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Matilda Sanders

From: Nanci_Nesmith@fpl.com
Sent: Monday, October 02, 2006 3:49 PM
To: Filings@psc.state.fl.us
Cc: Wade_Litchfield@fpl.com; Natalie_Smith@fpl.com; Bob_Valdez@fpl.com; Lynne_Adams@fpl.com; Jamie_Patterson@fpl.com; Larry Harris; Bill_Feaster@fpl.com
Subject: Electronic Filing for Docket No. 060172-EU/060173-EU - FPL's, Progress Energy's, TECO's and Gulf Power's Joint Reply Comments

Attachments: Joint Post Hearing Comments 10-2-06.doc; Exhibit A.doc

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Joint Post ng Comments (76 KB) Exhibit A.doc

Electronic Filing

a. Person responsible for this electronic filing:

Natalie F. Smith, Principal Attorney
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408
(561) 691-7207
natalie_smith@fpl.com

b. Docket No. 060172-EU - 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
and
Docket No. 060173-EU - Proposed Amendments to Rules Regarding Overhead Electric Facilities to Allow More Stringent Construction Standards than Required by National Electric Safety Code

c. Document being filed on behalf of Florida Power & Light Company, Progress Energy Florida, Tampa Electric Company and Gulf Power Company.

d. There are a total of 44 pages.

e. The document attached for electronic filing is FPL's, Progress Energy's, TECO's and Gulf Power's Joint Reply Comments.

(See attached file: Joint Post Hearing Comments 10-2-06.doc) (See attached file: Exhibit A.doc)

Thank you for your attention and cooperation to this request.

Nanci NeSmith
Florida Power & Light
850-521-3900

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In 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.	)	DOCKET NO. 060172-EU
In re: Proposed amendments to rules regarding overhead electric facilities to allow more stringent construction standards than required by National Electrical Safety Code.	)	DOCKET NO. 060173-EU FILED: October 2, 2006

JOINT POST-HEARING COMMENTS

Pursuant to Order No. PSC-06-0610-PCO-EU, issued July 18, 2006 in the above-referenced docket, Florida Power and Light Company ("FPL"), Progress Energy Florida ("PEF"), Tampa Electric Company ("Tampa Electric") and Gulf Power Company ("Gulf Power") (sometimes collectively referred to as the "investor-owned utilities" or "IOUs") file these Joint Post-Hearing Comments related to the Florida Public Service Commission's ("PSC's" or "Commission's") proposed new rules 25-6.0341 and 25-6.0342, and amendments to Rules 25-6.034, 25-6.064, 25-6.078, and 25-6.115, Florida Administrative Code (the "Proposed Rules").

Introduction

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. Staff and this Commission have worked to develop and propose fair and balanced proposed infrastructure hardening rules, taking into consideration the comments made by various interested parties.

Verizon Florida, Inc. ("Verizon"), BellSouth Telecommunications, Inc. ("BellSouth"), Embarq Florida, Inc. ("Embarq"), the Florida Cable Telecommunications Association, Inc. ("FCTA") and Time Warner Telecom ("Time Warner") (sometimes collectively referred to as the "Third-Party Attachers" or the "Attachers")[1] presented comments and/or testimony that aim to undermine the Commission's storm hardening objectives.[2] The Attachers seek the ability to disrupt attempts to harden IOU infrastructure by inserting provisions into the rules that would, in

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[1] It should be noted at the outset that Verizon, BellSouth and Embarq are not on the same legal footing as FCTA and Time Warner. Pole-owning telephone companies have traditionally entered into voluntary "joint use" agreements with pole-owning electric utilities as the means by which the pole infrastructure has been shared between them. As will be developed more fully in Section I.C., below, incumbent local exchange carriers do not enjoy the pole attachment rights granted by the Pole Attachments Act (47 U.S.C. § 224) to cable television companies and other telecommunications carriers. It is curious that these companies would align themselves in this proceeding in order to advance their interests at the expense of electric utilities.

[2] Pursuant to the directions of the Commission at the end of the August 31, 2006 rulemaking hearing, the IOUs, incumbent local exchange companies (ILECs) and other interested persons have held a number of meetings to discuss areas in which the parties may be able to reach consensus on certain rule language. Unfortunately, these discussions have not resulted in an agreement to present to the Commission. As always, the IOUs will remain in contact with the ILECs and other interested parties, and the IOUs are open to further discussions with the Attachers. The Proposed Rules with the changes suggested by the IOUs fairly meet the objections advanced by the Attachers at the hearing.

effect, give Attachers veto power over relocation projects and allow Attachers to delay implementation of construction and attachment standards. For the reasons addressed in these comments and in the pre-hearing comments filed by the IOUs on August 18 and 21, 2006, which are incorporated by reference and are found in Tabs 14 and 15 of the Staff Composite Exhibit,[3] the Commission should reject the Attachers attempts to derail implementation of the infrastructure hardening initiative.

The specific issues with respect to the Proposed Rules regarding construction standards (Rule 25-6.034), location of facilities (Rule 25-6.0341) and attachment standards (Rule 25-6.0341) which the Commission at the conclusion of the August 31, 2006 hearing asked to be addressed in post-hearing comments are: (1) Delegation of Authority: Would the adoption of the Proposed Rules result in an unlawful delegation of the Commission's authority; (2) Input from Attachers regarding construction and attachment standards: Should the rule require more than an opportunity for input from Attachers as electric utilities consider construction and attachment standards; (3) Costs: What are the costs of implementation and who should bear the costs associated with implementing the Proposed Rules; (4) Jurisdiction: Does the Commission have legal authority and jurisdiction to adopt the Proposed Rules?

Also discussed herein is: (1) the requirement that the utilities be guided by the extreme wind loading standard where reasonable, practical and cost-effective; (2) the evidentiary

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[3] Regarding the IOU comments filed August 18, 2006, the IOUs specifically incorporate by reference, to the extent not restated herein, Section I.B., pp. 18-20 (Proposed Rule 25-6.0342 would not void existing licensing agreements or constitute an impairment of private contracts); Section I.D., pp. 10-11 (FCTA's suggested revisions to Proposed Rule 25-6.0342(3) are at odds with this Commission's jurisdiction); Section II., pp. 20-21 (Regulation is not a reason to shift costs to electric utilities and their customers); Section III., pp. 21-26 (The Commission has ample evidentiary support for its Proposed Rules); Section V.A., pp. 29-30 (It is appropriate and consistent with Chapter 366 for the Proposed Rule to authorize standards that exceed those of the National Electrical Safety Code); and Section V.B., pp. 30-31 (Suggestions that the standards should be adopted by mutual agreement should be rejected as unworkable and inappropriate).

foundation for the Proposed Rules; and (3) the Attachers' unwarranted challenges to the Contribution-in-Aid-of-Construction ("CIAC") Rules.

To further strengthen the argument that the rules are valid and to address other concerns raised by the Attachers in comments and at the hearing, the IOUs suggest that the Proposed Rules be revised as reflected in Exhibit A to these comments. These suggested changes provide: (1) guidelines for developing hardening construction and attachment standards that must be filed with and approved by the Commission; (2) the hardening standards developed by the IOUs must be consistent with the construction guidelines; (3) meaningful input must be considered and evaluated for incorporation by the IOUs in the development of the hardening standards; (4) the hardening standards must be made available to the Attachers before the standards are implemented; (5) suspension of the effectiveness of the standard where a dispute is filed until the dispute is resolved by the Commission. These suggested changes fairly address the concerns raised by the Attachers without giving any party the ability to gridlock the process.

In sum, the Proposed Rules are an important additional step in exercising the Commission's safety and reliability jurisdiction to protect the critical distribution infrastructure for the provision of electric and communication services. The IOUs urge Staff and this Commission to move forward in adopting the Proposed Rules with the modifications suggested by the IOUs herein, in order to ensure safe and reliable electric service taking into consideration the increased risk of hurricane activity that we currently face.

I. Delegation of Authority

A. Rules 25-6.034 and 25-6.0342 as proposed do not unlawfully delegate the Commission's regulatory authority to the IOUs.

The Proposed Rules do not effect an unlawful "sub-delegation" of authority to electric utilities because the PSC has made the fundamental policy decision that utilities will be guided

by the extreme wind loading standards of the National Electrical Safety Code ("NESC") where reasonable, practical and cost-effective to do so, and has established the criteria that the utilities must follow in establishing their standards. Further, the Commission retains authority to resolve disputes brought by Attachers and others related to implementation of the rule. Consistent with the Commission's often stated role of regulating utilities through continuing oversight as opposed to micromanaging day-to-day utility operations and decision making, the Proposed Rules rely on the principle of management by exception, whereby the Commission will entertain and resolve complaints that a utility acted imprudently or in violation of PSC rule.

Notwithstanding the validity of the Proposed Rules, to help strengthen the argument that the rules are valid, the IOUs suggest that the Proposed Rules be revised to require that construction guidelines be filed for PSC approval. Standards and procedures implementing the PSC's rules must be consistent with the approved guidelines.

1. The Proposed Rules establish criteria for a utility's construction and attachment standards.

The proposed amendments to Rule 25-6.034, Construction Standards, and proposed new Rule 25-6.0342 should be read together. The proposed amendments to Rule 25-6.034 require each investor-owned electric utility to establish within 180 days of the effective date of the rule construction standards for overhead and underground electrical transmission and distribution facilities. New Rule 25-6.0342, Third Party Attachments, requires utilities, as a part of their construction standards adopted pursuant to Rule 25-6.034, to adopt standards and procedures for third-party attachments to utility facilities. Read together these rules require:

(1) Each utility must establish construction standards which include pole attachment standards and procedures within 180 days of the effective date of the rule.

(2) In establishing attachment standards, the utility shall seek input from other entities with existing agreements to share the use of its electric facilities.

(3) Copies of the standards must be maintained at its corporate headquarters and each district office and must be produced within two working days in Tallahassee for staff review in the companies' Tallahassee office.

(4) Any dispute arising from the implementation of this rule shall be resolved by the Commission.

Contrary to the assertions of the Attachers, the Proposed Rules do not effect an unlawful delegation of Commission authority to the utilities. Instead, the proposed amendments to Rule 25-6.034 and proposed new Rule 25-6.0342 simply direct utilities to adopt construction and attachment standards that meet certain minimum safety and reliability criteria. Proposed Rule 25-6.034 provides in pertinent part:

(1) Application and Scope. This rule is intended to define construction standards for all overhead and underground electrical transmission and distribution facilities to ensure the provision of adequate and reliable electric service for operational as well as emergency purposes. . .

* * *

(2) The facilities of each utility shall be constructed, installed, maintained and operated in accordance with generally accepted engineering practices to assure, as far as is reasonably possible, continuity of service and uniformity in the quality of service furnished.

(3) Each utility shall, at a minimum, comply with the applicable edition of the National Electrical Safety Code.

(a) The Commission adopts and incorporates by reference the 2002 edition of the NESC, published August 1, 2000.

(b) Electrical facilities constructed prior to the effective date of the 2002 edition of the NESC shall be governed by the applicable edition of the NESC in effect at the time of the initial construction.

(4) For the construction of distribution facilities, each utility shall, to the extent reasonably practical, feasible, and cost-effective, be guided by the extreme wind loading standards specified by Figure 250 2(d) of the 2002 edition of the NESC. As part of its construction standards, each utility shall establish guidelines and procedures governing the applicability and use of the extreme wind loading standards to enhance reliability and reduce restoration costs and outage times for each of the following types of construction:

(a) new construction:

(b) major planned work, including expansion, rebuild, or relocation of existing facilities, assigned on or after the effective date of this rule; and

(c) targeted critical infrastructure facilities and major thoroughfares taking into account political and geographical boundaries and other applicable operational considerations.

(5) For the construction of underground distribution facilities and their supporting overhead facilities, each utility shall, to the extent reasonably practical, feasible, and cost effective, establish guidelines and procedures to deter damage resulting from flooding and storm surges. (emphasis supplied)

Proposed Rule 25-6.0342 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.)

These provisions provide a clear statement of standards the utilities must meet in developing the construction and attachment standards required by the rules.

As discussed in greater detail in the jurisdictional argument in Section IV. below, 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 Electrical Safety Code, for purposes of ensuring reliable provision of service." *See* Section 17, Ch. 2006-230, *Laws of Florida* (2006 Senate Bill 888).

Exercising its safety and reliability jurisdiction under the new statutory provision, as well as under existing grants of authority, the Commission has proposed infrastructure hardening rules, including the proposed amendments to Rule 25-6.034 and Proposed Rule 25-6.0342 related to third-party attachment standards and procedures.

The amendments to Rule 25-6.034 adopt the 2002 edition of the NESC and require each utility to adopt construction standards that comply at a minimum with the NESC and assure that "the facilities shall be constructed, installed, maintained and operated in accordance with generally accepted engineering practices. . . ." *See* Proposed Rule 25-6.034(3). The utilities are to be guided by the extreme wind loading standards . . . of the 2002 edition of the NESC to the extent reasonably practical, feasible and cost-effective for specifically identified types of construction. *See* Proposed Rule 25-6.034(4) and (5). The construction standards must also consider practical, feasible and cost-effective guidelines and procedures to deter damage to underground and supporting overhead facilities due to flooding and storm surges. *See* Proposed Rule 25-6.034(6).

Proposed Rule 25-6.0342 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 Proposed Rule 25-6.0432, 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 rules would be resolved by the Commission. *See* Proposed Rules 25-6.034(7) and 25-6.0432(3).

2. The argument that the Proposed Rules would constitute an unlawful delegation of regulatory authority is a red herring.

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 Rules do not delegate regulatory authority to electric utilities. Consistent with its legislative grant of authority, the Commission, through its Proposed Rules, has made the policy decision that the utilities must be guided by the extreme wind loading standards of the NESC where reasonably practical, feasible and cost-effective to do so. It has not delegated away that fundamental policy decision, or left it to the discretion of the utilities. Further, the Commission retains power to decide whether the construction and attachment standards established by electric utilities under the rule satisfy the parameters for construction and 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.

Florida case law is clear that no unlawful subdelegation of authority has occurred where the fundamental policy decisions have been made by the regulatory body and the discretion of the entity implementing the agency's decision has been sufficiently limited. *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); *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 cases cited by Embarq in its August 4, 2006 comments and at the August 31, 2006 hearing do not dictate that an unlawful subdelegation would occur and, in fact, the cases Embarq relies upon support the argument that the rules are lawful. For example, Embarq cited the case *Amara v. Town of Daytona Beach Shores*, 181 So. 2d 722 (Fla. 1st DCA 1966) ("*Amara*"), for the proposition that "a governmental entity cannot delegate its governmental powers to a private entity." (Hearing Tr. 75). This statement is true. However, as stated above, the question of

whether "governmental powers" have indeed been delegated depends upon whether the fundamental policy decisions are made by the agency and whether there are adequate criteria to limit the discretion of the entity implementing the rule. In the *Amara* case, the Town of Daytona Beach adopted an ordinance that provided simply that licenses or permits for beach concessionaires would not be granted by the Town of Daytona Beach unless the prospective licensee had first obtained the written consent of the ocean front property owner in front of whose property the concession would be located. The court struck down the ordinance as void on grounds that it set "forth no criteria for determining the fitness and qualifications of concessionaires other than the prerequisite of securing the oceanfront property owner's consent." *See Amara*, 181 So. 2d at 724. Therefore, the court found that whether a license would be granted was effectively left to the unbridled discretion of a single individual. *See id.* at 725. That is not the case with the Proposed Rules.

Contrary to the *Amara* case, the Proposed Rules contain detailed criteria and standards that the utilities must meet in establishing construction and attachment standards. Further, under the Proposed Rules, customers, applicants for service, and attaching entities who believe that a particular utility has acted unreasonably in defining and adopting a particular construction standard are given a clear point of entry to come to the Commission for resolution of the dispute. Additionally, the Commission will continue to have authority to audit and monitor the utility's implementation of the standards to ensure compliance with the rules.

The Proposed Rules are consistent with the Attorney General Opinion, 078-53, cited by Embarq (Hearing Tr. 75-76), in which the Attorney General determined that the submission of rates to the PSC by private parties did not mean that the Commission had unlawfully delegated its ratemaking authority because the Commission made the final determination regarding the

appropriate rates. Similarly, here, the Commission makes the final determination regarding whether the standards comply with the Proposed Rules.

Embarq also relied on the case *Florida Nutrition Counselors Association v. Department of Business and Professional Regulation*, 667 So. 2d 218 (Fla. 1st DCA 1995) ("*Nutrition Counselors*"), and argued that case stands for the proposition that "an enforcement action cannot validate an invalid delegation of rulemaking authority." (Hearing Tr. 76). This proposition is not supported by the *Nutrition Counselors* case, and Embarq's reliance on this case is also misplaced. Indeed, there is no discussion of or provision for an administrative enforcement action, or enforcement action of any sort, in any of the rules stricken by the *Nutrition Counselors* court. As in *Amara*, the defect in the rule challenged on delegation grounds in *Nutrition Counselors* was that the Board of Medicine delegated to colleges "absolute discretion, by choice of curricula, to determine permissible 'instruments, devices, testing, or treatments'" as a prerequisite to licensure by the Board. *See Nutrition Counselors*, 667 So. 2d at 222. According to the *Nutrition Counselors* court, "such a delegation of authority to colleges to control practice standards for licensees, absent any stated guidelines, appears to be clearly arbitrary and beyond the Board's delegated authority." *See id.* (Emphasis supplied).

Again, these Proposed Rules are substantially different from the rule stricken in the *Nutrition Counselors* case. Here, it is the Commission that: (1) has made the fundamental policy decision as to the stated criteria that the standards must meet; (2) retains discretion to determine whether the utilities' construction and attachment standards comply with the rules; and (3) will resolve complaints regarding the rule's implementation. Because the Proposed Rules would not delegate regulatory authority to electric utilities, there is no merit to the argument that the Commission lacks legislative authority to subdelegate powers to a private entity.

3. The Commission historically regulates by exception.

The Commission practice of regulating by exception, not managing or micromanaging utilities, is an essential part of the Commission's regulatory oversight in a number of areas. The utilities are the entities that must design, construct and maintain their systems – not the Commission or the Attachers. Consequently, the Commission rules, 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. This is especially true where, as here, the subject matter of the construction standards is complex and it would be impossible for the Commission to articulate finite standards for each utility.[4]

As the Commission observed in *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.)

The Commission properly relies on the principle of management or regulation by exception in numerous ways. Indeed, the IOUs are not aware of another instance where the Commission has pre-approved any type of construction standards, as opposed to providing guidelines and enforcement mechanisms to govern the utilities' development of such standards. Similarly, the Commission does not pre-approve every contract entered into by a public utility but instead

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[4] *See, e.g., Avatar Dev. Corp. v. State*, 723 So. 2d 199, 207 (Fla. 1998) *quoting Askew v. Cross Key Waterways*, 372 So. 2d 913, 918 (Fla. 1978) and *Brown v. Apalachee Regional Planning Council*, 560 So. 2d 782 (Fla. 1990) (finding that "environmental protection requires highly technical, scientific regulatory schemes to ensure proper compliance with legislative policy" and determining that requiring the Legislature to "enact such rules, regulations and procedures capable of addressing the myriad of problems and situations that may arise implicating pollution control and prevention in Florida's varied environment" would be "difficult, if not impossible").

addresses and resolves any contention by a substantially affected person that a utility acted imprudently in entering into a particular contract.

As referenced above, 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. To do otherwise would unnecessarily involve the Commission in the utility's business decisions and, as an operational matter, could prevent the utility from achieving the policy objectives of the State and this Commission. For example, if the Commission was to approve each and every construction standard or relocation effort of a utility before it takes effect, the utility could be prevented from taking actions needed in order to provide safe and reliable service to customers as required by state law.

Instead, the Commission has recognized that 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. Here, in charging the utilities with the development of construction and attachment 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. The Commission has appropriately reasoned that some areas may have higher risk of damage and that stronger facilities are required in those areas.

B. Revisions that would require filing and approval of guidelines would strengthen the position that the rules do not unlawfully delegate authority.

At the August 31, 2006 rulemaking hearing, the Commission expressed reservations about the absence of a mechanism in the Proposed Rules for it to review hardening-related construction standards that are implemented by the IOUs pursuant to Rule 25-6.034. (Hearing Tr. 79-84, 107, 165, 175). At the same time, the Commission and Staff recognized that it would be difficult for them to review the details of the IOUs' voluminous construction standards before

those standards are put into effect, and that this time-consuming review could result in undesirable delays in implementing the standards. (Hearing Tr. 165-167). The Commission asked the IOUs and other rulemaking participants to consider whether a mechanism could be added to the rules to provide meaningful up-front Commission review, while avoiding the burden and potential delays of reviewing the detailed construction standards. (Hearing Tr. 165-175).

The IOUs believe that the most effective mechanism for achieving the balance that the Commission desires is to revise Proposed Rule 25-6.034 so that it (i) provides for each utility to file for Commission review and approval guidelines for developing hardening-related construction standards; and then (ii) requires that the utility's construction standards implement and be consistent with the Commission-approved guidelines. The IOUs envision that the guidelines would describe the systematic approach that each utility will follow to achieve the desired objectives of enhancing reliability and reducing restoration costs and outage times consistent with the hardening provisions of Proposed Rule 25-6.034. As discussed above, the specific revisions to the Proposed Rules suggested by the IOUs are reflected in Exhibit A to these Comments.

Under the IOUs' proposed approach, the construction standards would not themselves be subject to up-front Commission review, thus avoiding the burden and potential delay associated with such a massive undertaking. However, the hardening-related construction standards would be made available to attachers and joint users of utility poles, who would have a right to make comments or express concerns about the standards that would be taken into account by the utility. Ultimately, if an attacher or joint user is not satisfied that the hardening standards are consistent with the Commission-approved guidelines, it would have the right to challenge the standards in a proceeding before the Commission. The subject hardening standards would not

become effective until the Commission resolves the dispute which would be resolved by final agency action within 120 days.

The IOUs believe that the concept of focusing on up-front approval of guidelines may be useful with respect to the attachment standards addressed in Rule 25-6.0342 as well. Their proposed approach would provide for attachment standards, in addition to construction standards, to be addressed by the guidelines that would be filed for Commission review and approval. As with the construction standards, a utility's attachment standards would have to implement and be consistent with the Commission-approved guidelines, and there would be a process for input and dispute resolution concerning the attachment standards that each utility implements.

Coupled with the existing criteria in the Proposed Rules with which the utilities' construction standards must conform, the IOUs believe that requiring the utilities to file hardening guidelines for Commission approval, as well as providing for resolution of disputes concerning the standards implementing such guidelines before the standards take effect, should give the Commission added comfort that its Proposed Rules do not effect an unlawful delegation of regulatory authority to electric utilities.

II. Utilizing Input from Attachers

A. Suggestions that the standards should be adopted by mutual agreement should be rejected as unworkable and inappropriate.

Several Attachers urged a more collaborative process in developing the construction and attachment standards. For example, the FCTA argues that the Attachment Standards and Procedures should be "jointly developed" with third-party attachers and submitted to the Commission for approval, including the opportunity for an evidentiary hearing. Similar arguments are advanced with respect to construction standards. (Hearing Tr. 34; Staff

Composite Exhibit, Tab 9, FCTA August 4, 2006 Comments, Composite Exhibit MAG-1). Similarly, Time Warner suggests that the Commission review the standards for consistency in implementing the NESC. (Staff Composite Exhibit, Tab 8, Time Warner August 4, 2006 Comments, Attachment 1). These suggestions should be rejected as unworkable and inappropriate.

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. As called for by the Proposed Rules, the electric utilities will seek input from the attaching entities in the development of the construction and attachment standards and will coordinate the relocation of facilities with the attaching entities. For the Proposed Rules to give the attaching entities the ability to manage or veto the utility standards would undermine the objective of the Commission's proposed infrastructure hardening rules and threaten the safety and reliability of the grid.

The IOUs' suggested revisions to Rules 25-6.034 and 25-6.0342 discussed in I B. above and reflected in Exhibit A to these Comments fairly address the concerns raised by the Attachers without giving any party the ability to gridlock the process. These suggested changes provide: (1) guidelines for developing hardening construction and attachment standards that must be filed with and approved by the Commission; (2) the hardening standards developed by the IOUs must be consistent with the construction guidelines; (3) meaningful input must be considered and evaluated for incorporation by the IOUs in the development of the hardening standards; (4) the hardening standards must be made available to the Attachers before the standards are implemented; (5) suspension of the effectiveness of the standard where a dispute is filed until the dispute is resolved by the Commission.

These suggested changes fairly address the concerns raised by the Attachers and provide for a practical and workable procedure without creating an impasse.

B. Requiring extensive mandatory notice to coordinate construction, installation and migration projects would be unworkable and ineffective.

FCTA urges the Commission to amend Proposed Rule 25-6.0341 to require utilities to provide "notice and an opportunity to participate" where an expansion, rebuild, or relocation of electric distribution facilities affects existing third-party attachments and to "take into account the needs and requirements of third-party attachers in coordinating" the construction of its facilities with the attacher. (Staff Composite Exhibit, Tab 9, FCTA August 4, 2006 Comments, Attachment 4). Further, FCTA suggests that the utility shall be required to provide "reasonable and sufficient advance notice of its construction plans to permit third-party attachers to evaluate their construction alternatives and to make necessary budgetary plans." *Id.* Verizon also suggests a requirement of mandatory advance notice of "at least 12 months" (Staff Composite Exhibit, Tab 10, Verizon August 4, 2006 Comments, p. 4). These suggestions should be rejected.

To require utilities to provide substantial advance notice and consider the needs and requirements of third-party attachers whenever an attacher is affected by a project would undermine the reliability objectives of the Proposed Rules and elevate the third-party attachers to the role of managing the utilities' poles and projects. In some cases, municipal, state and other critical relocation projects will need to be done with notice of six months or less in emergencies. The utilities need the flexibility to respond to the customers' needs.

The Proposed Rules require the utility to "seek input from" and "to the extent practical, coordinate" with attachers where the expansion, rebuild, or relocation of electric distribution facilities affects existing attachments. *See* Proposed Rule 25-6.0341(4). This strikes the

appropriate balance between the Attachers' desire for appropriate notice and the electric utilities' need for flexibility to address its specific system needs as they arise. Nonetheless, to give the Attachers' greater confidence that their input will continue to be considered in evaluating relocation projects, the IOUs suggest modifications to subsection (4) that would make clear that the IOUs must evaluate input received from affected third-party attachers and joint users relative to relocation of distribution facilities to the front edge of the property, including consideration of the cost impacts on attachers and joint users. *See* Joint Comments, Exhibit A.

III. Costs

A. The cost estimates supplied by the Attachers are overstated and unreliable.

In an apparent effort to persuade the Commission to abandon the Proposed Rules, the Attachers have offered overstated and unreliable cost impact estimates that suffer from at least three critical flaws. First, the Attachers' cost impact estimates assume that the Commission's Proposed Rules require the IOUs to engage in mass, system-wide changes to their electric transmission and distribution systems *without regard* to feasibility, practicality, or cost-effectiveness. A review of the Commission's Proposed Rules, however, shows that this is simply not the case. Second, the Attachers' cost estimates are premised on the assumption that the Attachers have no involvement in and no mechanism to challenge any construction standards that may call for across the board relocation of facilities without regard to other considerations. Again, the plain language of the Proposed Rules clearly shows that the IOUs will seek the Attachers' input in development of the standards and the Attachers' can challenge standards that they allege to be unreasonable before the Commission. Also, the IOUs are required to seek input from the Attachers where expansions, rebuilds, or relocations of electric distribution facilities affect existing attachments and must coordinate with Attachers on such projects to the extent practical. The Attachers' cost estimates are necessarily overstated because they fail to

acknowledge the Attachers' ability to raise such challenges and be involved in relocations. Third, even if the Attachers' cost estimates were not unreliable for the two reasons discussed above, the lion's share of their estimates are simply overstated and are not consistent with the cost estimates that the IOUs themselves have filed with the Commission.

As stated above, the Attachers' cost impact estimates improperly assume that the Commission's Proposed Rules require the IOUs to engage in mass, system-wide changes to their electric transmission and distribution systems *without regard* to feasibility, practicality, or cost-effectiveness. (Time Warner's September 8, 2006 Comments, p. 5 (suggesting that the Proposed Rules will force IOUs to underground "large amounts" of their distribution facilities); Staff Composite Exhibit, Tab 9, FCTA's August 4, 2006 Comments, p. 10 and Attachment 1 (suggesting that the Proposed Rules would require IOUs to move all of their facilities from rear lots to front lots); Verizon's July 13, 2006 Presentation at Slide 9 (suggesting that the Proposed Rules would require 50% more poles to be installed); Staff Composite Exhibit, Tab 12, Kirk Smith's August 4, 2006 Testimony on Behalf of BellSouth, p. 13 (assuming that IOUs will abandon and relocate up to 40% of their poles)). However, the Commission's Proposed Rules instruct IOUs to be guided by the extreme wind loading standard and to take certain actions "to the extent practical, feasible and cost-effective." Cost estimates that do not acknowledge this fact are inherently flawed.

Next, the Attachers' cost estimates are premised on the assumption that the Attachers have no mechanism to challenge construction standards to implement the Proposed Rules at issue and no involvement in the development of standards. For example, FTCA's estimates assume that the IOUs will move all their rear-lot poles to front lot locations without regard to feasibility, reasonableness, or cost effectiveness, and that FCTA will be forced to accept this fact without recourse. (Staff Composite Exhibit, Tab 9, FCTA's August 4, 2006 Comments, p. 10

and Attachment 1). Again, however, the plain language of the Proposed Rules shows that the Attachers will have input on construction standards and can challenge standards that call for widespread relocations without regard to other considerations. Because their cost estimates do not acknowledge this fact and simply assume that the Attachers would be forced to accept "unreasonable" standards without recourse, they are necessarily unreliable.

Finally, the majority of the Attachers' cost estimates are simply overstated and are not consistent with the cost estimates that the IOUs themselves have filed with the Commission. For example, BellSouth witness Smith argues that electric companies will underground and abandon up to 40% of poles that have BellSouth attachments (Staff Composite Exhibit, Tab 12, Kirk Smith's August 4, 2006 Testimony on behalf of BellSouth, p. 13). Even with an emphasis on promoting conversions to underground facilities, a 10% conversion rate is greatly exaggerated. BellSouth's cost impacts based on its assertion that Proposed Rule 25-6.0341 calls for electric utilities to "as a general rule" place facilities in front of the customer's premises are also inflated. *See id.* Proposed Rule 25-6.0431 calls for electric utilities to place facilities adjacent to a public road "to the extent practical, feasible and cost-effective." The rule does not call for a broad brush approach to relocations. Rather, relocations would occur in a practical, feasible and cost-effective manner. Logically, the Attachers' cost impact estimates should be in line and in proportion with the IOUs estimates of what the IOUs anticipate doing and should not be based on "extreme" assertions that are not factually supported.

Regarding the replacement of existing poles with taller, stronger poles, BellSouth's assertion that 40% of poles will be impacted in the near term is high, and its range of cost per transfer of $95 to $470 appears inflated. (Staff Composite Exhibit, Tab 12, Kirk Smith's August 4, 2006 testimony on behalf of BellSouth, p. 15). Indeed, the stronger poles that are being set are current industry standard poles and, therefore, BellSouth already has experience in attaching to

these poles. Also, it is inappropriate to assume that all existing poles must be replaced as part of the hardening effort. These and other factors lead to inflated assumptions that render the cost calculations supplied by BellSouth and others unreliable.

Further, regarding the Attachers' alleged cost impacts associated with increases in pole rental rates (e.g., Staff Composite Exhibit, Tab 10, Verizon's August 4, 2006 Comments, p. 8), any increases in rental rates will not be disproportionately borne by attachers. Because of third-party attachments, it will cost the IOUs more money to meet wind-loading requirements. The IOUs and their customers should not be forced to subsidize the costs of the more fortified system that is needed to meet the needs of Attachers. Rather, the Attachers should bear their share of the costs.

B. Regulation is not a reason to shift costs to electric utilities and their customers.

The Incumbent Local Exchange Companies ("ILECs") assert that the costs of implementing the Proposed Rules should be shifted to the electric utilities because the electric utilities are rate-of-return regulated. (Staff Composite Exhibit, Tab 12, Pam Tipton's August 4, 2006 testimony on behalf of BellSouth, pp. 7-9). This argument must be rejected.

First, the rules and standards will apply to all Attachers in a fair and non-discriminatory manner. Increased costs to attaching entities will not be any greater than to any other user of the poles.

Second, the ILECs' comments ignore the fact that they have each elected price cap regulation under Section 364.051, Florida Statutes. These ILECs could have chosen to remain subject to rate-of-return regulation had they desired to do so, and costs should not be shifted to IOUs and their customers simply because of a choice the ILECs made. Furthermore, the price

caps are not absolute and may be eliminated under certain circumstances. *See* Section 364.051(3), (4)(a), Fla. Stat. (2006).

The argument that the ILECs and other Attachers will be competitively disadvantaged if they are forced to bear some of the costs associated with implementation of the Proposed Rules is simply irrelevant to whether the Proposed Rules merit adoption as a reasonable and appropriate exercise of the Commission's safety and reliability jurisdiction.

C. Cost Causation

The Attachers also argue that the Attachers are not "cost-causers" and that the rules "presuppose" that third party attachments on poles cause safety or reliability problems (Hearing Tr. 23; Staff Composite Exhibit, Tab 12, Kirk Smith's August 4, 2006 testimony on behalf of BellSouth, pp. 17-18). The Attachers' arguments miss the mark as the purpose of the Proposed Rules is to strengthen utilities' infrastructure. Therefore, the appropriate question is not who or what is causing problems or pole failures, but rather, what can be done to further ensure storm readiness on a going forward basis.

IV. Jurisdiction

The Proposed Rules are a valid exercise of the Commission's safety and reliability jurisdiction. The Attachers do not dispute that the Commission has broad safety and reliability jurisdiction over electric distribution infrastructure. However, they still question whether the Commission has authority to adopt rules which impact third-party attachments, in light of the FCC's pole attachment jurisdiction. These questions are unfounded both legally and practically.

A. This Commission has jurisdiction over safety and reliability issues.

This Commission's safety and reliability jurisdiction was not in any way diminished by the Pole Attachments Act. With the Pole Attachments Act, Congress did not preempt the entire field of pole attachments issues. Rather, the Act clearly makes room for state regulation by

distinguishing between two types of pole attachment issues: (1) contract issues, including the rates, terms and conditions applicable to the attachment (which *are* within the province of the FCC, unless a state certifies that it regulates rates, terms and conditions); and (2) safety, reliability, capacity and engineering issues raised by a request for attachment to a pole (which remain within the province of the states to the extent a state is regulating those areas).

As originally enacted in 1978, the Pole Attachment Act regulated only the contract issues arising from cable attachments to utility poles. Congress captures the contract issues by a single phrase: "rates, terms and conditions." *See* 47 U.S.C. § 224. Access to utility poles was voluntary and outside the scope of the Act. As such, access (and the concomitant issues of capacity, safety, reliability and engineering) was not a "rate, term or condition" of attachment. Congress also put in place a reverse preemption provision which required a state to "certify" that it "regulated the rate, terms and conditions of pole attachment." *See* 47 U.S.C. § 224(c)(2).

In 1996, Congress expanded the Act to mandate *access* to utility poles for cable and telecommunications companies, except "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." *See* 47 U.S.C. § 224(f)(1) & (2). Congress also amended the Act to provide: "Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State." *See* 47 U.S.C. § 224(c)(1). However, Congress did *not* amend Section 224(c)(1) to require "certification" for a state to exercise jurisdiction over anything other than "rates, terms and conditions." Congress's use of the disjunctive "or" in Section 224(c)(1) demonstrates its intentional separation between contract issues ("rates, terms and conditions") and issues of capacity, safety, reliability and

engineering. Simply put, under the plain language of the Act, a state *does not* have to "certify" that it regulates issues of access in order to reverse preempt – it just has to regulate.

Recognizing Congress's express words, the FCC acknowledged that certification is not required for state regulation of access issues:

> In such cases, the expansion of the Commission's authority to require utilities to provide nondiscriminatory access under section 224(f) is countered by a corresponding expansion in the scope of a state's authority under section 224(c)(1) to preempt federal requirements. The authority of a state under section 224(c)(1) to preempt federal regulation in these cases is clear. . . . We note that Congress did not amend sections 224(c)(2) to prescribe a certification procedure with respect to access (as distinct from the rates, terms, and conditions of access).

See Local Competition Order, 11 FCC Rcd. 15499, ¶¶ 1236 & 1240 (1996).

At the August 31, 2006 hearing and in its August 4, 2006 comments, the FCTA argued that the *Order on Reconsideration* (reviewing *Local Competition Order*) actually reversed field from the *Local Competition Order*, and held that a state must "certify" that it regulates access. This absolutely is not the case. The cable companies in that rulemaking had specifically requested that the FCC overturn its ruling in the *Local Competition Order*. *See Order on Reconsideration,* 14 FCC Rcd. 18049, ¶ 115 (1999) ("NCTA requests that the Commission reconsider its decision and require states to utilize the same procedural mechanisms for assuming jurisdiction over access that they must use to assume jurisdiction over pole attachment rates, terms and conditions."). But in the *Order on Reconsideration*, the FCC stated:

> The *Local Competition Order* noted that Congress did not amend section 224(c)(2) to prescribe a certification procedure with respect to access (as distinct from the rates, terms, and conditions of access). Parties seeking reconsideration have provided no new facts or arguments to justify their requested rule changes.

See 14 FCC Rcd 18049 (1999) at ¶ 114. Moreover, in the same (admittedly ambiguous-at-first-blush) paragraph upon which FCTA relies, the FCC stated with respect to its holding in the *Local Competition Order*: "we decline to reconsider this decision." *Id.* at ¶ 115.[5]

In keeping with its no-certification-required holding, the FCC further said in its *Order on Reconsideration*:

> We reiterate that, upon the filing of an access complaint with this Commission, the defending party or the state itself should come forward to apprise us whether the state is regulating such matters. If so, pursuant to the *Local Competition Order,* we shall dismiss the complaint without prejudice to it being brought in the appropriate state forum. We require any party seeking to demonstrate that a state regulates access issues to cite to the state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. We continue to believe that these procedures are consistent with the language and intent of the statute, and unduly burden neither the parties to an access complaint, nor the state entities responsible for pole attachment regulations.

See 14 FCC Rcd 18049 (1999) at ¶ 116. In summary, under the plain language of the Pole Attachment Act and the FCC decisions interpreting the Act, a state need not "certify" that it regulates capacity, safety, reliability and engineering (issues of access under Section 224(f)).

B. The Florida Supreme Court's Decision in *Teleprompter v. Hawkins* has no bearing on the matter before the Commission.

The Attachers have relied on *Teleprompter v. Hawkins*, 384 So. 2d 648 (Fla. 1980), in arguing that the Commission has no jurisdiction to adopt the proposed pole attachment rules. But *Teleprompter*, decided in 1980, addressed one question, and one question only: whether the Commission had the requisite statutory authority to certify jurisdiction over rates, terms and conditions of pole attachment. In *Teleprompter*, the Commission had "certified" (per Section

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[5] In the ambiguous-at-first-blush sentence cited by FCTA in its August 4, 2006 Comments, the FCC was actually talking about a situation where a state was thereafter certifying jurisdiction over rates, terms and conditions for the first time. In other words, to avoid confusion, the FCC was requiring a state to certify the "whole ball of wax" if it was going to the trouble of certifying regulation of rates, terms and conditions, and intended to regulate access issues as well.

224(c)(2)) its jurisdiction over rates, terms and conditions. Cable companies challenged this exercise of jurisdiction as being beyond the Commission's statutorily-granted authority. Importantly, *Teleprompter* pre-dated Congress' pronouncements in the 1996 Act and, therefore, did not address (and could not have addressed) this Commission's jurisdiction over capacity, safety, reliability and engineering issues in any respect. Moreover, it was after *Teleprompter* that the Florida Legislature further expanded this Commission's jurisdiction over the safety and reliability of electric distribution poles. The *Teleprompter* case is a red herring in the context of the Proposed Rules.

C. This Commission thoroughly regulates issues of safety and reliability

Florida thoroughly regulates issues of safety and reliability. For example, Section 366.04(6), Florida Statutes, delegates to the Commission "exclusive jurisdiction to prescribe and enforce safety standards for transmission and distribution facilities of all public electric utilities." Section 366.04(6) directs the Commission to adopt the 1984 edition and any new editions of the National Electrical Safety Code. With respect to reliability and engineering, Section 366.04(2)(c) grants the Commission authority over electric utilities for the purpose of requiring electric power conservation and reliability within a coordinated grid. Section 366.04(5) provides that the Commission has jurisdiction over the "planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy." In addition, section 366.05(1), Florida Statutes, grants the Commission the "power to ... adopt construction standards that exceed the National Electrical Safety Code, for purpose of ensuring the reliable provision of service."

Pursuant to these statutory provisions, the Commission has promulgated numerous regulations addressing system safety and reliability. *See, e.g.,* Rules 25-6.019, 25-6.034, 25-6.0345, 25-6.037, 25.6039, 25-6.044, 25-6.0455, Florida Administrative Code (2006). Because

jurisdiction over safety and reliability is clearly reserved to the states, and because Florida in fact has significant laws regulating those issues, and because this Commission has exercised this jurisdiction in the past, this Commission has jurisdiction to determine issues of safety and reliability regarding the state's electric distribution facilities as they relate to pole attachments.

D. 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.[6]

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. As discussed above, that assertion is without merit, but in any event it is of no significance here. First, the Commission has no role in

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[6] 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).

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.

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 attachment rates.

V. The Commission should move forward with adoption of Rules 25-6.034, 25-6.0341 and 25-6.0342 with the modifications suggested by the IOUs.

A. The Attachers' Criticisms of the Extreme Wind Loading Provisions of Proposed Rule 25-6.034 Lack Merit.

The Attachers have criticized the requirement in Proposed Rule 25-6.034(5) for construction of distribution facilities to be guided by the extreme wind loading standards of the NESC. (Hearing Exhibit 4, Verizon's presentation; Hearing Tr. 36-60 (Slavin); Staff Composite Exhibit, Tab 10, Appendix 1 to Verizon's August 11, 2006 Comments titled *Report Concerning Proposed Rule 25-6.034 As It Relates to Extreme Wind Loading Requirements*). As shown below, those criticisms all miss the mark.

Once again, the Attachers' criticisms seem to overlook the fact that Proposed Rule 25-6.034(5) only applies "to the extent reasonably practical, feasible and cost-effective." In essence, the criticisms constitute a critique of whether hardening distribution facilities to the NESC extreme wind standards are realistic and cost-justified. But the rule already provides that utilities need not harden to the NESC extreme wind standards if it is not "reasonably practical, feasible and cost-effective" to do so. Thus, Rule Proposed 25-6.034(5) effectively anticipates and addresses the criticisms that the Attachers have raised.

The FCTA suggests that resources should be focused on increased pole inspections and vegetation management rather than on hardening the distribution facilities to extreme wind standards. (Staff Composite Exhibit, Tab 9, FCTA August 4, 2006 Comments). But this is a false dichotomy. In reality, the Commission should focus – and is focusing – on both. The Commission has already directed utilities to adopt aggressive pole inspection and vegetation management programs. Those programs are likely to result in fewer poles failing due to deterioration and/or impacts from falling trees and other vegetation.

The IOUs do agree with BellSouth and others that Proposed Rule 25-6.034(4) should refer to the 2007 edition of the NESC rather than the 2002 edition. The 2007 edition has already been finalized and will become effective in February 2007. Incorporating the 2007 NESC edition will help make the rule as current as possible, and realistically no construction standards are likely to be implemented under the new rule until February 2007 in any event.

B. There is ample evidentiary support for adoption of Rule 25-6.0342.

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 the pole attachment effect on poles to prevent overloading. (Hearing Tr. 145; Staff Composite Exhibit Tab 14, Attachment 1).

The IOUs agree that the wind loading effect of pole attachments creates stress on utility poles. Although both electrical power equipment and telecommunications line attachments play a role in overall pole loading, telecommunications equipment can also have a significant effect on overall pole wind loading, contributing as much as 40% of the overall wind loading of a

typical pole line. In addition, once the basic power circuit is accounted for, additional power equipment can be addressed on a pole by pole basis. Conversely, communications circuit changes must be applied to the entire pole line that they are installed on. (Hearing Tr. 145; Staff Composite Exhibit Tab 14, Exhibit 1).

Tampa Electric presented a series of photographs which show the obvious effect pole attachments can have on the safety and reliability of the system. (Hearing Tr. 147-48; Staff Composite Exhibit Tab 13, Exhibit 14). Perhaps the most striking example is shown in the photograph identified as Document 1 to Tampa Electric's Comments filed August 18, 2006. (Staff Composite Exhibit, Tab 13, Exhibit 1). This photograph shows a third-party attachment at the center of the pole overloading the pole and causing it to split. The additional weight of an unnoticed 300 foot span of two additional overlashings of cable over eight lanes of vehicular traffic caused the pole to fail. (Staff Composite Exhibit Tab 13, Exhibit 1)

The photographs also show the significant size of overlashed cable which presents a significant wind surface and stress on a pole. (Documents 2-27, Staff Composite Exhibit Tab 13, Exhibit 1; Hearing Tr. 146-48). This size was also demonstrated by the sample of an overlashed cable identified as Exhibit 9. As many as seven cables are lashed together causing in many instances significant sagging and stress.

Cable companies do not typically give notice of overlashing, contending that such notice is unnecessary and not required because the pole attachment rate for a single cable or a seven-cable overlash is the same. This practice, of course, ignores the considerable additional wind loading and stress effect that the larger, heavier cable has on the pole. (Hearing Tr. 148; Staff Composite Exhibit, Tab 13, Exhibit 1).

The evidence presented at the hearing also shows that notification of attachments by third parties to electric utilities is inconsistent, sporadic and incomplete. For example in the last

Tampa Electric pole attachment count in the field, 21,000 unreported telephone attachments and over 26,000 unreported cable television attachments were discovered. (Hearing Tr. 149-50; Staff Composite Exhibit Tab 12, Exhibit 1).

All of this shows a significant need to develop pole attachment standards and procedures. This requirement is an essential tool in addressing pole attachment issues and is entirely consistent with the Commission's initiatives requiring pole inspections and audits of pole attachment agreements.

Pole attachment standards and procedures will reduce the number of unauthorized and unnoticed attachments which can lead to overloaded conditions on poles.

In sum, third-party pole attachments significantly affect wind ratings and pole line design. The Commission has ample evidentiary support for addressing third-party attachments as part of its endeavor to strengthen utilities' infrastructure and further ensure storm readiness on a going forward basis.

VI. The Attachers' protests of Rules 25-6.064, 25-6.078 and 25-6.115 (the CIAC Rules) are unwarranted and unnecessary.

The FCTA, BellSouth and Verizon all make essentially the same comment on Proposed Rules 25-6.064, 25-6.078 and 25-6.115: that those rules would be invalid if the construction standard requirements of Proposed Rule 25-6.034 were ultimately determined to be invalid. (Staff Composite Exhibit Tabs 9, 10 and 12, August 11, 2006 Comments of FCTA, BellSouth and Verizon). The IOUs believe that this comment misunderstands the purpose and effect of the cross reference to Proposed Rule 25-6.034 that appears in Proposed Rules 25-6.064, 25-6.078 and 25-6.115.

All three of those rules deal with the computation of CIAC applicable to the installation of underground distribution facilities. They all contain essentially the same cross-reference to

Proposed Rule 25-6.034: for the purpose of calculating the CIAC, the cost of the hypothetical overhead facilities that would be built if the customer had not elected underground facilities is to be based on the construction standards contained in Proposed Rule 25-6.034. None of these cross-references says what those construction standards are to be; they simply call for the CIAC calculation to rely upon whatever standards are contained in Proposed Rule 25-6.034. Therefore, even if the Attachers' comments successfully called into question the validity of the construction standards set forth in Proposed Rule 25-6.034 (which they do not), the IOUs fail to see how this would cast doubt on the validity of Proposed Rules 25-6.064, 25-6.078 and 25-6.115. Proposed Rule 25-6.034 dealt with construction standards well before the Commission proposed to revise it to address hardening. Even if the Commission ultimately determined not to amend Proposed Rule 25-6.034, it would still address construction standards and thus the cross-references in Proposed Rules 25-6.064, 25-6.078 and 25-6.115 would be valid and appropriate.

The IOUs consider it unfortunate that the Attachers have chosen to protest Proposed Rules 25-6.064, 25-6.078 and 25-6.115. Independent of the debate over the appropriate role of hardened construction standards in helping to ensure the resilience of Florida's overhead electric distribution system to storm impacts, the IOUs believe that there is an important role for undergrounding in appropriate settings. The IOUs have repeatedly urged the Attachers to withdraw their objections to Proposed Rules 25-6.064, 25-6.078 and 25-6.115 so that they can be put into effect as quickly as possible, but so far the Attachers have been unwilling to do so.

Finally, with respect to Proposed Rule 25-6.064, BellSouth asserts that it should receive a credit or reduction against the historical average pole cost used in calculating the joint use pole rental charge, to reflect the amount of CIAC contributions and payments by other attachers which the electric utility receives for the poles in question. This is simply not a relevant topic to the debate over Proposed Rule 25-6.064. Joint use agreements are negotiated contracts between

electric and telephone companies. These agreements clearly identify how attachment rates are calculated and the components to be included in that calculation. Any changes to that calculation would need to be mutually agreed upon by the parties to the agreements. This Commission does not regulate the terms and conditions of joint use agreements, so Proposed Rule 25-6.064 cannot properly be the vehicle for debating possible modifications to those agreements.

Conclusion

The Proposed Rules are an important part of the Commission's objective of ensuring facilities are storm ready in light of the increased threat of hurricane activity that we currently face. The Proposed Rules provide a critical means for dealing with this threat to electric distribution facilities in a fair and reasonable way, and the Commission should move forward with adoption of the rules with the revisions suggested by the IOUs in a timely manner.

Respectfully submitted this 2nd day of October, 2006.

R. Wade Litchfield, Esq.
John T. Butler, Esq.
Natalie F. Smith, Esq.
700 Universe Boulevard
Juno Beach, FL 33408
Telephone: (561) 691-7100
Facsimile: (561) 691-7135

ON BEHALF OF FLORIDA POWER & LIGHT COMPANY

Jeffrey A. Stone
Russell A. Badders
Beggs & Lane
Post Office Box 12950
Pensacola, FL 32591-2950
Telephone: (850) 432-2451
Facsimile: (850) 469-3331
and
J. Russell Campbell
Eric B. Langley
Balch & Bingham LLP
1710 Sixth Avenue, N.
Birmingham, AL 35203
Telephone: (205) 251-8100
Facsimile: (205) 488-5859

ON BEHALF OF GULF POWER COMPANY

Alex Glenn
John Burnett
Post Office Box 14042
St. Petersburg, FL 33733
Telephone: (727) 820-5184
Facsimile: (727) 820-5519

ON BEHALF OF PROGRESS ENERGY FLORIDA, INC.

Lee L. Willis
James D. Beasley
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302
Telephone: (850) 224-9115
Facsimile: (850) 222-7952

ON BEHALF OF TAMPA ELECTRIC COMPANY

By: s/ Natalie F. Smith
Natalie F. Smith

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Joint Post-Hearing Comments of the IOU's has been furnished by electronic mail* or U. S. Mail this 2nd day of October, 2006 to the following:

Mr. Larry Harris*
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Alex Glenn and John Burnett
Progress Energy Florida, Inc.
Post Office Box 14042
St. Petersburg, FL 33733

Jeffrey A. Stone and Russell Badders
Beggs & Lane
Post Office Box 12950
Pensacola, FL 32576-2950

R. Wade Litchfield, Natalie F. Smith and
John T. Butler
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420

James Meza III and Earl Edenfield, Jr.
c/o Ms. Nancy H. Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street
Tallahassee, FL 32301-1556

Charles J. Rehwinkel
Embarq
315 S. Calhoun Street, Suite 500
Tallahassee, FL 32301

Michael A. Gross
Florida Cable Telecommunications Assoc.
246 E. 6th Avenue, Suite 100
Tallahassee, FL 32303

Howard E. Adams
Pennington Law Firm
Post office Box 10095
Tallahassee, FL 32302

Thomas M. McCabe
TDS Telecom
Post Office Box 189
Quincy, FL 32353-0189

Dulaney L. O'Roark III
Verizon Florida, Inc.
Six Concourse Parkway
Atlanta, GA 30328

R. Scheffel Wright
Young Law Firm
225 South Adams Street
Tallahassee, FL 32301

J. Russell Campbell
Eric B. Langley
Balch & Bingham LLP
1710 Sixth Avenue, N.
Birmingham, AL 35203

s/ Natalie F. Smith
Natalie F. Smith