BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Florida Power & Light Company.	DOCKET NO. 20210015-EI DATED: August 2, 2021

FIT OPPOSITION TO FPL MOTION FOR PROTECTIVE ORDER FROM FIT NOTICE OF REMOTE DEPOSITION DUCES TECUM

Florida Internet and Television Association, Inc. ("FIT"), by and through undersigned counsel, respectfully requests that the Florida Public Service Commission ("the Commission") deny the Motion for Protective Order ("Motion") quashing FIT's Notice of Remote Deposition Duces Tecum ("the Notice"), filed by Florida Power & Light Company ("FPL") on July 30, 2021 in this proceeding.

INTRODUCTION

FPL's Motion – filed eleven days after FPL was served but a mere three business days before the deposition will take place – seeks only to obstruct FIT's efforts to obtain materials relevant to this case. Although FIT served the Notice on July 19, 2021, FPL waited until late in the day on Friday July 30, 2021 to respond. FPL sat on its Motion for *eleven days*, filing it on a Friday evening, knowing that the following business day – August 2, 2021 – nearly every party in this case would spend all day in a pre-hearing conference. FPL's Motion is not a timely or well-founded objection to the deposition.

The Florida Rules of Civil Procedure allow for a broad scope of discovery, and FIT's deposition is reasonably calculated to lead to the discovery of admissible evidence. As detailed below, the information FIT seeks to obtain through the proposed corporate designee deposition is relevant to this proceeding.

Additionally, FPL is mistaken in its assertion that FPL's pole attachment rates will be set pursuant to a different and future proceeding before this Commission, pursuant to SB 1944, and

are therefore irrelevant to this proceeding. Any such future proceeding under SB 1944 will (a) have no effect on 2020, 2021, and, more than likely, 2022 pole attachment rates, and (b) address only generally-applicable rules regarding how to calculate rates, not FPL's pole attachment rates. Therefore, this proceeding is an appropriate vehicle to explore whether FPL's estimated revenues for pole attachment rates rely on a proper application of the FCC's pole attachment rate formula.

Moreover, regardless of when a future pole attachment case occurs under the new law, FPL has put at issue its revenues for 2022, 2023, 2024, and 2025 in seeking a general increase in this case. Regardless how future pole attachment revenues are set and by whom, those future pole attachment revenues are still at issue here and just as relevant to this docket as are revenues from residential customers, commercial customers like FIT's members, and any other customers of FPL. All of these revenues go into the ultimate calculation as to whether FPL has earned its return for those future years. It is not possible to carve out some of the revenues, declare them irrelevant, and still be able to decide the larger revenue and rate of return questions that must be decided in a general rate case.

Given the relevance of the information sought at the deposition, and FPL's eleventh hour objection, the Prehearing Officer should deny FPL's motion and permit the deposition to take place as planned.

ARGUMENT

I. THE SCOPE OF DISCOVERY IS BROAD

Fla. R. Civ. P. 1.280 provides for a broad range of discovery, allowing the discovery of any document relevant to the subject matter of the pending action. "It is not ground for objection that the information sought will be inadmissible at the trial *if the information sought appears reasonably calculated to lead to the discovery of admissible evidence*." Fla. R. Civ. P. 1.280(b)(1) (emphasis added). Because the permissible scope of discovery is so broad, a "trial court is given

wide discretion in dealing with discovery matters." *Nucci v. Target Corp.*, 162 So. 3d 146, 152 (Fla. Dist. Ct. App. 2015) (quoting *Alvarez v. Cooper Tire & Rubber Co.*, 75 So. 3d 789, 793 (Fla. 4th DCA 2011)). Here, as discussed more below, there is no question that FIT's topics for the corporate designee deposition are reasonably calculated to lead to the discovery of admissible evidence. FPL has filed this general rate case, and, as a result, all of FPL's sources of revenue are relevant.

By requesting to quash the deposition, FPL is asking this Commission to exclude relevant evidence in advance. Its relevance objections are premature at the discovery stage. Discovery is about the investigation and discovery of facts. FPL may object to the relevance of any information FIT seeks to introduce at the hearing.

Moreover, the rules provide that a Protective Order may be granted only "for good cause shown" or "to protect a party or person from annoyance, embarrassment, oppression, or undue burden." Fla. R. Civ. P. 1.280(c); *see also Henkel v. Jasin*, 425 So. 2d 1219, 1219 (Fla. Dist. Ct. App. 1983) (denying Petitioner's motion for protective order despite noting "that several items requested [ ] appear overbroad" and also because Petitioner "did not object as to specific items and failed to show that good cause was present to limit or prohibit the discovery due to 'annoyance, embarrassment, oppression, or undue burden or expense' as required by Florida Rule of Civil Procedure 1.280(c)"). FPL has demonstrated none of these. It is hard to imagine how, in a proceeding with a record as expansive as this one, FPL could find unduly burdensome FIT's request to produce a witness who can address how FPL calculated its pole attachment revenue projections and related pole attachment rate issues.

FPL's contention seems to be that "a deposition about pole attachment rates on the eve of trial is unduly burdensome."[1] FPL provides no support for that assertion. Instead, the data FIT seeks is all within FPL's possession. It is all fundamental to its property and investment, and as a result, is within FPL's control. Moreover, despite FPL's characterization, FPL and some of FIT's members have been communicating regarding FPL's pole attachment rental rates for over one year. FIT's seeking to depose a witness regarding pole attachment rate issues cannot be a surprise to FPL. Instead, FPL's intent with its last minute motion is transparent – to obstruct FIT's inquiry into the reasonableness of the pole attachment rates FPL seeks to impose on FIT members.

II. THE INFORMATION SOUGHT IS RELEVANT

FPL is also incorrect that the pole rate and revenue-related discovery is irrelevant. As FIT has explained, FPL's revenues from pole attachment rentals is included in FPL's affirmative case. It is squarely at issue, as are component parts of the pole attachment rental rate formula, including the appropriate depreciation rate and treatment of accumulated deferred income taxes.

FPL has projected revenues in this case from pole attachment rates that show a 38% increase over just two years.[2] FIT believes those revenue numbers are overstated due to FPL's imposition of unlawfully high pole attachment rental rates. FIT's deposition aims to determine the propriety of those attachment rates by first ascertaining the inputs that must be used to calculate those rates pursuant to the FCC's pole attachment rate formula. FIT also seeks to question how FPL calculated its projections.

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[1] Motion at 3.

[2] FPL has projected $29,381,000 in revenues from pole attachment rentals in 2020, but it projects $36,538,000 in revenues from pole attachment rentals for test year 2022. (MFR, 2022 test year, Vol. 3, Section C, Sched C-4 pp.2-3, 14 (combining 2020 pre-merger revenues for FPL and Gulf).) That is a 24.36% increase. FPL projects $39,519,000 in revenues from pole attachment rentals in test year 2023, which is an additional 8.16% increase over 2022 and a 34.5% increase over 2020 revenues. (MFR, 2023 subsequent year adjustment, Vol. 3, Section C, Sched. C-4 pp.2.)

As the Order granting FIT's intervention recognized, FPL opposed FIT's intervention, specifically on the issue of pole attachment rates. (Order No. PSC-2021-0255-PCO-EI (July 13, 2021).) But as the Order also recognized, FPL "recognizes that elements within the current case will have some bearing on future pole attachment rates, inasmuch as certain cost inputs borne by FPL's electric customers inform the pole attachment rate setting process." (Order at 2 (quoting FPL Response to Petition to Intervene at 4).) The Order rejected FPL's arguments and found that pole attachment rates are grounds for intervention in this case. Essentially, FPL's current Motion is seeking to reverse the Order by asking the Prehearing Officer to rule that discovery on the issue is not relevant.

FPL also now argues that its projections of pole attachment revenues are not based on an application of the FCC's pole rental rate formula, but rather, are based on the "trend" in pole attachment revenues. (Motion at 3, 5.) That argument does not support FPL's Motion. Indeed, it emphasizes the need for the deposition. Pole attachment rental rates and the resulting revenues are a matter of objective criteria applied to a formula. FPL does not get to simply impose rate increases. Indeed, in FIT's members' experience, the size of the rate increases imposed by FPL are atypical and suggest the rates exceed the lawful maximum. As noted above, FPL has projected increases of approximately 35% over just 3 years. Those significant increases beg the question of whether the "trend" they were based on was accurate. In other words, were FPL's pole rental rates in 2019 through 2021 lawful or were they too high under the FCC's well-established formula and rules.

Finally, FPL now argues that even if FIT is correct that FPL has significantly overestimated its projected revenues for pole attachments, it essentially does not matter. However, FPL's "commitments" do not resolve the issue. FPL asserts:

> FPL commits to not amending the revenue requirement request or to decreasing the amount of the credit from pole attachment revenue FPL forecasted in its Minimum Filing Requirements in this proceeding. Alternatively, if FIT is wrong in its contention that the pole attachment revenue projections are too high . . . then FPL's pole attachment revenue data is correct and there will be no basis for any change in the data underlying the Petition.

(Motion at 5.) FPL's "commitment," however, begs the question of whether "FIT is wrong." To determine whether FIT is right or wrong about FPL's pole rates and the resulting revenues, FIT must be permitted to undertake discovery of the relevant information to calculate the pole rates. FIT also should be permitted to depose the FPL corporate designee on the alleged "trends" and the basis for the projections.

The fact remains that even if FPL's projections in this proceeding were not *based* on the FCC's rate formula, but on "trends in total annual pole attachment revenues,"[3] *the FCC's pole attachment rate formula still applies*, and the purpose of FIT's intervention is to seek to have it applied correctly. The FCC's pole attachment rate formula is cost-based, and FIT's deposition topics are specifically calculated to obtain the information and inputs needed to discern whether or not FPL's pole rental revenue projections – predicting a 38% pole attachment revenue increase over just two years – can result from a correct application of the FCC's pole attachment rate formula. FIT believes they cannot.

Ultimately, FPL has placed all of its expenses and revenues at issue in this general rate case. FPL cannot now argue that millions of dollars per year in revenue – potentially as much as $10 million per year – do not matter. FPL has put at issues its revenues for 2022, 2023, 2024, and 2025 in seeking a general increase in this case. Regardless how future pole attachment revenues are set and by whom, those future pole attachment revenues are still at issue here and just as

[3] Motion at 3, 5.

relevant to this docket as are revenues from residential customers, commercial customers like FIT's members, and any other customers of FPL. All of these revenues go into the ultimate calculation as to whether FPL has earned its return for those future years. It is not possible to carve out some of the revenues, declare them irrelevant, and still be able to decide the larger revenue and rate of return questions that must be decided in a general rate case.

III. FPL'S CURRENT AND NEAR-FUTURE POLE RATES ARE NOT THE GROUNDS FOR COMMISSION RULEMAKINGS UNDER SB 1944

FPL argues that its pole attachment rates will be at issue in the forthcoming Commission proceedings mandated by SB 1944, and therefore, cannot be considered in this proceeding. But that argument evinces a misunderstanding of SB 1944 and the effect it will have on FPL's pole attachment rates. As FIT explained in its prehearing statement, the enactment of SB 1944 does not affect this proceeding nor change the applicability of the FCC's rate regulations. FIT Prehearing Notice at 5-6.

First, SB 1944 is intended to provide this Commission with authority to regulate attachments to certain poles and potentially to certify to the FCC under 47 U.S.C. § 224(c) that it has taken over regulation of pole attachments. But SB 1944 gives the Commission until January 1, 2022 to propose rules to administer the new provisions under SB 1944. Fla. Stat. § 366.04(g). That means this Commission is only obligated to *begin* the rulemaking to take over regulation of pole attachment rates from the FCC by January 1, 2022. Accordingly, the Commission will not have in place rules that might satisfy the requirements under 47 U.S.C. § 224(c) until at least some time in 2022 and potentially 2023. Until this Commission satisfies the requirements to make the necessary certifications to the FCC, the FCC's rules will continue to govern FPL's pole attachment rates for, at least, the years 2020, 2021, and realistically, 2022, which are at issue in this proceeding because they are intertwined with FPL's rate case. That means FPL's 2020, 2021, and 2022 pole

attachment rates must be based on the FCC's pole attachment rate formula, and *not* on decisions and metrics to be established by this Commission in future proceedings, as FPL incorrectly claims.

Second, whenever this Commission does undertake a proceeding pursuant to SB 1944, it will be adopting rules of general applicability necessary to allow it to certify it has taken jurisdiction under 47 U.S.C. § 224(c). The Commission will not be adjudicating the specific propriety of FPL's pole attachment rates, as FPL argues. FPL itself states that while attaching pole owners can intervene in the first four formal administrative proceedings conducted to determine pole attachment rates under section 3(f) of SB 1944, "[a]fter the fourth such formal administrative proceeding is concluded by final order, parties to subsequent pole attachment rate proceedings are limited to *the specific pole owner and pole attaching entities involved in and directly affected by the specific pole attachment rate*." Motion at 6, n.4 (emphasis added). By drawing this distinction, FPL acknowledges that the first four administrative rulemakings authorized under SB 1944 – the same rulemakings it claims are the appropriate venue for FIT to challenge FPL's pole attachment rates – will not actually address the specific pole attachment rates of a particular company, but rather, generally applicable rules, presumably establishing the formula to be used and other related matters of general applicability.[4]

For the same reason, FPL's argument that "[l]itigating any aspect of FPL's pole attachment rates in this proceeding arguably violates the provisions of SB1944 which requires (sic) that pole owners and attaching entities have the opportunity to participate in the Commission's first four pole attachment rate proceedings following the enactment of SB1944" is equally unavailing.[5]

[4] SB 1944 explicitly provides that when the Commission hears and resolves pole attachment rate complaints, it "***shall apply*** the decisions and orders of the Federal Communications Commission and any appellate court decisions reviewing an order of the [FCC] regarding pole attachment rates. . . ." (Fla. Stat. § 366.04(d) (emphasis added)).

[5] Motion at 8, n.5.

2020-2022 rates will be established before those proceedings take place, and those proceedings will not address FPL's rates specifically. Therefore, this proceeding will not affect pole owners' rights to participate in Commission proceedings setting generally applicable base rates for 2023 and beyond.

Finally, there is no merit to FPL's apparent position that because FIT has not previously intervened in any of FPL's prior electric base rate proceedings, its decision to intervene now is improper. FIT's decision to intervene or not in the past is not relevant now. Rather, if anything, it emphasizes that FPL's pole attachment rental rate increases – and FPL's obstruction to FIT's members attempting to confirm the appropriate rates – are now so significant that it has driven the need for this issue to be raised in this rate case.

CONCLUSION

WHEREFORE, FIT hereby requests that the Commission deny FPL's Motion for Protective Order and allow for the August 5th deposition of a representative of FPL, which will seek relevant information about FPL's pole attachment rate as it relates to its pole attachment revenue projections in this proceeding, to proceed as planned.

Dated this 2nd day of August, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing has been served by electronic mail to the following on this 2nd day of August, 2021:

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