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July 28, 2006

BY HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Proposed amendments to rules regarding overhead electric facilities to allow more stringent construction standards than required by National Electric Safety Code; Docket No. 060173-EU

Dear Ms. Bayo:

Enclosed for filing in the above referenced are the original and fifteen (15) copies of the Joint Post Workshop Comments by Florida Power and Light Company, Progress Energy Florida, Tampa Electric Company and Gulf Power Company. We will also submit this filing today in electronic format.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,

s/Lee L. Willis

LLW/bjd
Enclosures

cc: All Parties of Record (w/encl.)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed amendments to rules regarding overhead electric facilities to allow more stringent construction standards than required by National Electric Safety Code.	)	DOCKET NO. 060173-EU FILED: July 28, 2006

JOINT POST WORKSHOP COMMENTS

Florida Power and Light Company ("FPL"), Progress Energy Florida ("PEF"), Tampa Electric Company ("Tampa Electric") and Gulf Power Company ("Gulf Power") file these Joint Post Workshop Comments. These comments are not intended to be a request for hearing but are filed in support of the proposed rules and in response to Staff's invitation to comment on the presentations made at the July 13, 2006 workshop.

Basis for the Proposed Rules

As a result of the extraordinary storm seasons of 2004 and 2005, the Commission has undertaken a multi-pronged approach to improve the electric infrastructure of this state in order to minimize future storm damage and customer outages.

This rulemaking together with the eight-year Pole Inspection Order No. PSC-06-0144-PAA-EI and the Storm Plan Order No. PSC-06-0351-PAA-EI have specified initiatives that the Commission has determined to be reasonable and necessary to storm harden the system. In each of these proceedings, the Commission has specifically determined that pole attachments affect the safety and reliability of the system and that action is necessary to reduce that effect.

The Basic Theme of the Rules

The Commission has reasonably determined that nothing should be attached to a pole that is not engineered to be there in advance. It reached this conclusion after finding that pole attachments can have significant wind loading and stress effect on a pole and can cause overloading and that some attachments are made without notice or prior engineering.

The Commission consequently concluded that steps should be taken to assess pole attachment effect on poles to prevent overloading.

Comments at the workshop made by Florida Cable Television Association's (FCTA) consulting engineer confirmed the Commission's wind loading and stress concerns by presenting a photograph of an overloaded pole and observing:

> Multiple cables which are attached lower than the power facilities on the poles do account for more wind load than the very basic power lines. . . . So there are poles out there where the cables are a very big factor of the wind loading but that normally is not the case. (Tr. 87) (Emphasis supplied.)

Florida Public Service Commission Jurisdiction

The Commission has very broad and exclusive jurisdiction over the safety and reliability of electric utility distribution facilities.[1] Further this jurisdiction has not been preempted by federal law which defers matters of reliability and safety related to pole attachments to the states.

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[1] *See, e.g.,* §§ 366.04(2), Fla. Stat. (2006) (granting the Commission jurisdiction over all electric utilities "[t]o require ... reliability within a coordinated grid, for operational as well as emergency purposes"); 366.04(5), Fla. Stat. (2006) (providing the Commission "... jurisdiction over the planning, development, and maintenance of a coordinated electric grid throughout Florida to assure an adequate and reliable source of energy ..."); 366.04(6), Fla. Stat. (2006) ("The Commission shall have exclusive jurisdiction to prescribe and enforce safety standards for ... distribution facilities of all public electric utilities ..."); 366.05(1), Fla. Stat. (2006) (granting the Commission authority to prescribe service rules and regulations and "... to require repairs, improvements and additions and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto ..."; 366.05(8), Fla. Stat. (2006) (providing that "[i]f the Commission determines that there is probable cause to believe that

The Federal Pole Attachment Act, which generally gives the Federal Communications Commission ("FCC") jurisdiction over pole attachments specifically states that the FCC does not have jurisdiction over pole access issues, including safety and reliability when such matters are regulated by the state. 47 USC §§ 224(c)(1) and (f)(2).

The Commission's very broad and exclusive jurisdiction over safety and reliability extends both to the utility and the facility itself. The proposed rules are an appropriate implementation of that jurisdiction.

There are two types of issues regarding third party attachments.

Issues of Access including the attachment's effect on safety and reliability.

Issues of Contract including rates, terms and conditions applicable to the attachment.

Each type of access is handled differently under federal law.

Issues of Access rest with the state to the extent it regulates such issues.

Issues of Contract rest with the FCC unless a state certifies it has jurisdiction.

BellSouth's Jurisdictional Argument

During the workshop, BellSouth asserted that the proposed rules encroach on the FCC's pole attachment jurisdiction and that the Florida Supreme Court in Teleprompter v. Hawkins, 384 So.2d 648 (1980) held the Commission does not have jurisdiction over pole attachments. Both assertions are incorrect.

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inadequacies exist with respect to energy grids developed by the electric utility industry, it shall have the power ... to require installation or repair of necessary facilities ..."). Subsection 366.04(6), conferring safety jurisdiction on the Commission, was enacted in 1986, six years after the Florida Supreme Court decision in *Teleprompter Corp. v. Hawkins*, 384 So. 2d 648 (Fla. 1980).

FCC Pole Attachment Rate Jurisdiction Does Not
Cover Charges Between ILECs and Electric Utilities

BellSouth argues that by causing the utilities to buy more expensive poles, which in turn raises pole rental rates under its negotiated contracts with electric utilities encroaches on the FCC jurisdiction. This is totally incorrect. It is impossible to encroach on jurisdiction the FCC does not have at all.[2]

BellSouth first asserts that the proposed rules will require electric utilities to install more reliable but more expensive electric infrastructure which will increase pole attachment rental rates. While this may be true in some circumstances, the rules do not affect the FCC's jurisdiction.

The rates paid by Incumbent Local Exchange Carriers (ILECs) to electric utilities are established by negotiated contract and are specifically excluded from the Federal Pole Attachment Act. The FCC has no jurisdiction over adjustment rates charged between ILECs and electric utilities.

BellSouth also asserts that it is not the cost causer. While that point may be subject to some debate, it is of no significance here. First, the Commission has no role in assigning costs. Second, the cause of a cost increase is heightened storm activity and governmental action taken in response to this activity in order to improve the safety and reliability of the system. Finally, the adjustment rates in contracts are a product of negotiation and are not under the jurisdiction of the FCC. Consequently, who or what was the cost causer is irrelevant.

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[2] 47 USC § 224 (a)(1) defines the term "utility" to mean "a local exchange carrier or an electric, gas, water, steam or other public utility which owns or controls poles." "Pole Attachment" is defined by § 224 (a)(4) as ". . . any attachment by a cable television system or provider of telecommunication service to a pole . . . owned or controlled by a utility." The term "telecommunications carrier" ". . . does not include any incumbent local exchange carrier . . ." See 47 USC § 224 (a)(5).

In all events, the FCC's jurisdiction has never extended to establishing the capital, operating and maintenance costs of utility poles; it extends only to the methodology under which such costs will be included in pole attachments rates.

Teleprompter v. Hawkins

The Teleprompter case decided in 1980 held that the Commission's jurisdiction does not extend to rates, terms and conditions of pole attachments. There was no discussion in that case concerning the Commission's Grid Bill and safety jurisdiction which is the basis for the proposed rules. Indeed, subsection 366.04(6) conferring the Commission's safety jurisdiction was not enacted until 1986. See Chapter 86-173, Laws of Florida, 1986. The Teleprompter decision is simply inapplicable to this rulemaking that arises from the Commission's reliability and safety jurisdiction.

Proposed Rule 25-6.0432 Does Not Delegate the Commission's Regulatory Authority to Electric Utilities

The rule does not effect unlawful delegation of Commission authority to the utilities. Instead it simply directs utilities to adopt construction standards that meet certain minimum safety and reliability criteria. The rule provides:

> The attachment standards shall meet or exceed the [NESC] . . . and other applicable standards imposed by state or federal law so as to assure, as far as reasonably possible that third party facilities attached to electric transmission and distribution poles do not impair electric safety, adequacy or reliability; do not exceed pole loading capacity, and are constructed, installed and maintained, and operated in accordance with generally accepted engineering practices for the utility's service territory." (Emphasis supplied.)

This provision is a clear statement of standards the utilities must meet in developing the construction standard required by the rule.

As noted above, the Public Service Commission has very broad and exclusive jurisdiction over the safety and reliability of electric utility distribution facilities. Indeed, in 2006, the

Florida Legislature supplemented the Commission's existing safety and reliability jurisdiction by amending Section 366.05 to provide the Commission "the ability to adopt construction standards that exceed the National Electric Safety Code, for purposes of ensuring reliable provision of service." *See* Section 17, Ch. 2006-230, *Laws of Florida* (2006 Senate Bill 888).

Implementing its safety and reliability jurisdiction under the new statutory provision, as well as existing grants of authority, the Commission has proposed infrastructure hardening rules, including Rule 25-6.0342 related to third-party attachment standards and procedures. The proposed rule requires each utility to "establish and maintain written safety, reliability, pole loading capacity, and engineering standards and procedures for attachments by others to the utility's electric transmission and distribution poles [that] ... meet or exceed the applicable edition of the National Electrical Safety Code ... and other applicable standards imposed by state and federal law so as to assure, as far as is reasonably possible, that third-party facilities attached to electric transmission and distribution poles do not impair electric safety, adequacy, or reliability; do not exceed pole loading capacity; and are constructed, installed, maintained, and operated in accordance with generally accepted engineering practices for the utility's service territory." *See* Proposed Rule 25-6.0432(1). According to the proposed rule, no attachment to a utility's electric transmission or distribution poles shall be made except in compliance with the utility's Attachment Standards and Procedures. *See* Proposed Rule 25-6.0432(2). Disputes arising from implementation of the rule would be resolved by the Commission. *See* Proposed Rule 25-6.0432(3).

The argument that the Commission is "sub-delegating" its regulatory authority to electric utilities is a red herring designed to distract the Commission from its goal of ensuring standards are in place to harden electric utility infrastructure in the wake of an increased threat of hurricane activity and to delay or derail the rulemaking process. The proposed rule does not delegate

regulatory authority to electric utilities. Consistent with its legislative grant of authority, the Commission retains power to decide whether the attachment standards established by electric utilities under the rule satisfy the parameters for attachment standards laid out in the statute and rule – i.e., that they are written for purposes of ensuring reliable provision of service and meet the criteria articulated in subsection (1) of the proposed rule. It is the Commission that: (1) has made the fundamental policy decision as to the guidelines that the standards must meet; (2) retains discretion to determine whether the utilities' attachment standards comply with the rule; and (3) will resolve complaints regarding the rule's implementation. Because the proposed rule would not delegate regulatory authority to electric utilities, there is no merit to an argument that the Commission lacks legislative authority to subdelegate powers to a private entity. *See, e.g., St. Johns County v. Northeast Florida Builders Assoc. Inc.,* 583 So. 2d 635, 642 (Fla. 1991) (finding ordinance did not create an unlawful delegation of power because the fundamental policy decisions were made by the county, and the discretion of the school board was sufficiently limited); *County Collection Services, Inc. v. Charnock*, 789 So. 2d 1109, 1112 (Fla. 4th DCA 2001) (finding there was no improper delegation of authority by a county that entered into a contract assigning code enforcement and lot clearing liens to a contractor where the county retained the power to decide which liens to assign; the power to decide what collection techniques are permissible and to prohibit the use of any technique it finds objectionable; the power to take back any assigned debt or lien; and the power to terminate the contract for any or no reason), *compare Florida Nutrition Counselors Assoc. v. Dept. of Business & Prof. Reg.*, 667 So. 2d 218, 221 (Fla. 1st DCA 1995) (holding, in part, that a proposed rule constituted an invalid delegation of authority to private individuals where no restrictions were imposed on the types of practices or standards such individuals may create); *City of Belleview v. Belleview Fire Fighters, Inc.*, 367 So. 2d 1086, 1088 (Fla. 1st DCA 1976) (finding improper delegation where, under the

contract between the city and a private entity, the city was powerless to direct the exercise of police power in the fire fighting area).

The utilities are the entities that must design, construct and maintain their systems – not the Commission. Consequently, the Commission rule, of necessity, must be a general statement of Commission policy with the specific implementation left to each utility, based on the particular facts and circumstances that each utility faces. As the Commission observed in Re: Aloha Utilities, Order No. PSC-04-0712-PAA-WS, issued in Docket Nos. 020896-WS and 010503-WU, on July 20, 2004:

> Commission practice has been not to micromanage the business decisions of regulated companies, but to instead focus on the end-product goal. In keeping with this established practice, we decline to prescribe the specific treatment process to be used in this case. (Emphasis supplied.)

What is reasonably sufficient, adequate and efficient service may depend upon the facts and circumstances of that particular customer or territory or portion of a territory. Attempting to define what is reasonably sufficient, adequate and efficient service for every potential set of circumstances statewide could dictate endless volumes of administrative rules. Rather than doing this, the proposed rule relies upon the principle of management by exception whereby the Commission would entertain and resolve complaints of any interested party who believes that a particular utility has acted unreasonably in defining and adopting a particular construction standard.

The Commission properly relies on the principle of management by exception in numerous ways. The Commission does not pre-approve every contract entered into by a public utility but instead addresses and resolves any contention by a substantially affected person that a utility acted imprudently in entering into a particular contract. The Commission has often stated

that its role is to regulate utilities through continuing oversight as opposed to micromanaging day-to-day utility operations and decision making.

Here, in charging the utilities with the development of construction standards, the Commission has recognized that the development of those standards requires expertise and flexibility of the utility to deal with complex and fluid conditions.

It would be difficult, if not impossible, for the Commission to incorporate all of the construction standards for the various utilities in the rule per se.

Timing of the Adoption of the Rules

BellSouth asserts that the rules should not be adopted until data is obtained from the eight-year inspections required by the Commission's Pole Inspection orders.

While such information will be useful in the future to refine the rules, there is no reason to delay the implementation of the rules at this point.

The possibility of improving the rules at a later date is not a reasonable basis for a delay.

Possibility of Differing Standards

BellSouth expressed concern that the rules may result in differing construction standards in different areas.

The Commission has appropriately reasoned that some areas may have higher risk of damage and that stronger facilities are required in those areas.

Construction standards are not uniform today.

Uniform standards among all utilities would not be practicable or cost beneficial for customers. Because of the diverse nature of Florida's geography, utilities need the flexibility to address unique infrastructure needs within and among respective service areas. The Commission's proposed rule is sensitive to this need for flexibility.

Appropriate Input in Developing the Standards

Comments were made urging a more collaborative process in developing the standards.

The rules appropriately balance a requirement of obtaining input without creating a situation where one party could effectively stall the process of finalization of the standards.

The rules provide full due process by allowing any affected party to file a complaint challenging the reasonableness of the standards developed by the utility after receiving input from the attachers.

Competitive Issues

The Florida Cable Television Association's (FCTA) attorney asserted that the safety and reliability is not the real basis for the rules. (Tr. 76-77)

This assertion is incorrect and should be somewhat insulting to the Commission. This assertion anticipates that the standards developed under the rules will be used to gain a competitive advantage for electric utilities and that the Commission would allow that to occur.

The proposed rules provide that any affected party can file a complaint with the Commission if any particular provision is alleged to be abusive.

These assertions made by the FCTA attorney are inconsistent with the comments of the consulting engineer made on behalf of FCTA who asserted that "almost all power companies already have construction standards for power lines. . . ." (Tr. 88). "The attachment rules need to be improved in my opinion. Not just copied over and then ratified by a government agency." (Tr. 92). "The power companies have standards and procedures. . . . Hopefully these will be an overall improvement in these attachment rules and procedures that would be very welcomed." (Tr. 92). "The NESC does not dictate how to accomplish what it requires, so power companies and communications companies must have construction standards which specify how they will accomplish what the NESC requires." (Tr. 95) "So I am here to ask you don't just simply ratify

an existing set of rules from a power company because it is in an existing contract. If we could work together for the benefit of all of us, we would re-look at those rules and compare between different power companies, some of the better rules and say, hey, this would be great if everyone would realize the benefits of starting out with a higher standard on a brand new pole, and then going to the NESC ultimately before you trash can a good pole and put a taller one in." (Tr. 98)

The attachers asserted that the proposed rules do not have adequate standards and that the Commission's authority to adopt the rules will be unlawfully delegated to electric utilities which are required to develop construction standards. This assertion is incorrect.

Conclusion

The Commission has recognized that pole attachments present a situation affecting the safety and reliability of electric service.

The rules provide a critical means for dealing with this threat to electric distribution facilities in a fair and reasonable way.

The objective is to make facilities more storm ready. These rules are an important part of the Commission's plan to meet this objective.

Respectfully submitted this 28th day of July, 2006.

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ON BEHALF OF TAMPA ELECTRIC COMPANY

By: _____
Lee L. Willis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Joint Post Workshop Comments has been furnished by Hand Delivery* or U. S. Mail this 28th day of July, 2006 to the following:

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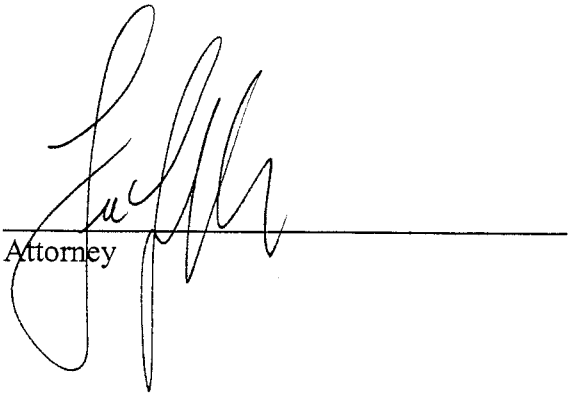

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