



Florida Cable Telecommunications Association

Steve Wilkerson, President

VIA ELECTRONIC DELIVERY

May 26, 2006

Ms. Blanca S. Bayo, Director
Division of the Commission Clerk
And Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RE: Docket No. 060172-EU and 060173-EU

Dear Ms. Bayo:

Attached are the Florida Cable Telecommunications Association's written comments and proposed rule revisions to Staff's May 19, 2006 Rule Development Workshop on:

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| Docket No. 060173-EU | Re: Proposed amendments to rules regarding overhead electric facilities to allow more stringent construction standards than required by National Electric Safety Code. |
| Docket No. 060172-EU | Re: Proposed rules governing placement of new electric distribution facilities underground and conversion of existing overhead distribution facilities to underground facilities, to address effects of extreme weather events. |

The FCTA's revisions are highlighted in yellow.

Thank you for your assistance in this matter. Please contact me with any questions.

Sincerely,

s/ Michael A. Gross

Michael A. Gross
Vice President, Regulatory Affairs &
Regulatory Counsel

Enclosure

cc: Larry Harris, Esq.

THE FLORIDA PUBLIC SERVICE COMMISSION

May 26, 2006

**COMMENTS OF THE FLORIDA CABLE
TELECOMMUNICATIONS ASSOCIATION (FCTA)**

- Docket No. 060173-EU Re: Proposed amendments to rules regarding overhead electric facilities to allow more stringent construction standards than required by National Electric Safety Code.
- Docket No. 060172-EU Re: Proposed rules governing placement of new electric distribution facilities underground and conversion of existing overhead distribution facilities to underground facilities, to address effects of extreme weather events.
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Introduction

Cable systems, as in the case of electric and telephone companies, distribute service for the most part through a community along lines and cables which extend either above ground attached to utility poles or below ground through conduits and trenches. Typically, available pole and conduit space is shared. In some instances, electric, telephone, and cable companies will share a joint trench for the construction of underground facilities. On other occasions, a cable company may dig a single trench for the construction of its own underground facilities.

Pole sharing arrangements are advantageous to all users. After installation, the cost of a pole, conduit or trench is fixed and does not vary with the number of users. With shared space, costs are spread over a larger number of users. Accordingly, multiple users can acquire needed space at far lower cost than if each user built and maintained separate facilities.

47 U.S.C.A. § 224 of the Communications Act requires all utilities to provide a cable system (and telephone company) with mandatory, nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by the utilities. The FCC has spelled out principles and guidelines for utilities to meet this requirement. In the case of poles, a utility must modify or change out a pole to increase its capacity to accommodate a cable company's request for access that cannot be accommodated due to a lack of available capacity. The FCC has devised a formula which has been upheld by the courts for determination of pole rates to be paid by cable companies for access to the poles. There has been a voluminous amount of litigation between the cable industry and the electric industry with respect to the appropriate amount of compensation due for access to the poles. In fact, the FCTA has been in litigation with Gulf Power Company for six years

over the pole rate issue, and these parties currently have a case pending at the FCC.

While it is true that, under federal law, a cable company has a mandatory right to nondiscriminatory access to poles, a power company may deny access to a cable or telephone company where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes. However, state requirements affecting pole attachments shall not conflict with the federal policy of nondiscriminatory, mandatory access, and the power companies shall not be permitted to use the proposed rules as a subterfuge to leverage their position in their ongoing dispute with the cable industry for the purpose of denying access and/or increasing the cost of access.

25-6.034 Standard of Construction.

The intent of this rule is to define construction standards for overhead and underground facilities to insure the provision of adequate and reliable electric service for operational as well as emergency purposes. The rule also requires each utility to establish construction standards for overhead and underground electrical facilities that conform to the guidelines and requirements set forth in the rule. Almost all power companies presently have construction standards for power lines specifying power lines and apparatus configurations for basic power pole assemblies. The National Electrical Safety Code (NESC) is a performance standard which contains detailed rules for what must be accomplished for safety of power and communications lines. The NESC does not specify the manner in which the rules are to be implemented. Therefore, power and communications companies must have construction standards that specify how they will apply the NESC standards. Most power companies and telephone companies that own poles have procedures for authorizing attachments by cable companies and other attachers. The pole owners also have specifications for cable attachments, and separation from power facilities and other cables.

Facilities are routinely added to poles over time by power companies and communications companies. As poles have more attachments added, the NESC rules must be applied as the standard for safety for separation of facilities and the strength of the poles. Measures should be taken to correct serious safety hazards, correct practices by all electric and communications companies which may create NESC violations. Such measures should also provide for orderly correction of existing violations. This rulemaking proceeding provides that opportunity.

A serious concern of the FCTA with section (2) of this rule is that it gives the power companies virtually unilateral and unfettered authority to establish construction standards, including attachment standards (in paragraph (8)), in conjunction with unilateral authority to deny cable attachers access to poles in contravention of the cable companies' right to access under section 224 of the Communications Act. In December 2005, the United Power Line Counsel filed a Petition for Declaratory Ruling requesting the FCC to classify broadband over power line-enabled Internet access service (BPL) as an information service leaving it largely unregulated in the same manner as cable modem and telco DSL services. Although classifying BPL as an information service would be

consistent with the FCC's classifications of cable modem and DSL services, there is a high risk that electric utilities will expand their anticompetitive pole practices as they deploy BPL. Denials of access and demands for higher rent will likely become more common as competitive BPL rollouts increase. Electric utilities own approximately 80% of the pole plant in the United States and will have enormous incentives to use their bottleneck control of distribution infrastructure to delay or encumber competitors' efforts. Section 224 has already been interpreted to preclude any unilateral determination that insufficient capacity exists for third-party attachments. (*Southern Company, et al. v Federal Communications Commission*, 293 F.3d 1338, 1347-49 11th Cir. 2002) Specifically, the case law provides that electric utilities do not have "unfettered discretion" to determine insufficient capacity and may only refuse to make capacity available on a particular pole "when it is agreed that capacity is insufficient." Accordingly, the provision in subsection (8) that gives the utility the unilateral authority to deny access is in violation of section 224 of the Communications Act and the rules, regulations, FCC decisions, and applicable judicial precedent.

The language in the rule should be revised to require cooperation and agreement between the utility and the cable companies, as well as other attachers, in developing adequate construction standards. Failing an agreement, either or both parties should have the additional recourse of seeking review by the Commission. Current language in the proposed rule provides for a challenge by a *customer* or *applicant* for service to the utility's filed construction standards in accordance with rule 25-22.032. This language is ambiguous as to whether an *attacher* would have the right to challenge the construction standards as a customer or applicant. Accordingly, the rule must be revised to expressly give to *attachers* the right to seek review by the Commission. Rule 25-22.032 is specifically crafted to establish "informal customer complaint procedures" that are designed to address disputes, subject to the Commission's jurisdiction, that occur between regulated companies and individual customers. Consequently, the customer complaint rule is not an appropriate procedure to handle a dispute between an attacher and a utility in a challenge to the construction standards, including the standards and procedures for attachments. The FCTA proposes that construction standards challenged by an attacher should be submitted for review by the Commission followed by notice and an opportunity for hearing. The FCTA has proposed language attached hereto that will provide for the attacher's participation in the development of construction standards, including attachment standards and procedures, as well as providing for Commission review and notice and opportunity for hearing before the Commission in the event that the parties cannot agree to the appropriate standards.

The FCTA further objects to the language in paragraph (8) of the rule that provides that "[s]uch Attachment Standards and Procedures shall meet *or exceed* the NESC" and other applicable standards. The FCTA believes that the current NESC standards are sufficient and exceeding the NESC standards is not necessary for safety and may not be a prudent use of resources. Reliance on NESC requirements varies greatly among various companies. Compliance with NESC requirements is mandatory, as it should be. The practice of providing for separation between cable and power facilities that exceeds NESC requirements may be appropriate for initial designs for tall poles. Facilities are

routinely added to poles over time by power companies and communications companies. As poles have more attachments added, the NESC rules must be applied as the standard for safety for separation of facilities and the strength of the poles. There is a practice, for planning purposes, to exceed many of the NESC requirements upon initial construction, although it is not necessary for safety. This practice allows enough pole strength and height to accommodate the addition of facilities by both power and communications companies. The FCTA has attached revisions to the proposed rules to effectuate this suggested change.

Although in some instances, it is an accepted practice to exceed NESC standards, it is questionable as to whether this Commission has authority to mandate standards that exceed the NESC standards. Section 366.04(6)(a) and (b) appear to recognize that NESC standards "shall constitute acceptable and adequate requirements for the protection of the safety of the public, and compliance with the minimum requirements of that code shall constitute good engineering practice by the utilities." This subsection also provides that in adopting safety standards, the Commission shall adopt the 1984 edition of the NESC as initial standards and adopt, after review, any new edition of the NESC. The use of mandatory language appears to limit the authority of the Commission to exceed the NESC standards. Further, the experience of FCTA members during the recent hurricane season reflected that fallen trees and metal from buildings and debris from roofs were the major causes of pole failures.

Although the FCTA does not have a large concern about paragraph (7)(b) in the case of new construction being placed streetside, the FCTA does have a concern about the language suggesting that for rebuild or relocation of the plant, it should be moved to streetside. This is not a common practice, and would substantially increase network costs. Existing facilities serve houses on the street on both sides of the block. Moving facilities to streetside would require twice as much plant in order to serve the same number of houses. The FCTA has suggested language to modify this subsection of the rule.

Cost Recovery

The proposed rules in 25-6.064, 25-6.078 and 25-6.115 provide for cost recovery by utilities for new installations of underground facilities and for conversion of existing overhead facilities to underground facilities. There is no similar provision providing for cost recovery to third-party attachers, including cable companies, who will necessarily incur additional costs for initial installations of underground facilities and conversions from existing overhead facilities to underground facilities. At the workshop on May 19, 2006, Staff suggested that third-party attachers such as cable companies would be able to recover the costs of undergrounding from developers. Subsequent to the workshop on May 19th, consultation with FCTA experts and review of applicable Florida Statutes outside of the jurisdiction of this Commission revealed that the cost of cable installations of underground facilities are not recoverable. The Commission is, by these rules, imposing requirements on utilities and third-party attachers that will necessarily impose additional costs on cable companies in connection with installation of underground

facilities. Accordingly, assuming the Commission has jurisdiction to impose these additional costs on cable companies, the Commission must have jurisdiction to provide for cost recovery to cable companies under these circumstances. The FCTA has provided language in the proposed rules to effectuate such cost recovery.

Conclusion

The common theme running through these comments is that any construction standards affecting attachers, including but not limited to, attachment standards, wind loading standards, and NESC standards should all be consistent with 47 U.S.C.A. § 224 of the Communications Act and the rules, regulations, FCC decisions, and applicable judicial precedent. Any portion of the attachment standards or any other provision of these rules that is inconsistent or in conflict with applicable federal law as described above shall be null and void. Therefore, such construction and attachment standards shall be consistent with the rights of attachers to mandatory, nondiscriminatory access to utility poles as provided for in federal law. Moreover, a utility shall not make a unilateral determination to deny access on the basis that there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes. A third-party attacher shall be given notice and an opportunity to cure any deficiencies, and any determination to deny access shall be based upon agreement of the parties or if the parties cannot agree, after review by the appropriate agency possessing jurisdiction to adjudicate the attacher's rights and obligations in a manner consistent with federal law