

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: February 17, 2022

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Harper, Cowdery, Sunshine) *SMC*
Office of Industry Development and Market Analysis (Wendel) *CH*

RE: Docket No. 20210137-PU – Proposed adoption of Rule 25-18.010, F.A.C., Pole Attachment Complaints.

AGENDA: 03/01/22 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Fay

RULE STATUS: Rule Hearing

SPECIAL INSTRUCTIONS: None

Case Background

By notice appearing in the Florida Administrative Register (F.A.R.) on November 4, 2021, the Commission proposed the adoption of new Rule 25-18.010, Florida Administrative Code (F.A.C.), Pole Attachment Complaints, to implement and administer Section 366.04(8), Florida Statutes (F.S.). The Commission proposed the rule after going through the rule development process that involved the following stakeholders: Florida Internet and Television Association, Inc. (FIT), Comcast Cable Communications, LLC (Comcast), AT&T, CTIA, Crown Castle Fiber LLC (Crown Castle), Duke Energy Florida (DEF), Florida Power & Light Company (FPL), Tampa Electric Company (TECO), and Frontier Communications.

On November 29, 2021, pursuant to Section 120.54(3)(c), F.S., a Joint Request for a Hearing and Separate Proceeding on Proposed Rule 25-18.010, F.A.C. (Petition), was filed with the Commission by FIT, Atlantic Broadband, Miami, LLC (Atlantic), Charter Communications, Inc. (Charter), Comcast, and Cox Communications Gulf Coast, LLC (Cox) (Petitioners). Atlantic,

Charter, Comcast, and Cox are all members of FIT. The Petition asked for a rule hearing to allow the Petitioners the opportunity to address several problems it identified with the proposed rule.

The Petitioners argued that the proposed rule conflicts with Section 366.04(8)(e), F.S., because it fails to recognize that the FCC's decisions, orders, and applicable appellate court decisions govern as the default rules applicable to pole attachment complaints. The Petitioners further argued that the proposed rule failed to articulate any standard or methodology to be followed by the Commission in resolving pole attachment complaints, which they alleged is required for certification to the FCC. Petitioners stated that, because the proposed rule has no methodology or standard governing whether a pole attachment rate is just and reasonable, the proposed rule is vague and lacking in adequate standards, resulting in unbridled discretion in the Commission. The Petitioners' position was that the FCC's rules should be set forth as the default standard, and that failure to include the FCC's decisions, orders, and applicable appellate court decisions is contrary to the public interest and will harm consumers. Petitioners also filed a rule challenge at the Division of Administrative Hearings (DOAH) that is currently stayed.¹

A Section 120.54(3)(c)1., F.S., rule hearing was held at the Commission's regularly scheduled agenda on February 1, 2022, at which staff recommended changes to the proposed Pole Attachment Complaints rule. The recommended changes were the result of discussions by staff with Petitioners and comments received from stakeholders during this rulemaking process. Staff's focus was for the changes to continue to reflect the authority and the direction given by the Legislature to the Commission set forth in Section 366.04(8), F.S. At hearing, the recommended changes were supported by Petitioners, FPL, TECO, and DEF.² AT&T suggested alternative changes to the proposed rule. The Commission did not vote on whether changes should be made to the proposed rule and asked for the matter to be brought back to the Commission for further consideration.

Section 366.04(8), Florida Statutes

The 2021 Florida Legislature amended Section 366.04, Florida Statutes (F.S.), Jurisdiction of Commission, to add a new Section (8), which states:

(8)(a) The commission shall regulate and enforce rates, charges, terms, and conditions of pole attachments, including the types of attachments regulated under 47 U.S.C. s. 224(a)(4), attachments to streetlight fixtures, attachments to poles owned by a public utility, or attachments to poles owned by a communications services provider, to ensure that such rates, charges, terms, and conditions are just and reasonable. The commission's authority under this subsection includes, but is not limited to, the state regulatory authority referenced in 47 U.S.C. s. 224(c).

¹ DOAH granted the stay on the basis that moving forward with the DOAH proceeding while the Commission is considering the request for a public hearing and conducting same would be duplicative and could result in a waste of judicial and other resources.

² Petitioners state in their status report to DOAH that if the changes to proposed Rule 25-18.010, F.A.C., (as shown in Attachment A) are approved by the Commission, they will file a voluntarily dismissal of the DOAH proceeding.

(b) In the development of rules pursuant to paragraph (g), the commission shall consider the interests of the subscribers and users of the services offered through such pole attachments, as well as the interests of the consumers of any pole owner providing such attachments.

(c) It is the intent of the Legislature to encourage parties to enter into voluntary pole attachment agreements, and this subsection may not be construed to prevent parties from voluntarily entering into pole attachment agreements without commission approval.

(d) A party's right to nondiscriminatory access to a pole under this subsection is identical to the rights afforded under 47 U.S.C. s. 224(f)(1). A pole owner may deny access to its poles on a nondiscriminatory basis when there is insufficient capacity, for reasons of safety and reliability, and when required by generally applicable engineering purposes. A pole owner's evaluation of capacity, safety, reliability, and engineering requirements must consider relevant construction and reliability standards approved by the commission.

(e) 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 conditions 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)

(f) In the administration and implementation of this subsection, the commission shall authorize any petitioning pole owner or attaching entity to participate as an intervenor with full party rights under chapter 120 in the first four formal administrative proceedings conducted to determine pole attachment rates under this section. These initial four proceedings are intended to provide commission precedent on the establishment of pole attachment rates by the commission and help guide negotiations toward voluntary pole attachment agreements. After the fourth such formal administrative proceeding is concluded by final order, parties to subsequent pole attachment rate proceedings are limited to the specific pole owner and pole attaching entities involved in and directly affected by the specific pole attachment rate.

(g) 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).

Paragraph 8(e) above provides the basis for the recommended language in Attachment A that would resolve this rule challenge. Pursuant to paragraph (8)(g) above, after the proposed rule is filed with the Department of State and becomes effective, staff intends to bring a recommendation to the next available Commission Conference for Commission approval and issuance of a certification order to be provided to the FCC.

Rule Hearing

This item is being brought back to the Commission as a Section 120.54(3)(c)1., F.S., rule hearing, the purpose of which is for the Commission to decide whether to change the language of the proposed Pole Attachment Complaints rule as shown in Attachment A. The provisions of Section 120.54(3)(c)1., F.S., give affected persons the opportunity to present evidence and argument on all issues under consideration. The Commission in making its determination is required to consider any material pertinent to the issues under consideration submitted to it between the date of publication of the notice of proposed rule and the end of the public hearing.

The Commission has jurisdiction under Sections 120.54, 350.127(2), and 366.04(8), F.S.

Discussion of Issues

Issue 1: Should the Commission make changes to proposed Rule 25-18.010, F.A.C., Pole Attachment Complaints?

Recommendation: Yes. The Commission should change proposed Rule 25-18.010, F.A.C., Pole Attachment Complaints, as shown in Attachment A. (Cowdery, Wendel)

Staff Analysis: The intent of proposed Rule 25-18.010, F.A.C., was to adopt a procedural rule that would identify for complainants and respondents the information they would need to file with the Commission in order for the Commission to process pole attachment complaints pursuant to Section 366.04(8), F.S.

At the February 1, 2022 rule hearing, AT&T made several suggested changes to the proposed rule language. Staff agrees with two of the suggested changes. First, AT&T suggested that the word “requests” should be substituted for the words “involves” and “proposes” in paragraphs (1)(f) and (4)(b). Second, AT&T suggested that the word “decisions” should be added to those paragraphs.³ The recommended changes to the filing requirements in the proposed Pole Attachment Complaints rule are as follows:

(1) A complaint filed with the Commission by a pole owner or attaching entity pursuant to Section 366.04(8), F.S., must contain:

...

~~(f) 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 of the methodology the complainant is requesting the Commission to apply; If the complaint requests the establishment of rates, charges, terms, or conditions for pole attachments and the complainant proposes the application of rates, terms, or conditions that are based upon Federal Communications Commission (FCC) rules, decisions, orders, or appellate decisions, the complainant must identify the specific applicable FCC rules, decisions, orders, or appellate decisions that the Commission should apply pursuant to Section 366.04(8)(e), F.S.; provided, however, that if the complainant requests an alternative cost-based rate, the complainant must identify the methodology and explain how the alternative cost-based rate is just and reasonable and in the public interest.~~

(4) A response filed under subsection (3) of this rule must include the following:

...

³ At the February 1, 2022 rule hearing, AT&T suggested that the word “decisions” be added after the word “rules” in the first phrase in paragraphs (1)(f) and (4)(b) of the recommended changes that states: “rules, orders, or appellate decisions.” However, AT&T did not ask to have “decisions” added to the second identical phrase in those paragraphs. Staff is recommending that “decisions” be added to both phrases in those paragraphs to correct this oversight.

~~(b) If the complaint requires the Commission to establish just and reasonable cost-based rates, terms, and conditions for pole attachments, the response must contain an explanation of the methodology the respondent is requesting the Commission to apply.~~ If the complaint requests the establishment of rates, charges, terms, or conditions for pole attachments and the respondent proposes the application of rates, terms or conditions that are based upon FCC rules, decisions, orders, or appellate decisions, the respondent must identify the specific applicable FCC rules, decisions, orders, or appellate decisions that the Commission should apply pursuant to Section 366.04(8)(e), F.S.; provided, however, that if the respondent requests an alternative cost-based rate, the respondent must identify the methodology and explain how the alternative cost-based rate is just and reasonable and in the public interest.

The changes to the proposed rule language are consistent with Section 366.04(8)(e), F.S., which requires the Commission in resolving complaints to 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 unless a pole owner or attaching entity establishes by competent substantial evidence “that an alternative cost-based pole attachment rate is just and reasonable and in the public interest.” Staff believes that these changes give more specificity to the filing requirements, while not changing the intent of the procedural rule. Providing more specificity as to filing requirements gives more guidance to parties to assure that the Commission gets the information it needs to fulfill its statutory duty to hear and resolve complaints as set forth in 366.04(8), F.S.

Staff does not recommend making the remaining changes suggested by AT&T at the February 1, 2022 rule hearing because those changes are unnecessary and are not consistent with the enabling legislation, Section 366.04(8)(e), F.S.

Conclusion

For the reasons set forth above, staff recommends that the Commission should change proposed Rule 25-18.010, F.A.C., Pole Attachment Complaints, as shown in Attachment A.

Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open pending further rulemaking steps under Section 120.54, F.S. In addition, the docket should remain open until the Commission provides certification to the FCC as required by Section 366.04(8)(g), F.S. (Cowdery)

Staff Analysis: This docket should remain open to take further rulemaking steps under Section 120.54, F.S., in order to file the rule for adoption with the Department of State. The rule will become effective 20 days after it is filed for adoption.

In addition, the docket should remain open until the Commission provides certification to the FCC as required by Section 366.04(8)(g), F.S. After the rule becomes effective, staff intends to bring a recommendation to the next available Commission Conference for the Commission to issue a certification as required by Section 366.04(8)(g), F.S., to be provided to the FCC pursuant to 47 U.S.C. § 224(c)(2) and 47 C.F.R. § 1.1405.

1 25-18.010 Pole Attachment Complaints

2 (1) A complaint filed with the Commission by a pole owner or attaching entity pursuant to
3 Section 366.04(8), F.S., must contain:

4 (a) The name, address, email address, and telephone number of the complainant or
5 complainant's attorney or qualified representative;

6 (b) A statement describing the facts that give rise to the complaint;

7 (c) Names of the party or parties against whom the complaint is filed;

8 (d) A copy of the pole attachment agreement, if applicable, and identification of the pole
9 attachment rates, charges, terms, conditions, voluntary agreements, or any denial of access
10 relative to pole attachments that is the subject matter of the complaint;

11 (e) A statement of the disputed issues of material fact or a statement that there are no
12 disputed issues of material fact;

13 (f) ~~If the complaint requires the Commission to establish just and reasonable cost-based~~
14 ~~rates, terms, and conditions for pole attachments, the complaint must contain an explanation of~~
15 ~~the methodology the complainant is requesting the Commission to apply; If the complaint~~
16 ~~requests the establishment of rates, charges, terms, or conditions for pole attachments and the~~
17 ~~complainant proposes the application of rates, terms, or conditions that are based upon Federal~~
18 ~~Communications Commission (FCC) rules, decisions, orders, or appellate decisions, the~~
19 ~~complainant must identify the specific applicable FCC rules, decisions, orders, or appellate~~
20 ~~decisions that the Commission should apply pursuant to Section 366.04(8)(e), F.S.; provided,~~
21 ~~however, that if the complainant requests an alternative cost-based rate, the complainant must~~
22 ~~identify the methodology and explain how the alternative cost-based rate is just and reasonable~~
23 ~~and in the public interest.~~

24 (g) If the complaint involves a dispute regarding rates or billing, a statement of the dollar
25 amount in dispute, the dollar amount not in dispute, whether the amount not in dispute has
CODING: Words underlined are additions; words in ~~struck through~~ type are deletions from
existing law.

1 | been paid to the pole owner, and if not paid the reasons why not;

2 | (h) A statement of the relief requested, including whether a Section 120.569 and 120.57,
3 | F.S., evidentiary hearing is being requested to resolve the complaint; and

4 | (i) A certificate of service that copies of the complaint have been furnished by email to the
5 | party or parties identified in paragraph (1)(c) of this rule.

6 | (2) The filing date for the complaint is the date that a complaint is filed with the
7 | Commission Clerk containing all required information set forth in subsection (1) of this rule.

8 | (3) The pole owner or attaching entity that is the subject of the complaint may file a
9 | response to the complaint. The response must be filed with the Commission Clerk within 30
10 | calendar days of the date the complaint was served on the respondent, unless the Prehearing
11 | Officer grants a motion for extension of time filed pursuant to Rule 28-106.204, F.A.C., or
12 | Rule 28-106.303, F.A.C., as appropriate.

13 | (4) A response filed under subsection (3) of this rule must include the following:

14 | (a) A statement of whether a Section 120.569 and 120.57, F.S., evidentiary hearing is
15 | being requested to resolve the complaint; and

16 | (b) ~~If the complaint requires the Commission to establish just and reasonable cost-based~~
17 | ~~rates, terms, and conditions for pole attachments, the response must contain an explanation of~~
18 | ~~the methodology the respondent is requesting the Commission to apply. If the complaint~~
19 | requests the establishment of rates, charges, terms, or conditions for pole attachments and the
20 | respondent proposes the application of rates, terms, or conditions that are based upon FCC
21 | rules, decisions, orders, or appellate decisions, the respondent must identify the specific
22 | applicable FCC rules, decisions, orders, or appellate decisions that the Commission should
23 | apply pursuant to Section 366.04(8)(e), F.S.; provided, however, that if the respondent
24 | requests an alternative cost-based rate, the respondent must identify the methodology and
25 | explain how the alternative cost-based rate is just and reasonable and in the public interest.

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1 (5) The Commission will take final action on a complaint concerning rates, charges, terms,
2 conditions, and voluntary agreements relative to pole attachments at a Commission
3 Conference no later than 360 days after the complaint's filing date as set forth in subsection
4 (2) of this rule.

5 (6) The Commission will take final action on a complaint limited to denial of access
6 relative to pole attachments at a Commission Conference no later than 180 days after the
7 complaint's filing date as established under subsection (2) of this rule.

8 *Rulemaking Authority 350.127(2), 366.04(8)(g) FS. Law Implemented 366.04(8) FS. History-*
9 *New _____*

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