

REQUEST FOR CHANGE TO AGENDA CONFERENCE
HAND DELIVER

ORIGINAL

Date of Request: 6/16/2006 Date of Agenda Conference: 6/20/2006 Item No. 3

Docket No.: 060172-EU Brief Title: Amendments to Rules for Electric Facilities

Requested by: Staff Other Florida Cable Telecommunications Assn.
(Name)

Please attach a copy of the written documentation filed (IF OTHER)

STAFF's Recommendation to Executive Suite (IF OTHER) Approve Request Deny Request

ACTION REQUESTED [see APM 2.11]

- Defer Item to Agenda Scheduled Date: _____
- Change Order of Item or Take Up at Time Certain
- Withdraw Item (not expected to return to Agenda)
- Late Filed Recommendation (must be filed no later than 3:00 p.m. on the date approved for late filing) **A copy of the front page of the recommendation must be provided to CCA by 12 noon on the regular filing date for use as a place-holder during agenda preparation.**

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- Add Item to Published Agenda [see Section 120.525(2), F.S.] – Issue an ADDENDUM and give Legal NOTICE
- Add Emergency Item to Published Agenda [see Section 120.525 (3), F.S.] – Issue an ADDENDUM and Give Fair NOTICE

Concise explanation, justification or comments (attach additional sheet if necessary):

Staff does not believe deferral will assist in resolution of these dockets. Staff intends to propose language to clarify the obligation of electric utilities to seek input from attaching third parties during the development of the utilities' construction and attachment standards. Staff also believes Commission proposal of rule language will assist interested persons in meaningful participation at the scheduled July 13, 2006 rule development workshop and the August 22, 2006 rule hearing.

Signature (Technical Staff): *Boyd Flynn*
Signature (Legal Staff): *Thompson Wang*

Initials (Division Director or Designee): *[Signature]*
Initials (General Counsel or Designee): *MJC*

EXECUTIVE DIRECTOR:

Recommendation to the Chairman's Office

Initials: *MAB*

Comments:

I agree with staff

Approve Request Deny Request
Date: 6/16/06

CHAIRMAN'S OFFICE:

Initials: *[Signature]*

Approve Request Deny Request
Date: 6/16/06

Executive Suite will send the original to the Division of Commission Clerk & Administrative Services and return copy to the requesting staff after the Chairman's Office takes action on this request. Requesting staff should distribute copies to the Division Directors (OPR & OCR) and Attorney assigned to the docket.

DOCUMENT NUMBER - DATE

05260 JUN 16 06



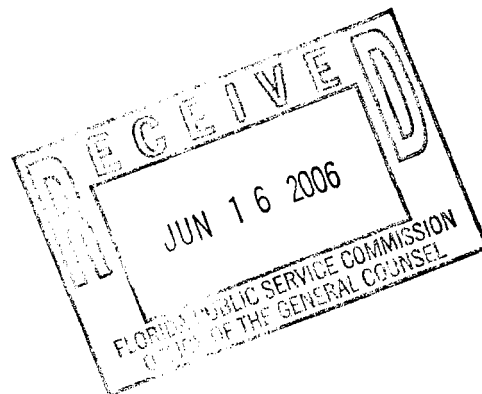
Florida Cable Telecommunications Association

Steve Wilkerson, President

June 16, 2006

BY HAND DELIVERY

Chairman Lisa Polak Edgar
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850



Re: June 20, 2006 Agenda Item 3, Docket Nos. 060172-EU and 060173-EU

Dear Chairman Edgar:

The FCTA respectfully requests that the Commission defer consideration of Item 3 of the upcoming June 20, 2006, agenda until a more informed course may be determined and reschedule the item as early as practicable under the circumstances.¹ At the outset, we would like to make it eminently clear that the FCTA fully supports this Commission's undertaking to address the damage to electrical utilities resulting from recent hurricanes and to enforce the necessary means to minimize future storm damages and customer outages.

The FCTA, as well as representatives of other industries who will be substantially affected by the proposed rules, have not had sufficient notice and an opportunity to fully participate in the rulemaking process. A deferral of the vote on this item will allow sufficient time for Staff to conduct one or more additional workshops and if necessary, afford the Commission time to conduct a hearing, to enable more meaningful participation by parties outside of the electric industry who are substantially affected by the proposed rules. Although the FCTA belatedly became aware that provisions of the proposed rules would have a major impact on the cable industry, and in particular, give anticompetitive advantages to the electric utilities, the FCTA scrambled to file comments and proposed rule revisions after the May 19, 2006 workshop. However, the FCTA simply has not had sufficient time and the necessary degree of participation to enable it to refute many erroneous factual claims made by the electric industry, and to respond to some very serious issues regarding the proposed rule provisions that would have this Commission assert jurisdiction over pole attachments in a manner that would conflict with federal law and constitute a severe encroachment upon the exclusive jurisdiction of

¹ It appears that some rules that are less controversial may be rescheduled sooner than the more controversial rules.

the FCC. It appears that factual and jurisdictional conclusions in this area were a fait accompli before the FCTA entered the proceeding.

The Staff Recommendation acknowledges that the FCTA and others have raised concerns about the proposed rules and recommends that an additional Staff workshop be held with respect to certain rules after the rules are proposed, and that a hearing be held on other rules after they are proposed. The FCTA respectfully suggests that Staff should hold one or more additional workshops and, if necessary, the Commission should hold a hearing, before the rules are proposed.

One of the FCTA's substantial concerns arises from the fact that, pursuant to these rules, the Commission will be giving unilateral authority to the utilities to establish construction and attachment standards, and then, unfettered authority to deny an attachment that does not comply with the standards unilaterally established by the utilities. The rules also give the Commission the authority to review any disputes over the construction standards and attachment standards in clear violation of federal law, including statutory, judicial, and FCC legal precedent.

The FCTA will cite the applicable law below, but in order to fully appreciate the anticompetitive nature of these rules, discussion of the adversarial relationship between the electric industry and cable industry is warranted. The electric and cable industries have been litigating for 20 years over pole attachment access rights and pole attachment rates. There have been several federal appeals court decisions, numerous FCC decisions, as well as two landmark United States Supreme Court decisions arising out of this litigation. Indeed, the FCTA has been in litigation with Gulf Power for six years in a case still pending at the FCC over issues of pole rates and capacity, and the issues of safety, reliability, and engineering, that are subsumed by the capacity issue.

It is highly anticompetitive under both Chapter 364, Florida Statutes, as well as federal law, for these rules to give the electric companies unilateral authority to set construction at attachment standards and unfettered authority to deny access to a prospective attacher, in a vacuum, as if the rules were not giving anticompetitive leverage to the electric companies in their ongoing disputes with the cable industry. Specifically, the electric industry has a docket pending at the FCC requesting that its Broadband over Power Line (BPL) service be afforded the same deregulatory treatment as DSL and cable modem service. The cable industry has not opposed the deregulatory treatment requested for BPL. However, it is essential that this Commission be aware that the power industry is offering, and will offer on a larger scale in the future, a competitive service on the very same poles for which they are, by these proposed rules, being given carte blanche to deny access to their competitors, including the cable industry.

Several of the arguments put forth by T-Mobile in Docket No. 060355-EI, in its filing on May 30, 2006, apply with equal force in these rulemaking dockets. The FCC has stated that "it would not invalidate summarily all local requirements," while in the same paragraph, the FCC made equally clear that state and local safety requirements apply *only* if there is no "direct conflict with federal policy.... Where a local requirement

directly conflicts with a rule or guideline we adopt herein, our rules will prevail.” *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, CC Dkt. Nos. 96-98, 95-1 85, 11 FCC Rcd. 16073 § 1154 (1996) (“*Local Competition Order*”).

The FCC went on to say that it would consider the merits of “any individual case” alleging safety, reliability or engineering as a basis for denial.² The FCC also specifically rejected “the contention of some utilities that *they* are the primary arbiters of such concerns, or that their determinations should be presumed reasonable,” while noting that § 224(f)(1) “reflects Congress’ intention that utilities must be prepared to accommodate requests for attachments by telecommunications carriers and cable operators.”³ On reconsideration of that Order, the FCC refused to categorically restrict the type of pole attachments that must be allowed, reiterating that “when evaluating any attachment request, including a wireless attachment, access determinations are to be based on the statutory factors of safety, reliability, and engineering principles.”⁴ Those statutory factors are subject to a reasonableness determination by the FCC (or a *certified* state, which Florida is not) on a case by case basis, where, as here, a prospective attaching entity protests the denial of access on one of those, or other, grounds.

Indeed, as stated by the FCC only two months ago in response to similar claims by another utility pole owner, Entergy Arkansas, Inc., that the FCC lacked jurisdiction and “specific expertise with respect to electric utilities and their unique safety and operational issues,” the FCC ruled:

Pursuant to the provisions of section 224, the Commission, through its Bureaus, has exercised its jurisdiction in prior pole attachment complaint proceedings to determine whether a pole owner’s adoption or application of specific engineering standards was unjust and unreasonable. Making such a determination does not require the Commission to establish a set of engineering standards that utilities must use across-the-board. Indeed, in adopting rules governing pole attachments, the Commission expressly

² Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates, *Public Notice* (December 23, 2004) (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order on Reconsideration, 14 FCC Rcd 18049, 19074 172 (1999)).

³ *Id.* at 16074 § 1158; see also *In the Matter of Kansas City Cable Partners v. Kansas City Power & Light Company*, 14 FCC Rcd 11599, T 11 (1 999) (stating that “the utility is not the final arbiter of [standards for safety, reliability, and generally applicable engineering standards] and its conclusions are *not* presumed reasonable”) (emphasis added).

⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order on Reconsideration, 14 FCC Rcd 18049, 19074 772 (1999).

declined to establish a comprehensive set of engineering standards that would govern when a utility could deny access to its poles based on capacity, safety, reliability, or engineering concerns. The Commission concluded, instead, that “the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis.”⁵

There is abundant precedent for the FCC’s jurisdiction over safety issues. The FCC routinely considers allegations that attachments will pose safety problems. *See, e.g., In the Matter of the Cable Television Assoc. of Georgia v. Georgia Power Company*, 2003 FCC Lexis 4463, *14 (2003) (dismissing a pole owner’s alleged safety issues, as they were not supported by the record, because the pole owner could not point to a single instance of property damage or personal injury caused by the pole attachments); *In the Matter of Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Order and Request for Information, File No. PA 99-005, DA 00-1250 at ¶19 (June 7, 2000) (requiring a utility pole owner to “cease and desist from selectively enforcing safety standards or unreasonably changing the safety standards” that the party seeking to attach to its poles must adhere); *In the Matter of Newport News Cablevision, Ltd. Communications, Inc. v. Virginia Electric and Power Company*, Order, 7 FCC Rcd. 2610 ¶ 15 (April 27, 1992) (considering the reasonableness of VEPCO’s guying requirements). The FCC has also affirmatively considered specific safety requirements in rulemaking proceedings, such as the impact of overlashing by attaching entities and third parties, including the impact on wind and weight load burdens. *In the Matter of Amendment of Rules and Policies Governing Pole Attachments, In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, CS Dkt. Nos, 97-98, 97-151, 16 FCC Rcd. 12103 ¶¶ 73-78 (2001). Accordingly, the FCC has, and does exercise, jurisdiction over pole safety issues.

Consequently, the proposed rules violate federal legal precedent in giving unilateral and unfettered discretion to utilities to set construction and attachment standards and deny access. Moreover, the rules violate federal law in conferring upon this Commission’s authority to review disputes over construction and attachment standards, where the states have been preempted, and the FCC is the proper forum for such review.

In conclusion, the FCTA urges the Commission to take a more prudent and deliberative course and fully investigate the legal and factual issues in this rulemaking process. The FCTA suggests, at a minimum, that one or more workshops be held on the rules for construction and attachment standards. Based upon the foregoing reasons, the FCTA respectfully requests that the Commission defer consideration of Item 3 presently scheduled on the June 20, 2006 agenda.

⁵ *Arkansas Cable Telecommunications Association v. Entergy Arkansas, Inc.*, 21 FCC Rcd 2158,lv 8-10 (rel March 2,2006) (intemal citations omitted).

Sincerely,

A handwritten signature in cursive script that reads "Michael A. Gross".

Michael A. Gross

Vice President, Regulatory Affairs and Regulatory Counsel

/mj

cc: Commissioner Matthew M. Carter
Commissioner J. Terry Deason
Commissioner Isilio Arriaga
Commissioner Katrina J. Tew
Parties of Record