application by presenting competent,
17 substantial evidence that, quote, "an alternative
18 cost-based pole attachment rate is just and
19 reasonable, and in the public interest."

20 Commissioners, the revised rule language
21 provides more specificity regarding the type of
22 information that the parties must include in their
23 pleadings in order to assist the Commission in
24 carrying out its statutory duty to regulate and
25 resolve pole attachment complaints.

1 I would be remiss if I didn't take just two
2 seconds to thank staff for all of the work that
3 they did in trying to resolve the pending petition,
4 and to develop language that will avoid the need
5 for further proceedings. And for all of these
6 reasons, FPL supports the staff recommendation.

7 Thank you.

8 CHAIRMAN FAY: Great. Thank you.

9 Ms. Cuello, you are recognized.

10 MS. CUELLO: Good morning. Duke Energy
11 understands the proposed rule is consistent with
12 tracking the statute, in particular that the
13 precedential nature of the rules, orders and
14 appellate decisions of the FCC do not bind this
15 commission, and therefore, we do not have any
16 concerns with the rule.

17 And we also appreciate staff being able to
18 answer all the questions we had throughout this
19 process.

20 CHAIRMAN FAY: Okay. You were efficient, Ms.
21 Cuello. Thank you.

22 Next we will move on to TECO, Mr. Wahlen.

23 MR. WAHLEN: Good morning, Commissioners.

24 Jeff Wahlen on behalf of Tampa Electric Company.

25 Tampa Electric generally supports the staff

1 recommendation. We really appreciate all the hard
2 work that the parties and the staff put into the
3 rule. We had a couple of little changes that we
4 might have made, in particular, the word applicable
5 in the rule; but on balance, we think that the rule
6 fairly levels the playing field. It's a procedural
7 rule and it does not require the Commission to
8 follow the FCC rules decisions, and so forth.

9 So we are okay with this. I know that there
10 were some proposed changes filed by one of the
11 parties, AT&T, last night. We haven't had a lot of
12 time to think about them. I hope that as this
13 unfolds, we will have a chance to react to those.

14 We are okay with the rule as proposed, but if
15 we are going to start making some changes, Tampa
16 Electric might want to start making changes, and it
17 could get pretty complicated in a hurry. So at
18 bottom, we are okay with the rule as provided, with
19 the clarification that it does not require the
20 Commission to follow the FCC rules and regulations
21 in all instances; that there is room for
22 alternatives.

23 CHAIRMAN FAY: Great. Thank you.

24 MR. WAHLEN: Thank you.

25 CHAIRMAN FAY: Thank you very much.

1 Next, Mr. Self.

2 MR. SELF: Thank you, Mr. Chairman. Floyd
3 Self and Brooke Lewis of the Berger Singerman Law
4 Firm on behalf of petitioners in this matter who
5 have already been identified.

6 We support the staff recommendation, and if I
7 may, I just have two brief comments.

8 First, I would like to thank the Commission
9 staff for agreeing to work with us, especially the
10 General Counsel, Mr. Hetrick. As we worked on
11 drafting the petition request for the hearing in
12 this matter, it became abundantly clear to me that
13 if we could just sit down and talk about the
14 statute and what it requires with respect to this
15 procedural rule, that we ought to be able to
16 overcome the differences that we had had up to that
17 point in time. And Mr. Hetrick, and Ms. Cibula,
18 and Ms. Cowdery were very generous with their time
19 in affording us the opportunity to sit and talk
20 with them about the statute and what it means. And
21 as a result of that discussion process, you have
22 the amended rule that's before you today.

23 And with respect -- that's the segue to my
24 second point, which is the rule is not perfect. It
25 doesn't have everything that if we lived in

1 isolation and could control things would put in the
2 rule, but nevertheless, the rule does reflect a
3 reasonable and efficient compromise that will
4 enable future pleaders under this statute to be
5 able to plead their cases consistent with the
6 statutory intent. So therefore, we wholeheartedly
7 support the staff recommendation, and recommend
8 that you approve this amended rule.

9 Thank you.

10 CHAIRMAN FAY: Great. Thank you.

11 And next up, Mr. Moyle.

12 MR. MOYLE: Thank you, Mr. Chairman. Thank
13 you, Commissioners, for giving me the opportunity
14 to share some comments and thoughts.

15 For the record, Jon Moyle with the Moyle Law
16 Firm, representing AT&T. And Tracy Hatch with AT&T
17 is with me, and serving as co-counsel in this
18 matter.

19 Let me just spend a minute with some
20 background. I appreciate the staff introduction of
21 the matter. And this is a little different, a
22 little unusual.

23 I have been to a lot of Agenda items, and I
24 have heard people ask questions of the Commission,
25 of staff, and rarely do you get the chance to do

1 this. And in this rule hearing, I think we will
2 have just a few questions for staff at the end. So
3 that's one difference.

4 Another difference, as you have heard the
5 discussion, Mr. Self representing FIT, and FPL,
6 Maria Moncada, were able to have some discussions
7 and come up with an accord with respect to some
8 language. And oftentimes, when you are presented
9 with an accord, or a settlement, your decision is
10 to approve it or not. And there is often language
11 that says if you don't approve it, the deal is off.
12 That's not the case here. This is a rule-making
13 proceeding, and I think the collective objective of
14 the group is to get the rule as best it can be, and
15 in the best shape that it can be.

16 AT&T has some suggestions that we want to talk
17 with you about. We were not part of those
18 discussions, and, you know, today is the hearing.
19 We have met with your legal staff and shared a lot
20 of these concepts with them. And, you know, the
21 suggestion was, come present them to the
22 Commission. So that's what we are doing today, and
23 we will walk, you know, walk through that.

24 TECO's comments, you know, it sounded like
25 they may have a couple of improvements as well.

1 And what we are presenting today, we believe, are
2 improvements to the rule, and are consistent with
3 what staff has said this rule is about, which is to
4 provide additional specificity, additional clarity.

5 So if there are ways to be more precise and be
6 more clear in a draft rule, I think that should be
7 done. And I am fond of the saying that, you know,
8 let's get it right, not fast. And so to the extent
9 that there are provisions that you believe warrant
10 a change, you are here on changes anyway. The
11 first set of changes were done through discussions
12 with two parties. These proposed other set of
13 changes are the result of us looking at the staff
14 recommendation and coming and saying, you know,
15 this is probably a better word here.

16 So I am going to, if I may, Mr. Chairman,
17 spend a few minutes and kind of walk through in
18 detail the recommended changes that AT&T is putting
19 forward. I -- when we did this with staff, it was
20 a little confusing, at least to me anyway, because
21 it was red lines on top of red lines, and we
22 undertook to put together a document that was color
23 coded with respect to the proposed changes that we
24 have. I believe that you have copies of these.
25 We've provided these to staff, your staff, and we

1 have also filed it last night. We also have a
2 stack of copies of what I would like to walk
3 through over there. I have some additional copies.
4 If you all don't have any and want to have a hard
5 copy in front of you as I walk through it, I can
6 either approach you or have somebody pass these
7 out. Whatever your pleasure is.

8 CHAIRMAN FAY: Sure. Thank you, Mr. Moyle.
9 Let me make sure at least the Commissioners have --
10 you do not have a copy. If we can have maybe one
11 of our folks grab that for you, and then make sure
12 everybody else has a copy, correct. Ms. Cowdery,
13 staff has a copy also?

14 Great. With that, everyone has a copy.

15 All right. Mr. Moyle, if I could, I would
16 just ask you to be somewhat succinct in each of
17 these, because it looks like there is six of them
18 that you are presenting to us, and then, of course,
19 the Commission can ask questions or interject. And
20 then at the end of your description, I will allow
21 you to ask questions of staff at that time.

22 MR. MOYLE: Okay. Thank you.

23 So the first change that we suggest is the
24 proposed staff recommendation uses the word if the
25 complaint involves, and also it also, further down,

1 the two words highlighted in green, it says: If
2 the complaint proposes. We think those words are
3 not as precise, not as specific as request; and
4 that, again, this has been described as a rule to
5 help people plead and set forth their case. And in
6 pleadings, you have prayer for relief, where you
7 request what you want the Commission to do. And we
8 think that the use of the word request, as
9 indicated on the document that I handed out, in
10 green, is the better choice, is more specific and
11 consistent with what staff has said is the
12 objective of the rule.

13 The second change is the insertion of the
14 words just and reasonable before rates. That's
15 used in the statute. I think it's important that
16 we be clear, that we be precise.

17 In some discussions leading up to this, I have
18 heard it said, well, everybody knows it has to be
19 just and reasonable rates. It's implicit. Well,
20 if that's the case, then I would respectfully
21 suggest that we insert the words just and
22 reasonable there, as indicated on the document in
23 the yellow.

24 The third suggestion is to insert the word
25 charges where it's shown in the -- this is kind of

1 a gray-ish color. And that's consistent with the
2 use of the word charges just above that. The
3 statute uses the word charges. And by not
4 including it there, in the rule, I think it raises
5 more questions. Why is charges not picked up in a
6 parallel construction as originally set forth? So
7 that's the point on No. 3.

8 No. 4, the staff suggestion, it talks about
9 FCC orders of appellate decisions and rules that
10 are based upon. Based upon, in our view, is loose
11 and not as precise, and not as tight as the phrase
12 required by the FCC.

13 And required by, you could say, well, that's
14 pretty tight, but the Legislature made clear that
15 that should be the case. And I will just reference
16 you that they had said that it would be shall. The
17 Legislature uses the mandatory word shall, and it
18 says that the Commission shall apply the decisions
19 and orders of the Federal Communications Commission
20 and any appellate court decisions reviewing an
21 order of the Federal Communications Commission.

22 So we think that the use of the legislative
23 language was clear. We think shall has meaning,
24 and our suggested change here should be adopted.

25 The next one is with respect to the insertion

1 of the word decisions about the FCC authority.
2 Decisions is a word that is used in the statute.
3 It should be along with orders and appellate
4 decisions and rules. And I think that that, again,
5 is consistent with the statute. It provides
6 additional clarity and specificity and should be
7 put in.

8 And the last one in the gray language relates
9 to stating, in detail, the legal and factual basis
10 for its view that the alternative methodology
11 yields a cost-based rate.

12 And I think at a high level, the best way to
13 explain this requested change is, is that the
14 purpose of pleading is to let the Commission and
15 let the other parties know what is being contended.
16 What's being asserted. What's the case about? And
17 in Florida civil procedure cases, there is a
18 requirement that you plead with specificity, and
19 say here's what we want. Here are the details.
20 Here's why we want it. Here's the law that
21 supports it.

22 General notice pleading has been disfavored,
23 and we think that you should have additional
24 requirements that detail be provided about the
25 legal and factual basis for an alternative

1 complaint.

2 So alternative complaint, there is -- you
3 know, it's pretty wide open. And so to have a rule
4 that says you don't have to set it forth in detail
5 with specificity, we don't believe is the best
6 approach or the best idea.

7 And I think we would also note that above,
8 when it is talking about the FCC-based complaint,
9 it uses the phrase, the complainant must identify
10 the specific applicable FCC orders, rules or
11 appellate decisions.

12 So above, with respect to the FCC, there is a
13 requirement to specifically identify FCC authority,
14 but in this more amorphous approach with respect to
15 the alternative, there is no similar requirement to
16 assert it with specificity. So we think that is a
17 good change that should be considered and adopted
18 by the Commission.

19 So those were the suggested changes that we
20 have. I have walked through them pretty quickly,
21 but I am happy to answer any questions that you may
22 have. And if you do not have questions, then I
23 have a few questions for staff under that portion
24 of the agenda.

25 CHAIRMAN FAY: Great. Thank you.

1 And I know some of the other interested
2 persons may want to respond to some of these, but
3 what I would like to do first is just make sure the
4 Commission doesn't have any specific questions
5 based on Mr. Moyle's information that he submitted,
6 and if not, then allow you to go ahead and ask your
7 questions of staff.

8 Okay. Go ahead.

9 MR. MOYLE: And just so we are clear, the
10 questions don't necessarily have to do with this.
11 They are questions about the rule, but this is a,
12 you know, a rule hearing, and it's a procedural
13 rule, so I have four or five just procedural type
14 questions, if I could.

15 CHAIRMAN FAY: Sure. You are not legally
16 prohibited to do so, but recognizing that there was
17 a workshop and a lot of discussion as to the whole
18 time period that we've gotten up into here, I would
19 ask you just to make sure they are material to
20 proposed rule.

21 MR. MOYLE: Yes. They will be related to the
22 rule that's before you today.

23 CHAIRMAN FAY: Great. Thank you.

24 MR. MOYLE: The first question is, and this is
25 addressed to legal staff probably, but whoever

1 wants to take it, I am not directing it to a
2 particular person, is just confirmation that the
3 rule is procedural in nature. Is, indeed, this
4 rule proceed rule?

5 CHAIRMAN FAY: Ms. Cowdery, you can respond
6 without being recognized. Go ahead.

7 MS. COWDERY: This is a procedural rule. You
8 are correct.

9 MR. MOYLE: Okay. And will a notice of change
10 be filed for the changes that are discussed, any
11 changes that are discussed and made?

12 MS. COWDERY: If the Commission votes to make
13 changes to the proposed rule, we will be filing a
14 notice of change, yes.

15 MR. MOYLE: Okay. And with respect to, you
16 know, the statute sets up that there will be four
17 cases that come before the Commission, and it has a
18 pretty detailed process, and also the ability to
19 set forth alternatives. Will the -- will a
20 litigant have the ability to plead in the
21 alternative, as is typically the case, so that you
22 could plead maybe more than one alternative?

23 MS. COWDERY: This isn't something that we
24 really have discussed or thought about as part of
25 this rule, so I am not sure that I can even answer

1 that. We don't have any prohibition against that.

2 MR. MOYLE: Is it contemplated with respect to
3 the draft rule, when we talk about the FCC rules,
4 orders or appellate decisions, that the Commission
5 and litigants -- I mean, this kind of harkens back
6 to the statute, an incorporation by reference, but
7 would -- is it contemplated that changes to FCC
8 authority that take place, you know, next week, or
9 took place a month ago, would be part of the
10 authority that could be relied upon; or is the view
11 that, no, given how incorporation has to be done
12 with specificity in the APA, that the FCC authority
13 would be that as it existed on the date that the
14 law became effective?

15 MS. COWDERY: This, again, is not something
16 that we have gotten into as part of this rule. The
17 way the statute is written, the Commission shall
18 apply the orders and decisions and appellate
19 decisions of the FCC.

20 MR. MOYLE: And I was just trying to dig in a
21 little bit as to say, okay, does that mean, you
22 know, as it existed on -- prior to? Because
23 incorporation, you know, as to the APA, you have to
24 specifically identify things, and if there are
25 changes, they don't necessarily get picked up.

1 MS. COWDERY: Because sometimes you have got
2 statutes and rules and orders that are applied
3 retroactively, and sometimes you don't. I think
4 the particulars of that would need to be addressed
5 at the hearing and not in the rule.

6 MR. MOYLE: Okay. Mr. Chair, can I have a
7 minute just to check with co-counsel to see if
8 there are any other questions?

9 CHAIRMAN FAY: Sure.

10 MR. MOYLE: No. Thank you. Thank you for the
11 chance to present comments to you and to ask some
12 questions. We appreciate it.

13 CHAIRMAN FAY: Okay. Great. Thank you.

14 And, Ms. Cowdery, just for clarification, if
15 the change is made there, the Commission would
16 refile in the FAR. Would the Commission also put
17 out a notice at that time, its own notice?

18 MS. COWDERY: Yes. Yes, sir.

19 CHAIRMAN FAY: Okay. With that, Ms. Cowdery,
20 if you could maybe -- I know Mr. Moyle presented a
21 lot of specifics, but just in general to some of
22 those comments, could you just speak to if some of
23 the presented changes were something that were
24 discussed either in the workshop or through the
25 rule-making process? And then if not, maybe how we

1 could address them here today?

2 Because I know the Legislature gave us a clear
3 directive to implement these, and based on the
4 language and the statute, some of what we do will
5 be figured out as we go through that process as we
6 actually have those hearings, but I do want to give
7 you just an opportunity to speak to any of these if
8 you would like to.

9 MS. COWDERY: Yes. These particular details
10 in the language, you know, were not discussed at
11 the workshop. However, in responding to them, I
12 can say, you know, staff, as Mr. Moyle pointed out,
13 did meet with AT&T, and we've had an opportunity to
14 consider these changes. And we don't have a
15 problem with changing to adding the word decisions
16 into the rule. It does track the statute. We sort
17 of felt like decisions were orders, but if there --
18 there could be a difference and we follow the
19 statute. That sounds fine to us.

20 CHAIRMAN FAY: Which is No. 5 on Mr. Moyle's
21 comments, correct?

22 MS. COWDERY: It may be.

23 CHAIRMAN FAY: I just want to make sure.

24 MS. COWDERY: Yes. It is. It's No. 5.

25 And then I think his No. 1, with the word

1 requests, we don't have a problem changing it to
2 the word requests. We keep in mind at all times
3 that the Commission will be following the statute,
4 and that is what is going to be guiding the
5 Commission going forward. And that this rule, as
6 Mr. Moyle pointed out, is a procedural rule. It is
7 intended to give the Commission what it needs to go
8 forward with the 120.57 hearing, if that is
9 requested, and continue with the prehearing officer
10 and the orders and possible discovery, and
11 everything like that.

12 As to the remaining -- I guess we will go
13 through inserting the words just and reasonable.
14 You know, yes, that term -- that phrase is used in
15 the statute, and it is used in the context of the
16 Commission shall set just and reasonable pole
17 attachment complaint -- or pole attachment rates.
18 It is the Commission that sets just and reasonable.
19 And generally a petitioner files and asks for
20 rates, and the Commission determines if they are
21 just and reasonable. So that's why we did not
22 think it was the right thing to do to put in just
23 and reasonable. That's for the Commission to
24 determine.

25 Required by, that's in item 4.

1 CHAIRMAN FAY: In no. 4, yeah.

2 MS. COWDERY: Yeah, item 4. That's sort of
3 the same thing. The Commission, under the statute,
4 shall apply FCC orders, et cetera, unless the
5 alternative cost-based rates are supported by
6 competent, substantial evidence, et cetera.

7 But the way that the rule is written, again,
8 we are talking about what is being supplied to the
9 Commission. And we have no indication, we don't
10 know that the FCC has particular orders or rates
11 for a particular case that it requires, that the
12 FCC rules or orders are requiring. So we have a
13 pretty strong feeling that that language should not
14 be in the rule.

15 CHAIRMAN FAY: And then 3 and 6 would be the
16 only two left, Ms. Cowdery, if you would like to
17 speak on them. Charges --

18 MS. COWDERY: Yeah, charges. In fact, what
19 we've written in the rule does follow the statute.
20 The statute, at the first part of it, says that the
21 Commission shall set just and reasonable, you know,
22 or hear complaints involving -- or concerning rates
23 and charges, et cetera. But then when you get to
24 the next part of the sentence, when it talks about
25 the -- go to the statute here.

1 In (8)(e) -- (8)(e), the language says that
2 after the -- when taking action in filing such
3 complaints, the Commission shall establish just and
4 reasonable cost-based rates, terms and conditions.
5 And that is the phrase that the statute uses, and
6 that is why we used it in the second part of our
7 rule. And when you go to the FCC itself, and what
8 it's going to be certified on, it also uses rates,
9 terms and charges.

10 If there is a discussion that needs to be
11 made, or an issue that's made at a hearing because
12 the first part of the sentence talks about setting
13 charges -- or the first part of the statute talks
14 about setting charges and the second part doesn't,
15 then, if in fact, that becomes an issue, that can
16 be an issue in the hearing. We are going to follow
17 the statute in our language.

18 CHAIRMAN FAY: Great. And I think the last
19 would just be 6, which is the specific methodology.

20 MS. COWDERY: Yeah. We also would not
21 recommend that this language be adopted as sort of
22 going outside what the statute -- again, the
23 statutory language.

24 There is nothing in the statutory language
25 that talks about identifying an alternative rate

1 methodology, and having any kind of requirement in
2 the statute that the methodology yield a cost-based
3 rate.

4 What the statute addresses is the rates. You
5 have got to have competent, substantial evidence
6 that will support your alternative cost-based rate.
7 It has to be just and reasonable. There is nothing
8 about the methodology.

9 So in that respect, we think that this
10 language would not add clarity, but it, in fact, is
11 going beyond what the statute actually says and
12 could cause vagueness, could cause ambiguity and
13 could actually be something that could subject the
14 Commission to a rule challenge. So we don't agree
15 with that language.

16 Let me make sure I have addressed all their --
17 I think that is it.

18 And, you know, just sort of in addition to
19 that, asking to explain the legal basis for the
20 alternative cost-based rate, we can't really see
21 what that would be, because the statute gives a
22 party the right to ask for an alternative
23 cost-based rate. I don't know what other legal
24 basis you would be talking about.

25 And the statute, again, says that the

1 alternative cost-based rate must be established by
2 competent, substantial evidence. And during the
3 course of the proceeding, that's going to come out
4 at hearing, and that's what the Commission is going
5 to base its decision on, is what is at hearing.
6 They are not going to be basing their decision on
7 what is in the pleading in the first plays.

8 So I think that sums our remarks.

9 CHAIRMAN FAY: Great. Thank you, Ms. Cowdery.

10 And thank you, staff, just for all your work
11 on this. I know it's a long process, and sometimes
12 when one interested person weights in and changes
13 are made, then a new interested person comes in and
14 they have their changes, and so it can be somewhat
15 exhausting to try to get these rules completed.
16 But I think making sure the Commission has all the
17 information for that decision is the right thing to
18 do, so I really do appreciate all the work you have
19 put into this.

20 Commissioners, I know that some the other
21 interested persons who support the recommended
22 language as presented forward by staff might want
23 to weigh into some of the proposed changes by Mr.
24 Moyle, but I just first want to make sure, as a
25 commission, we didn't feel comfortable with the

1 recommendation that's put forward by staff, and if
2 we did, then the Commission could choose to weigh
3 in and vote on that. If not, then we could have
4 some discussion about the proposed comments and
5 allow staff to digest those and understand them
6 fully, and then come back to us at a later date.

7 So with that, I will allow Commissioners to
8 weigh in.

9 Commissioner Clark.

10 COMMISSIONER CLARK: Thank us, Mr. Chairman.

11 A couple of comments, observations, the
12 previous Chairman in his wisdom sent this group
13 back to do some work on this during our workshop,
14 and I think the results that we see that came out
15 of that were very productive.

16 The ultimate goal here is to develop the best
17 rule possible. It's not about a race. We are not
18 trying to get to the finish line tomorrow. We met
19 our statutory deadline when we proposed the rule by
20 January 1st.

21 Mr. Chairman, I have looked at the changes and
22 the proposed changes. I don't have issues. I
23 understand staff's point. I don't disagree with
24 you.

25 There are a lot of legal ramifications here to

1 the suggested language that I can't necessarily
2 understand right now. I think I need more time
3 personally to be able to understand what the
4 implications of the proposed changes are.

5 I would say, if I had to do anything, I would
6 scold AT&T a little bit. I think you guys laid out
7 a little too long. If you had been at the table, I
8 think maybe today we would have already been at a
9 point where we could make a decision.

10 With that said, I would acknowledge that when
11 it comes to the rule, you are probably the most
12 impacted, not only as a company that is going to
13 potentially be on the negative side, but the
14 positive side as well. You have attachments and
15 you are an attachee in both situations, so there is
16 probably no one more affected here than AT&T.

17 And with that said, Mr. Chairman, I would go
18 back to my underlying principle. I think it's
19 important that we get the rule right. I think that
20 there is -- my understanding, Ms. Cowdery, there --
21 we have no other statutory deadlines in terms of
22 getting a final rule finished and proposed, and if
23 we think that there is any hope whatsoever that we
24 could reach some compromise that works for everyone
25 in this case, Mr. Chairman, I would say that we

1 give them a little bit more time to work on it.

2 That's one man's opinion.

3 CHAIRMAN FAY: Great. Thank you, Commissioner
4 Clark.

5 And just to clarify, Ms. Cowdery, we've met
6 the statutory requirements as of the proposed
7 language, and there is no additional requirements?

8 MS. COWDERY: Yes, that is correct.

9 CHAIRMAN FAY: Great.

10 With that, Commissioners, I am happy to take
11 any other comments. Otherwise, I would allow the
12 interested persons to address some of what's in
13 front of us here, and I can start with you, Ms.
14 Moncada. And then, of course, as the rule comes
15 back to us, there is time in between all of that
16 discussion.

17 Just before your comments, Ms. Cowdery, just
18 to be clear, we would allow further discussion on
19 the rule and it would come back under this 120.54
20 process for to the Commission make a final decision
21 on the language. Once that's made, the language is
22 then published. There is a time period while
23 that's finalized and becomes effective.

24 I know there is also the possibility of future
25 litigation, or future challenges in addition to

1 that. Would we -- once that language has become
2 effective, it's essentially past the Commission,
3 and whatever other legal procedures are presented
4 then would be outside of 120.54, correct?

5 MS. COWDERY: Yes. What we have is once we,
6 the Commission decides that it wants, assuming it
7 wants to make changes to the rule, you know, at
8 whatever time period it does that, then we file the
9 notice of change with the FAR. And there is a
10 21-day time period where, if somebody believes that
11 there is an invalid exercise of delegated
12 legislative authority, they can, you know,
13 challenge the proposed rule at DOAH. It would be
14 outside of the Commission at that point. And, you
15 know, otherwise anytime we've got an existing rule,
16 anybody can challenge an existing rule at any point
17 in time.

18 CHAIRMAN FAY: Okay. Great. Thank you.

19 And I am with Commissioner Clark. I don't
20 love that this has come in sort of late, knowing
21 that there has been a long process up to this point
22 with a number of interested parties engaged in
23 that. I am also not a big Perry Mason fan, or
24 anything, so I think, you know, the earlier these
25 things can be presented to the Commission probably

1 the better. But with that said, I would like to
2 allow the other interested persons comment at least
3 today, and then obviously they can provide
4 additional information to staff before this is
5 brought back to us with that recommendation.

6 So with that, Ms. Moncada, and if you could
7 try to address specifically some of the comments
8 that are made, and not necessarily holistically the
9 changes of the rules that may now come to fruition
10 now that we have discussed other changes.

11 MS. MONCADA: I will he remain focused on the
12 items have been spoken about today.

13 CHAIRMAN FAY: Thank you.

14 MS. MONCADA: In particular, Items 1 through 5
15 that were proposed by AT&T, I completely -- FPL
16 completely agrees with staff, as we do on No. 6. I
17 just wanted to add something additional to what Ms.
18 Cowdery said on item No. 6.

19 Item No. 6 says that if there is a party who
20 wants to propose a rate methodology that differs
21 from what exists at the FCC, AT&T's request is that
22 that party specifically plead the factual and legal
23 basis for the alternative approach.

24 The statute does not require any legal basis
25 for the alternative approach. And in fact, if we

1 look at the history of how we got here, the only
2 law, if there is any, is at the FCC. So there is
3 no alternative law. And the statute specifically
4 says -- and this is what I quoted in my brief
5 comments -- that the party who wants the
6 alternative method establishes by competent and
7 substantial evidence pursuant to proceedings
8 conducted pursuant to 120.569 and 120.57, that an
9 alternative cost-based pole attachment rate is just
10 and reasonable and in the public interest.

11 So, Mr. Chairman and Commissioners, it will
12 not be based on law. It will be a policy decision
13 that you all make for the first time as a result of
14 a hearing conducted pursuant to Chapter 120. So
15 any addition of a requirement that there be a legal
16 basis for the alternative method is incorrect and
17 contrary to the statute.

18 CHAIRMAN FAY: Great. Thank you.

19 MS. MONCADA: Thank you.

20 CHAIRMAN FAY: Ms. Cuello.

21 MS. CUELLO: Duke Energy would also agree with
22 staff's analysis regarding the proposed changes No.
23 1 through 6. And we would also echo FPL's concern
24 with the inclusion of facts in law No. 6.

25 Thank you.

1 CHAIRMAN FAY: Great. Thank you.

2 Mr. Wahlen. And if you could address these,
3 and then I know you have an additional comment, you
4 are welcome to present that at this time, or later
5 to staff.

6 MR. WAHLEN: Great. Thank you.

7 I guess, first of all, we got this this
8 morning when we walked in, and I really haven't had
9 time to talk with my client about it. I can tell
10 you it sounds to me like the changes proposed in 1
11 and 5, which staff are okay with, everybody else
12 seems to be fine.

13 I do share staff's serious concern about
14 adding No. 4. I think that goes in the wrong
15 direction. It looks to me like it's an attempt to
16 put your thumb on the scale in favor of FCC
17 decisions when the statute clearly says that the
18 Commission should not be bound by them. So we
19 would object to No. 4.

20 And we tend to agree with staff. I feel like
21 we are kind of changing the tires while the car is
22 going down the road here a little bit. We were
23 prepared to come in here this morning and say we
24 liked the staff recommendation. We thought it was
25 a fair balance, and it's a reasonable rule, and it

1 should be adopted, and are still in that posture if
2 the Commission wants to. But if the Commission
3 wants to start making changes, it might make sense
4 to tap the brakes a little bit and make sure I have
5 time to talk with my client anyway about some of
6 these. But we are okay with the rule as proposed
7 in the staff recommendation if the Commission would
8 like to go forward today with that.

9 CHAIRMAN FAY: Okay. Great. Thank you.

10 COMMISSIONER CLARK: Mr. Chairman, was Mr.
11 Wahlen using some Jon Moyle illustrations there of
12 tapping brakes and things?

13 MR. WAHLEN: Well, I was trying to bring Perry
14 Mason in, but I was too young for Perry Mason.

15 CHAIRMAN FAY: I will not respond to that on
16 the record, Mr. Wahlen.

17 All right. With that, Mr. Self, did you have
18 anything you would like to add?

19 MR. SELF: Thank you, Mr. Chairman.

20 I think my clients would tell you that they
21 like all of the FPL -- I am sorry, all of the AT&T
22 proposed changes, but I think it's also appropriate
23 and necessary to say that, you know, the process
24 that we've followed to get to this point we are
25 certainly very vested in the rule.

1 As I understand Ms. Cowdery's comments about
2 the six specific points, there are at least a
3 couple of changes that the staff is okay with, and
4 it sounds like TECO, FPL and Duke are at least
5 potentially okay with those couple of them, I have
6 call them word substitution changes.

7 Like I said, we like the rest of the changes
8 that are proposed by the other parties, but we are
9 also not interested in blowing up an agreement on
10 the rule.

11 CHAIRMAN FAY: Sure. I appreciate the
12 feedback.

13 I think there are some of these that,
14 arguably, will be changes that make sense to be
15 made based on what we've heard from everybody, and
16 others won't be.

17 But just for clarity, and I -- Ms. Cowdery,
18 either you or Mary Anne maybe want to address this,
19 but just procedurally allow that time for staff and
20 these interested persons to discuss this and bring
21 it back. Would we set an actual future date, or we
22 would allow that time period and then come forward
23 and set that future date at a later time period?

24 MR. HETRICK: Mr. Chairman.

25 CHAIRMAN FAY: Yeah, Mr. Hetrick.

1 MR. HETRICK: Could we have a couple of
2 minutes, please, to discuss this?

3 CHAIRMAN FAY: Sure. Why don't we take a
4 10-minute recess and just let staff and legal
5 discuss it.

6 MR. HETRICK: Thank you.

7 (Brief recess.)

8 CHAIRMAN FAY: All right. And we are one
9 Commissioner down. We'll give him a second to walk
10 very slowly back into the room and then we'll have
11 an explanation from staff. I just don't want to
12 exclude him on this.

13 Welcome, Commissioner Clark.

14 All right. Ms. Cowdery or Mary Anne, whoever
15 you choose.

16 MS. HELTON: Can I see if my boss wants to
17 address it?

18 CHAIRMAN FAY: Your boss can always address
19 it.

20 MR. HETRICK: I am sorry, I didn't hear the
21 question, Mr. Chair.

22 CHAIRMAN FAY: The question was, essentially,
23 as we move forward with the rule, would we set a
24 timeline for the next -- for it to come next in
25 that rule process, in the 120.54(3)(c)1, or do we

1 wait and set a date later?

2 MR. HETRICK: Well, there are a couple of
3 things at play here, and I am going to let Ms.
4 Cowdery discuss that, but we do have a petition
5 pending at DOAH, and I am not exactly sure,
6 depending on what the Commission does here today,
7 whether or not we are going to move forward with
8 that petition.

9 But secondly, I think what we would be doing
10 if we move forward with another, it wouldn't be a
11 workshop. It would be a full blown hearing. So
12 that's the posture that we are in, but I will let
13 Ms. Cowdery discuss that, and then we a suggestion.

14 CHAIRMAN FAY: Okay. Great.

15 Go ahead, Ms. Cowdery, you are recognized.

16 MS. COWDERY: Okay. If we want to move on,
17 what we probably want to do is meet with the
18 parties and see if we have fruitful discussions,
19 and then based on that, we can see what agenda we
20 would want to set it to if, it would be, you know,
21 March or April, rather than trying to set it for a
22 particular agenda, if that's the route that the
23 Commission wants to go. We would like to have the
24 ability to make that determination based on what
25 happens with the parties.

1 And what we would do is we would be also
2 filing another notice of public hearing. It would
3 be the same thing like this. You would have
4 another agenda item rule hearing, is what I would
5 contemplate.

6 CHAIRMAN FAY: Okay. Great.

7 And I tend to agree with Commissioner Clark.
8 I think we want to get this right, and some of the
9 specificity that's applied seems to make sense.
10 Others might be debated, and so you might hear from
11 interested parties as we do that going forward.

12 Is there a recommendation that you would also
13 like to provide, Mr. Hetrick?

14 MR. HETRICK: Yes. We have, during the break,
15 at least talked with Commissioner Clark, and we are
16 at somewhat of an odd posture here. But I think
17 that going back to what Ms. Cowdery said about Mr.
18 Moyle's proposals. His proposals we have been
19 aware for some time, and staff has looked at those.
20 And I think the parties, most of the parties have
21 had them for at least a little bit, since he filed
22 them yesterday, enough to be able to react to them.

23 But from our standpoint, I want to emphasize
24 that the backdrop that we look at any kind of rule
25 language is against what we can defend at DOAH, and

1 we look at it against the bases that a rule can be
2 challenged, which is described under Section
3 120.52(8) of the Florida Statutes.

4 So the things that Mr. Moyle has suggested
5 kind of fall into two categories. The two issues
6 that we -- that he has raised dealing with the word
7 requests and adding the word decisions, I think Ms.
8 Cowdery said we were absolutely clearly fine with.
9 They don't change the tone. They are not violative
10 of the statute. They comport with the statute.

11 The other four items that Mr. Moyle raised,
12 we've looked at in-depth, and we feel pretty
13 strongly that they are vague and arbitrary, and
14 enlarging upon the statute in various ways,
15 specific ways that we can go into and describe.
16 But -- and I think all the parties, FPL kind of
17 echoed that.

18 So it -- those other issues, when we break --
19 to try to talk about that, those -- that language
20 will be probably a nonstarter for a lot of the
21 parties, and so we have to come up with alternative
22 language. And I don't think, based on what we've
23 seen and how much we've put into this, that we are
24 going to get anywhere. I think right now, we have
25 general consensus among the parties. And I think

1 with Mr. Moyle, we would certainly have consensus
2 over two of his six items.

3 And we would like to see, you know, the
4 Commission proceed today with a vote that would
5 accept the rule as we've proposed with two of Mr.
6 Moyle's changes, and perhaps hear from the parties
7 as to what they think about that proposal.

8 The other thing I would like to also
9 specifically have you ask, Mr. Chair, of Mr. Self,
10 is that he is actually the petitioner in his case,
11 and what his reaction would be kind of at the
12 outset to what I have laid out here.

13 And by the way, I would add, I think
14 Commissioner Clark has a pretty good understanding
15 of this language as well.

16 CHAIRMAN FAY: Great. Yeah. Thank you.

17 And, Mr. Self, I will allow you to address Mr.
18 Hetrick's question. But with that said, just as I
19 see it moving forward, within the 120.54 process,
20 we would move forward appropriately to allow the
21 time to have Ms. Cowdery come back -- staff to come
22 back for us to make a decision.

23 I understand the position of wanting to make a
24 decision today, but I haven't heard that from any
25 of my colleagues, and so I also want Tom Brady to

1 play another year in Tampa. I don't think it's
2 likely to happen, and so I think we have to make a
3 decision then how we would proceed based on that.

4 And so I think we don't need to set that
5 timeline. I think the petition that has been filed
6 by Mr. Self is one that is pending. If you want to
7 address that, you are welcome to do so, because I
8 know some of the goal was to resolve some of that,
9 and that probably won't change knowing that the
10 Commission will come back and have some
11 conversations about some of these other words, but
12 I would allow you to represent that for your client
13 however you would like to.

14 MR. SELF: Sure. Thank you, Mr. Chairman.

15 A couple of things. First, if you proceeded
16 to move forward on the staff recommendation, as
17 modified by Mr. Hetrick, to include the two sets of
18 changes that everybody, I think, agrees with the
19 word swaps, as I call them, if you proceeded to
20 move forward with that such that the staff would
21 then file the amended rule in the FAR, given the
22 fact that that would then be the proposed rule out
23 for adoption, we would then withdraw our DOAH
24 petition which would end that proceeding.

25 We right now have a stay that's in effect

1 through the end of the month. I am assuming -- I
2 don't know that anybody here can predict with any
3 certainty, but I am assuming that if you punted
4 this matter for further discussion, hearing,
5 whatever, I am assuming DOAH would agree to
6 continue to stay that proceeding for another month
7 or 60 days, whatever it is that's necessary.

8 CHAIRMAN FAY: Okay. Great. Thank you.

9 Then with that, Ms. Cowdery, unless my
10 colleagues have anything to add? Nope. With that,
11 do we need to formally motion to move that forward
12 to give you the time, or is it just that we don't
13 vote on the language as proposed today and allow
14 you to do that?

15 MS. COWDERY: I don't think you need to
16 formally vote on it. We will just proceed, and we
17 will be issuing another notice of hearing once we
18 determine, you know, what that date would be, what
19 agenda that next rule hearing would be on.

20 CHAIRMAN FAY: Okay. Great. Thank you.

21 With that, we will -- that concludes Item 2.

22 I know we have another hearing coming up after
23 us, so we will -- Commissioner Graham will be
24 chairing that hearing. We will allow the parties
25 to come back here for 11:10 to start with that

1 hearing.

2 With that, this meeting is adjourned. Thank
3 you.

4 (Agenda item concluded.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, DEBRA KRICK, Court Reporter, do hereby
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DATED this 16th day of February, 2022.



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