

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Proposed Adoption of Rule 25-18.010,)
F.A.C., Pole Attachment Complaints) Docket No. 20210137-PU
_____))
_____)

**JOINT REQUEST FOR A HEARING AND SEPARATE PROCEEDING ON
PROPOSED RULE 25-18.010, F.A.C.**

Pursuant to Section 120.54(3)(c), Florida Statutes, Florida Internet and Television Association, Inc., Charter Communications, Inc., Comcast Cable Communications, LLC, and Cox Communications Gulf Coast, LLC (collectively “Petitioners”) file this request with the Florida Public Service Commission (“Commission” or “PSC”) for a hearing and a separate proceeding on proposed Rule 25-18.010, Florida Administrative Code (“F.A.C.”) (“Proposed Rule”). The Proposed Rule was noticed by the Commission in a Notice of Rulemaking in Order No. PSC-2021-0412-NOR-PU (“Proposed Rule Order”), issued on November 4, 2021, and by publication in the November 4, 2021, edition of the Florida Administrative Register (“FAR”). In support of this request for a hearing and a separate proceeding, Petitioners state:

I. Identification of Parties and Representatives

1. The identification of the Petitioners and their respective business addresses for Florida are as follows:

- a. Florida Internet and Television Association, Inc. (“FIT”), 246 East 6th Avenue, Suite 100, Tallahassee, Florida 32303.
- b. Atlantic Broadband (Miami) LLC (“Atlantic”), 1681 Kennedy Causeway, North Bay Village, FL 33141.

c. Charter Communications, Inc. (“Charter”), 2251 Lucien Way, Maitland, Florida, 32751.

d. Comcast Cable Communications, LLC (“Comcast”), 1100 Northpoint Parkway, West Palm Beach, FL 33407.

e. Cox Communications Gulf Coast, LLC (“Cox”), 7401 Florida Boulevard, Baton Rouge, Louisiana, 70806.

2. Copies of all pleadings, notices, orders, and other documents relevant to this matter should be provided to the attorneys representing the respective Petitioners in this matter as follows:

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II. Timeliness and Standing

3. This docket was initiated by the Commission Staff on August 13, 2021, for the purpose of proposing the adoption of a rule to implement section 366.04(8), Florida Statutes (2021) regarding Pole Attachment Complaints.⁴ The Commission published notice of its intent to adopt the Proposed Rule pursuant to section 120.54(3)(a), Florida Statutes, in the FAR on November 4, 2021. Petitioner received notice of the intended agency action via the FAR and the Proposed Rule

² Qualified Representative status pending.

³ Qualified Representative status pending.

⁴ *See*, Chapter 2021-191, Laws of Florida (2021).

Order on November 4, 2021. This Petition was filed within twenty-one days after the date of the publication required by section 120.54(3)(a), Florida Statutes, and is therefore timely.⁵

4. Pursuant to section 120.54(3)(c), Florida Statutes, “affected persons” are entitled to a hearing on a proposed rule if requested within 21 days of the date of publication of the proposed rule, which Petitioners have done. FIT is an established association of Florida broadband Internet and cable television facilities providers that provide both connectivity and content to millions of Floridians. Members of FIT are Atlantic Broadband; Charter Communications, Inc.; Comcast Cable Communications, LLC; Cox Communications Gulf Coast, LLC; and Mediacom Communications Corporation. Each of FIT’s members are an “attaching entity,” as that term is defined in Section 366.02(4), Florida Statutes. Each FIT member has entered into various pole attachment agreements with pole owners⁶ to utilize poles⁷ to deploy their facilities throughout their respective service areas.⁸ FIT members rely primarily on poles owned by third parties, attaching their facilities to a significant number of poles that would be subject to the Proposed Rule; FIT members generally are not pole owners. FIT’s members pay pole owners tens of millions of dollars per year for pole attachments that will be subject to the Proposed Rule if it

⁵ Day 21 fell on a legal holiday, November 25, 2021. Pursuant to Rule 28-106.103, F.A.C., the deadline therefore carries over to the next day that is not a legal holiday, Saturday, or Sunday, which in this case is November 29, 2021, since November 25 and 26 were state legal holidays, and November 27 and 28 were Saturday and Sunday.

⁶ “Pole owner” “means a local exchange carrier, a public utility, a communications service provider, or a cable television operator that owns a pole.” § 366.02(8), Fla. Stat.

⁷ Throughout this Petition, references to a “utility pole” or “pole” shall mean the term “pole” as defined by Section 366.02(6), Florida Statutes.

⁸ The term “pole attachment” is more particularly defined in Section 366.02(7), Florida Statutes, and the pole attachments of each FIT member described herein are those that would be subject to the Proposed Rule if it becomes final.

becomes final. FIT has participated in the prior proceedings in this docket, including the rule development hearing on September 1, 2021, the submission of written comments on September 15, 2021, and participation at the November 2, 2021, Agenda Conference.

5. Petitioner Atlantic Broadband provides cable service, broadband internet access service, and other services via cable systems in Florida in areas where Atlantic Broadband attaches to poles that would be within the scope of the Proposed Rule. Atlantic Broadband's affiliate, Atlantic Broadband Enterprise, LLC, is regulated by the Commission as a Competitive Local Exchange Carrier ("CLEC"). Atlantic Broadband attaches to at least 13,000 poles in Florida which would be subject to the Proposed Rule, with such poles representing approximately \$275,000 per year in pole attachment rental fees to pole owners that would be governed by the Proposed Rule. Atlantic Broadband has participated at various points in the PSC docket, including the rule development hearing on September 1, 2021, and through FIT's submission of written comments on September 15, 2021, and participation at the November 2, 2021, Agenda Conference.

6. Petitioner Charter provides cable service, broadband Internet access service, and other services via cable systems in Florida in areas where Charter attaches to poles that would be within the scope of the Proposed Rule. Charter's affiliate, Spectrum Fiberlink Florida, LLC, is regulated by the Commission as a Competitive Local Exchange Carrier ("CLEC"). Charter attaches to at least 900,000 poles in Florida that would be subject to the Proposed Rule, with such poles representing approximately \$7 million dollars per year in pole attachment rental fees to pole owners that would be governed by the Proposed Rule. Charter has participated at various points in this docket, including the rule development hearing on September 1, 2021, and through FIT's submission of written comments on September 15, 2021, and participation at the November 2, 2021, Agenda Conference.

7. Petitioner Comcast provides cable service, broadband Internet access service, and other services via cable systems in Florida in areas where Comcast attaches to poles. Petitioner Comcast's affiliates, Comcast Business Communications, LLC and Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone, are regulated by the Commission as CLECs. Comcast attaches its cable system facilities to more than 950,000 poles in Florida that would be subject to the Proposed Rule, representing in excess of \$15 million a year in pole attachment rental fees to pole owners that would be subject to the Proposed Rule. Comcast has participated at various points in this docket, including the rule development hearing on September 1, 2021, and through FIT's submission of written comments on September 15, 2021, and participation at the November 2, 2021, Agenda Conference.

8. Petitioner Cox provides cable service, broadband Internet access service, and other services via cable systems in Florida in areas where Cox attaches to utility poles. Petitioner Cox's affiliate Cox Florida Telcom, L.P. d/b/a Cox Communications d/b/a Cox Business d/b/a Cox is regulated by the Commission as a CLEC. Cox attaches its cable system facilities to distribution poles owned by various utilities throughout the state. Cox's facilities are attached to approximately 115,000 utility distribution poles in Florida that would be subject to the Proposed Rule, and Cox pays approximately \$900,000 annually in pole attachment rental fees subject to the Proposed Rule. Cox has participated at various points in this docket, including the rule development hearing on September 1, 2021, and through FIT's submission of written comments on September 15, 2021, and participation at the November 2, 2021, Agenda Conference.

9. “[U]tility poles provide the scaffolding for the technology of the twenty-first century.”⁹ Accordingly, it is well-established that the ability of Petitioners to attach to utility poles at just and reasonable rates, terms, and conditions is critical to the provision of competitive cable, broadband, and telecommunications services to millions of Floridians. The FCC, for example, has “recognized that lack of reliable, timely, and affordable access to physical infrastructure—particularly utility poles—is often a significant barrier to deploying wireline and wireless services.” 47 C.F.R. §§ 1.1406(d), 1.140(b), 1.1409, 1.1410. The Florida Legislature has also specifically recognized that “there is a need for increased availability of broadband Internet access throughout this state” and “[t]he lack of Internet connectivity and widespread broadband availability is detrimental to the growth of the economy, access to telehealth, and educational opportunities.” § 288.9963(1), Fla. Stat. In light of the importance of pole attachments to consumers and competition, the rates, terms, and conditions of pole attachments have long been regulated.

10. As attaching entities entitled to access to utility poles at just and reasonable rates, and subject to the Commission’s jurisdiction regarding resolution of complaints pursuant to the terms of Section 366.04(8), Florida Statutes, the Petitioners and all of FIT’s members are substantially affected by the Proposed Rule’s implementation of section 366.04(8), Florida Statutes. FIT routinely appears on behalf of its members’ interests in a variety of legislative, regulatory, and judicial proceedings, and FIT specifically provided both oral and written comments on behalf of its members on the Proposed Rule to the Commission during the rulemaking process.

⁹ CS/SB 1944, Florida Senate Professional Staff of the Committee on Appropriations, *Bill Analysis and Fiscal Impact Statement*, at 3 (Apr. 21, 2021). Available at <https://www.flsenate.gov/Senate/Bill/2021/1944/Analyses/sos1s01944.sp.pdf>.

The subject matter of the Proposed Rule falls squarely within FIT's general scope of interest and activity. Petitioners are therefore substantially affected by the Proposed Rule. Petitioners, therefore, at the very least seek and are entitled to a hearing on the Proposed Rule.

11. Pursuant to section 120.54(3)(c)(2), Florida Statutes, where a person whose substantial interests will be affected in the proceeding demonstrates that the proceeding "does not provide adequate opportunity to protect those interests," the agency must convene a separate proceeding under sections 120.569 and 120.57, Florida Statutes.

12. Petitioners contend that the rulemaking process is insufficient to protect the Petitioners' interests. As explained below, the Proposed Rule must include the FCC's substantive rules regarding the rates, terms, and conditions of pole attachments, *i.e.*, the FCC's methodology. Petitioners' interests can only be protected if allowed to present testimony and other evidence as to the substance of the FCC's methodology and application of same to complaints such as those brought by Petitioners. Petitioners therefore request that the Commission convene a separate proceeding under sections 120.569 and 120.57, Florida Statutes.

III. Problems with the Proposed Rule

13. Since 1978, the FCC has exercised jurisdiction over the rates, terms and conditions for pole attachments¹⁰ throughout the country, including Florida. 47 U.S.C. § 224. States are allowed to regulate the rates, terms, and conditions for pole attachments only if the State certifies to the FCC that "(A) it regulates such rates, terms, and conditions; and (B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the

¹⁰ "Pole attachment" means "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

consumers of the utility services.” 47 U.S.C. § 224(c)(2). States are not considered to regulate the rates, terms, and conditions for pole attachments unless, among other things, “the State has issued and made effective rules and regulations implementing the State’s regulatory authority over pole attachments.” 47 U.S.C. § 224(c)(3). More specifically, the State must certify:

(1) It regulates rates, terms, and conditions for pole attachments;

(2) In so regulating such rates, terms, and conditions, the state has the authority to consider and does consider the interests of the consumers of the services offered via such attachments, as well as the interests of the consumers of utility services; and

(3) It has issued and made effective rules and regulations implementing the state’s regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state).

47 C.F.R. § 1.1405(b)(1)-(3) (emphasis added).

14. In 2021, the Florida Legislature amended section 366.04, Florida Statutes, to require the Commission to “regulate and enforce rates, charges, terms, and conditions of pole attachments . . . to ensure that such rates, charges, terms, and conditions are just and reasonable.” § 366.04(8)(a), Fla. Stat. The Commission is required to “hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreement, or any denial of access relative to pole attachments.” § 366.04(8)(e), Fla. Stat. When taking action on such complaints, the amended Florida statute requires the Commission to “establish just and reasonable cost-based rates, terms, and conditions for pole attachments and shall apply the decisions and orders of the [FCC] and any appellate court decisions reviewing an order of the [FCC] regarding pole attachment rates, terms, or conditions in determining just and reasonable pole attachment rates, terms, and conditions unless a pole owner or attaching entity establishes . . . that an alternative cost-based pole attachment rate is just and reasonable and in the public interest.” *Id.*

15. The Proposed Rule purportedly implements the Legislature’s mandate to the Commission to “propose procedural rules to administer and implement” the amendment no later than January 1, 2022, and “upon adoption of such rules, . . . provide its certification to the [FCC] pursuant to 47 U.S.C. s. 224(c)(2).” § 366.04(8)(g), Fla. Stat. The Proposed Rule, however, fails to properly implement this clear statutory mandate for several reasons.

16. First, contrary to the express language of sections 366.04(8)(d) and (8)(e), the Proposed Rule fails to state that, in the absence of an alternative cost-based showing by a pole owner or attaching entity that otherwise establishes a pole attachment rate that is “just and reasonable and in the public interest,” the Commission will apply the FCC’s decisions and orders regarding the rates, terms, and conditions of pole attachments, and the appellate decisions related thereto. *See* § 366.04(8)(e), Fla. Stat. (“[T]he commission shall . . . apply the decisions and orders of the [FCC] and any appellate court decision reviewing an order of the [FCC] regarding pole attachment rates, terms, or conditions in determining just and reasonable pole attachment rates, terms, and conditions unless a pole owner or attaching entity establishes . . . that an alternative cost-based pole attachment rate is just and reasonable and in the public interest.”). Moreover, the Proposed Rule violates Section 366.04(8)(e) by allowing—indeed requiring—a re-litigation in every case of the appropriate default rules governing not only rates, but also terms and conditions. Under Section 366.04(8)(e), the only time the statute might allow the Commission to deviate from the FCC’s regulations is in the case of a complaint regarding pole attachment *rates*, and then only if the “pole owner or attaching entity establishes by competent substantial evidence pursuant to proceedings conducted pursuant to ss. 120.569 and 120.57 that an alternative cost-based pole attachment *rate* is just and reasonable and in the public interest.” § 366.04(8)(e), Fla. Stat. (emphasis added).

17. The Commission is charged with implementing section 366.04(8) in a way that gives full effect to *all* of its provisions. *See Acosta v. Richter*, 671 So. 2d 149, 153-54 (Fla. 1996) (“A statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts.” (quoting *State ex rel. City of Casselberry v. Mager*, 356 So. 2d 267, 269 n. 5 (Fla. 1978))). Failure to include the default FCC provision is thus fatal to the Proposed Rule as currently written.

18. Second, because the Proposed Rule does not articulate any standard or methodology, the Commission *cannot* fulfill its mandate to certify to the FCC that it has issued rules and regulations implementing its authority to regulate pole attachment rates, terms, and conditions, including a “specific methodology for such regulation which has been made publicly available in the state”. *See* § 366.04(8)(g), Fla. Stat.; 47 U.S.C. § 224(2)-(3); 47 C.F.R. § 1.1405(b)(3). Before such certification can be made, consistent with both applicable federal and state law, the Commission must revise its Proposed Rule to specifically include the reference to the default FCC pole rates, rules, conditions, and orders as explained above.

19. Third, the Proposed Rule is so vague and ambiguous that it fails to establish adequate standards for Commission decisions, and therefore impermissibly vests unbridled discretion in the Commission. Indeed, the Proposed Rule suggests that there is no methodology or standard governing whether a pole attachment rate is just and reasonable, which leaves for the Commission unbridled discretion over each complaint and dispute.

20. Finally, by failing to include the FCC’s decision, orders, and applicable appellate court decisions as the default methodology, the Proposed Rule conflicts with the public interest. To effectively take jurisdiction over pole attachments, the Commission must “consider the interests of the consumers of the services offered via such attachments.” 47 C.F.R. § 1.1405(b)(2). The

Proposed Rule will create regulatory ambiguity and uncertainty that will adversely affect Petitioners' subscribers.

A. Failure to Specify Applicability of FCC Rules, Orders, and Decisions

21. The Proposed Rule conflicts with the requirements of section 366.04(8)(e) because it fails to recognize, explicitly or even implicitly, that the FCC's decisions, orders, and applicable appellate court decisions govern as the default rules applicable to pole attachment complaints.

22. Section 366.04(8)(e), Florida Statutes, provides

The commission shall hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments. Federal Communications Commission precedent is not binding upon the commission in the exercise of its authority under this subsection. When taking action upon such complaints, the commission shall establish just and reasonable cost-based rates, terms, and conditions for pole attachments and shall apply the decisions and orders of the Federal Communications Commission and any appellate court decisions reviewing an order of the Federal Communications Commission regarding pole attachment rates, terms, or condition in determining just and reasonable pole attachment rates, terms and conditions unless a pole owner or attaching entity establishes by competent substantial evidence pursuant to proceedings conducted pursuant to ss. 120.569 and 120.57 that an alternative cost-based pole attachment rate is just and reasonable and in the public interest.

(Emphasis added.) In other words, the statutory *default* is to apply FCC orders and decisions when determining whether a rate, term, or condition is just and reasonable. The only time the Commission might not apply the FCC's standards is in a complaint challenging a pole attachment rate, and in such case, the pole owner must provide competent, substantial evidence in an evidentiary hearing that an alternative cost-based approach is just and reasonable and in the public interest. There is no option for the Commission to deviate from FCC decisions, orders, and

applicable appellate court decisions in complaints challenging terms and conditions of pole attachments.

23. The Proposed Rule, in subsections (1)(f) and (4)(b), fails to comply with the statute. Indeed, the Proposed Rule suggests that there is no methodology or standard governing whether a pole attachment rate, term, or condition is just and reasonable. Subsection (1)(f) provides that if the complaint “requires the Commission to establish just and reasonable cost-based rates, terms, and conditions for pole attachments, the complaint must contain an explanation for the methodology the Complainant is requesting the Commission to apply.” Similarly, subsection (4)(b) provides that the response “must contain an explanation for the methodology the respondent is requesting the Commission to apply.” These subsections indicate that the Commission has no substantive methodology for determining whether a rate, term, or condition is just and reasonable, and the burden is entirely on the complainant to propose a methodology and justify why it should be applied. Yet, section 366.04, Florida Statutes clearly calls for the FCC’s regulations to be applied. Under section 366.04(8)(e), the Commission “shall apply the decisions and orders of the Federal Communications Commission and any appellate court decisions reviewing an order of the Federal Communications Commission” when acting on pole attachment complaints. Likewise, Section 366.04(8)(d) provides that a party’s right to nondiscriminatory access to a pole “is identical to the rights afforded under 47 U.S.C. s. 224(f)(1).” The Legislature’s intent to apply the FCC decisions, orders, and applicable appellate court decisions as the default is clear.

24. Indeed, the only time the statute might allow the Commission to deviate from the FCC’s regulations is in the case of a complaint regarding pole attachment rates, and then only if the “pole owner or attaching entity establishes by competent substantial evidence pursuant to proceedings conducted pursuant to ss. 120.569 and 120.57 that an alternative cost-based pole

attachment *rate* is just and reasonable and in the public interest.” § 366.04(8)(e), Fla. Stat. (emphasis added). In direct conflict with the statute, the Proposed Rule would allow—indeed require—a re-litigation in every case of the appropriate default rules governing not only rates, but also terms and conditions.

25. The Proposed Rule also fails to comply with statute’s goal to “encourage parties to enter voluntary pole attachment agreements.”¹¹ A clear statement that the FCC’s decisions, orders, and applicable appellate court decisions are the default that will govern pole attachment complaints will allow parties to negotiate pole attachment agreements with greater understanding of their baseline rights, diminishing the likelihood of a dispute. As the FCC has emphasized, “[t]here would be no reasonable negotiation without a benchmark rate against which to compare the utility’s proposed rate.” *See Amendment of Commission’s Rules and Policies Governing Pole Attachments, Consolidated Partial Order on Reconsideration*, 16 FCC Rcd. 12103 ¶13 (2001) (“2001 Order”). Furthermore, if a dispute does arise, a clearer rule will help streamline the complaint process before the Commission, by eliminating disputes regarding the applicable standard, for example.

26. By failing to recognize, explicitly and implicitly, that the FCC’s decisions, orders, and applicable appellate court decisions shall be applied by the Commission in every case as the default, and that only in a rate case may an alternative be potentially proposed and established pursuant to the statute, the Proposed Rule contravenes the express language of sections 366.04(8)(d) and (8)(e), Florida Statutes.

B. The Proposed Rule Fails to Include a Methodology Required for Certification to the FCC

¹¹ § 366.04(8)(c), Fla. Stat.

27. The Proposed Rule also contravenes the requirements of section 366.04(8)(g), Florida Statutes. Section 366.04(8)(g) provides:

The commission shall propose procedural rules to administer and implement this subsection. The rules must be proposed for adoption no later than January 1, 2022, and, upon adoption of such rules, shall provide its certification to the Federal Communications Commission pursuant to 47 U.S.C. s. 224(c)(2).

(Emphasis added).

28. Before a State can exercise jurisdiction over pole attachments, it must certify that it has rules regulating “rates, terms, and conditions for pole attachments.” 47 U.S.C. § 224(c)(2)-(3). The certification must include an indication that the Commission’s rules include “a specific methodology for such regulation which has been made publicly available in the state.” 47 C.F.R. § 1.1405(b)(3) (emphasis added).

29. As noted above, the Proposed Rule contains no methodology, and, to the contrary, suggests that there are no substantive rules or methodologies. Instead, the Proposed Rule requires each complainant to articulate the methodology it proposes be applied, and justify why it should be applied. Without an indication that the FCC decisions, orders, and applicable appellate court decisions will apply as required by the Florida statute, the Proposed Rule is completely devoid of the required methodology for regulating the rates, terms, and conditions for pole attachments that the FCC rules require for certification. As a result, the Proposed Rule contravenes section 366.04(8)(g), Florida Statutes.

C. The Proposed Rule Is Vague and Lacking in Adequate Standards, Resulting in Unbridled Discretion in the Commission

30. The Proposed Rule is also so vague and lacking in adequate standards that it results in unbridled discretion in the Commission. As noted above, the Proposed Rule appears to indicate

that there are no substantive rules or methodologies governing pole attachments, and each complainant must propose a methodology and justify its application. By failing to specify that FCC decisions, orders, and applicable appellate court decisions apply as the default methodology in determining “just and reasonable pole attachment rates, terms, and conditions,” and ultimately, by failing to include any methodology at all, the Proposed Rule is vague, fails to establish adequate standards for Commission decisions, and therefore impermissibly vests unbridled discretion in the Commission. *See, e.g., Fla. Dep’t of Business & Prof’l Reg. v. Target Corp. et al.*, 321 So. 3d 320, 324 (Fla. 1st DCA 2021) (recognizing that where a rule fails to provide adequate direction and standards and “is subject to inconsistent application”, the rule leaves the agency “with unbridled discretion”) (quoting *State, Dep’t of Fin. Servs. v. Peter R. Brown Constr., Inc.*, 108 So. 3d 723, 728 (Fla. 1st DCA 2013)).

31. Such license for the Commission to exercise unbridled discretion would be contrary to the nondelegation doctrine embodied in Article II, section 3 of the Florida Constitution. *See Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 29 (Fla. 1st DCA 2008) (recognizing that “the legislature ‘may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law.’” (quoting *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000))). The Legislature could not have intended this result, and in fact it specifically crafted the amendment to *avoid* it by expressly including the default FCC provision that the Proposed Rule inexplicably ignores and omits. Accordingly, the unbridled discretion endorsed by the current Proposed Rule is another independent basis for the inability of the Commission to certify to the FCC under 47 U.S.C. section 224(c).

D. Inclusion of a Methodology is Not Contrary to Section 366.04(8)(g), Florida Statutes

32. Petitioners recognize that section 366.04(8)(g) authorizes only “*procedural* rules to administer and implement this subsection.” (Emphasis added.) Petitioners’ proposed inclusion of language to elaborate on the statutory directive to follow the FCC’s decisions, orders, and applicable appellate court decisions is entirely consistent with the directive to promulgate “procedural rules” as such language provides critical information necessary to the Commission ability to provide the required certification to the FCC. Without some indication of the applicable FCC decisions, orders, and applicable appellate court decisions, the Proposed Rule does not provide a specific or sufficient methodology that would inform potential parties to pole attachment proceedings as to the specific methodology necessary for regulation by the state. 47 U.S.C. § 224(C)(2)-(3); 47 C.F.R. § 1.1405(b)(3).

33. Further, to the extent such elaboration may be considered substantive and not procedural, the Commission is charged with implementing Section 366.04(8) in a way that gives full effect to all of its provisions. *See Acosta v. Richter*, 671 So. 2d 149, 153-54 (Fla. 1996) (“A statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts.” (quoting *State ex rel. City of Casselberry v. Mager*, 356 So. 2d 267, 269 n. 5 (Fla. 1978))). Inclusion of a methodology for determining just and reasonable pole attachment rates, terms and conditions properly falls within the scope of “procedural” within section 366.04(8), Florida Statutes. *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994) (recognizing that “substantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights.”) (emphasis added) (citing *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975))). It is unnecessary, however, to split hairs over this issue.

34. If the necessary changes Petitioners seek are perceived as substantive and not procedural in nature, section 366.05(1)(a), Florida Statutes, grants the Commission the power to “adopt rules pursuant to ss. 120.536(1) and 120.54 to implement and enforce the provisions of [Chapter 366].” Even if a methodology is considered substantive, the Commission regularly relies on its rulemaking authority in sections 366.05(1)(a) and 350.127(2), Florida Statutes, to implement the provisions of Chapter 366, Florida Statutes. Nothing in section 366.04(8)(g), Florida Statutes, limits that authority. Hence, whether the proposed language is deemed procedural or substantive in nature, the only way for the Commission to implement the requirement of section 366.04(8)(g) to provide certification to the FCC is to include the necessary methodology for determining pole attachment rates, terms, and conditions.

35. There is a clear legislative intent in the language of the statute for the PSC to take the necessary steps to be able to certify to the FCC. If this means that the Commission must articulate its methodology for determining just and reasonable rates, terms, and conditions, then doing so is justified. Any narrower interpretation of the Commission’s rulemaking authority that would limit the methodology language in the Proposed Rule to its present scope would have the effect of invalidating section 366.04(8) on several grounds. First, an interpretation of section 366.04(8), Florida Statutes, as a limitation on the Commission’s authority to include a methodology in its Proposed Rule would result in a *legislative mandate* that the Commission violate due process by failing to include reasonable standards to guide its actions. *Barrow v. Holland*, 125 So. 2d 749, 751-52 (Fla. 1960) (recognizing that the constitution requires that agency rules include reasonable standards to guide regulated entities and to govern the agency in applying it). The Legislature could not have intended this result.

36. Second, such a narrow interpretation of section 366.04(8)(g), would mean that the Legislature is essentially *requiring* the Commission to exercise unbridled discretion, contrary to the nondelegation doctrine embodied in Article II, section 3 of the Florida Constitution. *See Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 29 (Fla. 1st DCA 2008) (recognizing that “the legislature ‘may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law.’” (quoting *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000))). Again, the Legislature could not have intended this result.

37. Finally, such a restrictive reading of Section 366.04(8)(g), would force the Commission to develop a methodology on an *ad hoc* basis, resulting in an adopted rule. *See Southern Baptist Hosp. of Fla. v. Agency for Health Care Admin.*, 270 So. 3d 488, 504-05 (Fla. 1st DCA 2019) (holding that the use of a methodology in decision-making without adopting the methodology as a rule, results in an invalid unadopted rule).

38. It is axiomatic that section 366.04(8)(g) should not be interpreted in a way that would render the statute invalid. *See, e.g., State v. Fuchs*, 769 So. 2d 1006, 1008 (Fla. 2000) (“It is well established that, where reasonably possible, a statute will be interpreted in a manner that resolves all doubts in favor of its constitutionality.”). Therefore, section 366.04(8)(g)’s requirement to propose procedural rules, should not be read as a limitation on its ability to include the required methodology for determining “just and reasonable pole attachment rates, terms, and conditions” in the Proposed Rule.

E. Failure to Set Forth the FCC’s Rules as The Default Standard Is Contrary to The Public Interest and Will Harm Consumers

39. In addition to being consistent with Section 366.04(8)(e), explicit adoption of the FCC rental rate rules is sound public policy and is necessary to consider the interests of consumers.

To effectively take jurisdiction over pole attachments, the Commission must “consider the interests of the consumers of the services offered via such attachments.” 47 C.F.R. § 1.1405(b)(2). Explicitly stating that the FCC’s decisions, orders, and applicable appellate court decisions will be the default governing standard for pole attachment rates, terms, and conditions will support the deployment of broadband to the benefit of Petitioners’ subscribers and the public.

40. The FCC’s pole attachment rules are the gold standard, providing regulatory clarity to both attaching parties and pole owners. The FCC’s pole attachment rate rules have been adjudicated numerous times over the last several decades,¹² including by the U.S. Supreme Court,¹³ to be fully compensatory and the touchstone of cost-based reasonableness. Indeed, in 1987, the U.S. Supreme Court found that the cable rate formula adopted by the Commission provides pole owners with adequate compensation, and thus did not result in an unconstitutional taking.¹⁴ That

¹² See, e.g., *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC 2d 1585 (1978); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Order, 77 FCC 2d 187 (1980); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd. 4387 (1987); *Implementation of Section 224 of the Act*, et al., Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 (2011); *Implementation of Section 224 of the Act*, et al., Order on Reconsideration, 30 FCC Rcd. 13731 (2015); see also 47 C.F.R. § 1.1406(d).

¹³ See *FCC v. Florida Power Corporation*, 480 U.S. 245 (1987).

¹⁴ *Id.* at 253-54.

is why almost every certified state follows the FCC cable formula¹⁵ for pole attachments and has rejected alternatives.¹⁶

41. The FCC pole rate rules are also transparent and easy to administer. The FCC designed the formulas and its rules to rely on publicly available data, such as FERC Form 1, to allow the parties to administer and calculate the rates without having to resort to time-consuming and expensive rate cases for every rental rate change.¹⁷ That transparency and ease of administration has helped attaching parties and pole owners avoid formal disputes many times over the course of decades. As noted above, without an explicit statement that the FCC's decisions,

¹⁵ The FCC's rules provide slightly different formulas for attachments by cable operators and telecommunications providers. *Compare* 47 C.F.R. § 1.1406(d)(1) (cable attachments) *with* 47 C.F.R. § 1.1406(d)(2) (telecommunications attachments). In a series of orders, the FCC implemented a formula that cable television system attachers and utilities could use to determine a maximum allowable just and reasonable pole attachment rate – referred to as the cable rate formula – and procedures for resolving rate complaints. *See, e.g., Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC 2d 1585 (1978) (adopting complaint procedures); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Order, 77 FCC 2d 187 (1980); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd. 4387 (1987). The cable rate formula was originally codified at 47 C.F.R. § 1.1409(e)(1) by the *1998 Implementation Order. Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd. 6777 (1998) (“1998 Implementation Order”), *aff'd in part, rev'd in part, Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev'd, Nat'l Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327 (2002).

In the Telecommunications Act of 1996, Congress adopted a separate statutory formula for attachments by providers of telecommunications services, which the FCC further amended in a series of orders in order to bring the rate for telecommunications attachments more in line with the rate for cable attachments. *See, e.g., 1998 Implementation Order*, 13 FCC Rcd. at 6796, ¶ 34; *FCC 2011 Order*, 26 FCC Rcd. 5240, ¶¶ 135-54.

¹⁶ *See, e.g., Ohio Admin. Code* 4901:1-3-04(D); *Wash. Admin. Code* 480-54-010; *N.H. Code Admin. R. PUC* 1304.06; *Vt. Admin. Code* 18-1-8:3.706.

¹⁷ *See, e.g., 2011 Pole Order* ¶ 172 n.553 (describing how the formula “uses publicly filed cost data, such as FERC 1 data, that are verifiable and comply with the uniform system of accounts of the Commission and FERC.”).

orders, and applicable appellate court decisions are the default standards governing pole attachment rates, terms, and conditions, attaching parties and pole owners will struggle to negotiate pole attachment agreements, leading to more disputes and adversely impacting the deployment of broadband services to Petitioners' subscribers.

42. Indeed, reinventing pole attachment rules from whole cloth would cause uncertainty and disruption to all parties involved. By clarifying the application of FCC's decisions, orders, and applicable appellate court decisions as the default substantive rules, the Commission will provide clarity and maintain certainty, while also supporting the timely and cost-efficient deployment of broadband to the benefit of Petitioners' subscribers. Further, enumerating the FCC decisions, orders, and applicable appellate court decisions as the default will provide context to the ability of a party to propose an alternative methodology. Without including the statutory directive for application of the FCC decisions, orders, and applicable appellate court decisions as a default, a party will not be able to demonstrate that its "alternative cost-based pole attachment rate is just and reasonable and in the public interest" as is required by Section 366.04(8)(e).

IV. Request for Separate Proceeding

43. Section 120.54(3)(c)(2) provides that if "the rulemaking proceeding is not adequate to protect the person's interests, [the agency] shall suspend the rulemaking proceeding and convene a separate proceeding under the provisions of ss. 120.569 and 120.57." The Commission has not previously regulated pole attachments under the regime required by the new law. Given the identification of problems discussed herein, there are substantial shortcomings in the Proposed Rule that if not addressed would make any certification under Section 366.04(8) materially deficient. The Joint Petitioners assert that given the nature of the legislation and the Commission's previous rejection of both its written comments on September 15, 2021 and its oral comments on

November 2, 2021, at the Agenda Conference, the Commission has lacked an evidentiary record that would facilitate the Commission's understanding for the scope and scale of these issues and how failure to properly implement this law will have serious and adverse impacts on Petitioners and in turn Florida consumers. It is in the public interest for the Commission to conduct an evidentiary hearing at which the Petitioners shall present witnesses and other evidence in order to demonstrate how the FCC decisions, orders, and applicable appellate court decisions operate in order to best inform the Commission as to the necessity for such inclusion. Only by understanding the full measure of how the statute is to operate through these rules can the Commission be able to properly certify its compliance to the FCC.

V. Conclusion

WHEREFORE, pursuant to section 120.54(3)(c)(2), Florida Statutes, Petitioners request a separate proceeding under sections 120.569 and 120.57, Florida Statutes, or at the very least a public hearing pursuant to section 120.54(3)(c)(1), Florida Statutes, so that the Commission can receive testimony and other evidence for the purposes of revising the Proposed Rule to address the matters stated herein.

Respectfully submitted, this 29th day of November, 2021.

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