

State of Florida



# Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

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**DATE:** May 25, 2022

**TO:** Office of Commission Clerk (Teitzman)

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

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

**AGENDA:** June 7, 2022 – Regular Agenda – Ministerial Act – Public Participation Is At The Commission’s Discretion.

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Fay

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

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## Case Background

The 2021 Legislature amended Section 366.04, Florida Statutes (F.S.), Jurisdiction of Commission, to add subsection (8) that requires the Commission to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments. Section 366.04(8)(g), F.S., required the Commission to propose procedural rules to administer and implement Section 366.04(8), F.S., no later than January 1, 2022. In accordance with this statutory mandate, the Commission proposed Rule 25-18.010, Florida Administrative Code (F.A.C.), Pole Attachment Complaints,<sup>1</sup> on November 4, 2021, by publication in the Florida Administrative Register (F.A.R.).

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<sup>1</sup> A rule is *each* agency statement of general applicability that describes a procedure or practice. § 120.52(16). Thus, Rule 25-18.010, F.A.C., is a collection of sub-units, containing a number individual rules and regulations.

After considering evidence and argument at two rule hearings, the Commission voted to make changes to the proposed rule, and a Notice of Change was published in the F.A.R. on March 3, 2022. On March 11, 2022, AT&T filed a rule challenge at the Division of Administrative Hearings (DOAH), alleging that Proposed Rule 25-18.010 was an unlawful delegation of legislative authority under Section 120.52(8), F.S. By Final Order issued on May 19, 2022, DOAH dismissed AT&T's petition, finding that Proposed Rule 25-18.010 does not constitute an invalid exercise of delegated legislative authority as to the objections raised by AT&T.

On May 19, 2022, Rule 25-18.010, F.A.C., was filed for adoption with the Department of State and will become effective on June 8, 2022.<sup>2</sup> Section 366.04(8)(g), F.S., requires that upon adoption of the procedural rule, the Commission must provide its certification to the Federal Communications Commission (FCC) pursuant to 47 U.S.C. § 224(c)(2).

Section 224(c)(2) of 47 U.S.C. states:

(c) State Regulatory Authority Over Rates, Terms, and Conditions; Preemption; Certification; Circumstances Constituting State Regulation

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission 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 consumers of the utility services.

Additional detail on the certification requirement of 47 U.S.C. § 224(c)(2)(A) is given in 47 U.S.C. § 224(c)(3)(A), which provides that a State shall not be considered to “regulate the rates, terms, and conditions” for pole attachments unless the State “has issued and made effective rules and regulations implementing the State’s regulatory authority over pole attachments.” A federal regulation implementing 47 U.S.C. § 224(c)(3)(A), 47 C.F.R. § 1.1405(b)(3), gives further guidance and states that it will be rebuttably presumed that the state is not regulating pole attachments if the FCC does not receive certification from a state that:

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).

This recommendation addresses the next step in the required process set out in Section 366.04(8), F.S., which is for the Commission to provide its certification to the FCC pursuant to 47 U.S.C. § 224(c)(2). The Commission has jurisdiction under Section 366.04(8), F.S.

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<sup>2</sup> See Section 120.54(3)(e)6., F.S.

## Discussion of Issues

**Issue 1:** Should the Commission provide its certification to the FCC pursuant to 47 U.S.C. § 224(c)(2), as required by Section 366.04(8)(g), F.S.?

**Recommendation:** Yes. As required by Section 366.04(8)(g), F.S., the Commission should file its certification with the FCC as set forth in Attachment A once the rule becomes effective on June 8, 2022. (Cowdery, Hinton)

**Staff Analysis:** As described in the Case Background, under 47 U.S.C. § 224(c)(2), the Commission must certify to two things, which are:

(A) it regulates such rates, terms, and conditions for pole attachments; 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 consumers of the utility services.

As explained in more detail below, the Commission can and should make its certification to the FCC via the order appended as Attachment A.

The plain language of Section 366.04(8)(a), F.S., shows that the Legislature delegated to the Commission the power and duty to “regulate and enforce rates, charges, terms, and conditions for pole attachments,” as set forth in 47 U.S.C. § 224(c)(2)(A) and directed the Commission, in so regulating, to consider the interests of subscribers and consumers as required by 47 U.S.C. § 224(c)(2)(B). The Commission regulates rates, terms, and conditions for pole attachments as required by 47 U.S.C. § 224(c)(2)(A), as further detailed in 47 U.S.C. § 224(c)(3)(A) and 47 C.F.R. § 1.1405(b)(3), through the requirements of Rule 25-18.010 and Section 366.04(8), F.S.

Rule 25-18.010 implements the State’s regulatory authority over pole attachments by identifying the information that needs to be in a pole attachment complaint and response; explaining how a filing date is set; and establishing the time limits for the Commission to take final action on a complaint. This procedure sets forth a specific methodology for filing a complaint to initiate the complaint resolution process. As stated in the Case Background, in order for the Commission to be considered to regulate the rates, terms, and conditions for pole attachments, 47 U.S.C. § 224(c)(3)(A) requires the rules implementing the State’s regulatory authority over pole attachments to be “effective.” Rule 25-18.010 becomes effective on June 8, 2022.

Section 366.04(8), F.S., sets forth requirements that the Commission must follow concerning resolving pole attachment complaints. Among other requirements, Section 366.04(8)(d), F.S., provides that a party’s right to nondiscriminatory access to a pole is identical to the rights afforded under 47 U.S.C. § 224(f)(1). Section 366.04(8)(e), F.S., specifies what information the Commission must consider and apply in determining just and reasonable pole attachment rates, terms, and conditions. Section 366.04(8)(f), F.S., requires the Commission in the administration and implementation of subsection (8) to follow a specified procedure in conducting administrative proceedings to determine pole attachments rates under Section 366.04(8), F.S.,

including that the “initial four proceedings are intended to provide [C]ommission precedent on the establishment of pole attachment rates by the [C]ommission and help guide negotiations toward voluntary pole attachment agreements.” All these requirements and procedures, along with Rule 25-18.010, F.A.C., constitute a specific methodology which has been made publically available in Florida.

**Conclusion**

As required by Section 366.04(8)(g), F.S., the Commission should file its certification to the FCC as set forth in Attachment A once the rule becomes effective on June 8, 2022.

**Issue 2:** Should this docket be closed?

**Recommendation:** Yes. This docket should be closed upon filing of the 47 U.S.C. § 224(c) Certification with the FCC. (Cowdery)

**Staff Analysis:** This docket should be closed upon filing of the 47 U.S.C. § 224(c) Certification with the FCC.

**DRAFT**

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed adoption of Rule 25-18.010,  
F.A.C., Pole Attachment Complaints.

DOCKET NO. 20210137-PU  
ORDER NO.  
ISSUED:

The following Commissioners participated in the disposition of this matter:

ANDREW GILES FAY, Chairman  
ART GRAHAM  
GARY F. CLARK  
MIKE LA ROSA  
GABRIELLA PASSIDOMO

47 U.S.C. §224(c) CERTIFICATION TO THE  
FEDERAL COMMUNICATIONS COMMISSION

BY THE COMMISSION:

The Florida Public Service Commission hereby certifies to the Federal Communications Commission pursuant to 47 U.S.C. § 224(c) that the Florida Public Service Commission as an agency of the State of Florida and as authorized by Section 366.04(8), Florida Statutes (2021):

- (1) Regulates the rates, terms, and conditions for pole attachments;
- (2) In so regulating 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 consumers of the utility services; and
- (3) Has issued and made effective rules and regulations implementing the State of Florida's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state).

By ORDER of the Florida Public Service Commission this \_\_\_\_ day  
of \_\_\_\_\_, \_\_\_\_\_.

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ADAM J. TEITZMAN  
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Florida Public Service Commission  
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

KGWC