

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Base Rate Increase and)
Rate Unification by Florida Power & Light) Docket No. 20210015-EI
Company.)
_____) Filed: June 30, 2021

**FLORIDA INTERNET AND TELEVISION ASSOCIATION
PETITION TO INTERVENE**

Petitioner Florida Internet and Television Association, Inc. (“FIT”), pursuant to Sections 120.569 and 120.57(1), Florida Statutes, and Rule 28-106.205, Florida Administrative Code, hereby files its Petition to Intervene in the above captioned docket, and in support thereof states as follows:

1. **Party Identification.** The Petitioner/Intervenor in this matter is:

Florida Internet and Television Association, Inc.
246 East 6th Avenue, Suite 100
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2. All pleadings, orders, notices, and other communications or filings in this docket should be provided to the following on behalf of FIT:

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3. **Affected Agency.** The affected agency is the Florida Public Service Commission (“PSC” or “Commission”), with a principal place of business at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.

4. **Affected Party.** The affected utility in this docket is Florida Power & Light Company (“FPL”).

5. **Statement of Substantial Interests.** 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, Cox, and Mediacom. FIT member companies are retail electric customers of FPL and/or Gulf Power Company (“Gulf”), and FIT members purchase electricity from FPL and Gulf pursuant to various rate schedules that are subject to Commission review and approval. FIT members also attach their cables and other equipment to FPL and Gulf utility poles pursuant to federal law.

6. Specifically, FIT’s members attach their facilities to a significant number of FPL and Gulf utility poles pursuant to pole attachment agreements with FPL and Gulf and applicable law. Comcast, alone, attaches its lines to 611,638 poles owned by FPL and Gulf. Likewise, Charter attaches to 198,009 FPL poles, Cox attaches to 87,376 Gulf poles, Mediacom attaches to 24,182 Gulf poles, and Atlantic Broadband attaches to 14,793 FPL poles. As a result, FIT’s members pay FPL and Gulf tens of millions of dollars per year for pole attachments.

7. “[U]tility poles provide the scaffolding for the technology of the twenty-first century.”¹ Accordingly, it is well-established that the ability of FIT’s members 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 Federal Communications Commission (“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.”² In light of the importance of pole attachments to consumers and competition, the rates, terms, and conditions of pole attachments have long been regulated.

8. Currently, the rates, terms, and conditions of FIT’s members’ pole attachment agreements with FPL and Gulf and access to their poles are subject to regulations adopted by the FCC, as well as FCC Orders and federal court cases, pursuant to 47 U.S.C. § 224, the federal Pole Attachment Act. Notably, the FCC has well-established rules and precedent governing the maximum just and reasonable annual rental rates that FPL and Gulf may lawfully charge attaching entities, such as FIT’s members.

9. Among other things, the FCC’s regulations set forth a detailed formula from which the maximum lawful pole attachment rental rate may be calculated.³ The FCC’s formula was originally adopted over forty years ago. In a series of orders, the FCC implemented a formula that

¹ 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/Session/Bill/2021/1944/Analyses/2021s01944.ap.PDF>

² See, e.g., 47 U.S.C. § 224; *In re Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, ¶ 3 (2011) (“*FCC 2011 Order*”).

³ 47 C.F.R. §§ 1.1406(d), 1.1408(b), 1.1409, 1.1410.

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.⁴ In the Telecommunications Act of 1996, which opened telecommunications markets to competition, Congress adopted a separate statutory formula for attachments by providers of telecommunications services,⁵ which the FCC further amended in a series of orders.⁶ A fundamental component of both the FCC’s pole rate formulas is that they depend on data from the pole owning utility (in this case FPL/Gulf), such as the utility’s investment in pole and other plant, as well as data regarding the utility’s rate of return, as well as the height and number of the poles each utility has in service.⁷ As a result, although this Commission does not currently regulate pole attachment rates,⁸ the issues presented in this case will directly and

⁴ See, e.g., *First Report and Order*, 68 FCC 2d 1585 (adopting complaint procedures); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Memorandum Opinion and Order, 77 FCC 2d 187 (1980) (defining, e.g., safety space, average usable space, attachment as occupying 12 inches of space, and make-ready as non-recurring cost); *1987 Rate Order*, 2 FCC Rcd 4387. The cable rate formula was 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*, CS Docket No. 97-151, 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) (*Gulf Power v. FCC*), *rev’d*, *Nat’l Cable & Telecommunications Ass’n v. Gulf Power*, 534 U.S. 327 (2002) (*Gulf Power*).

⁵ 47 U.S.C. § 224(e).

⁶ See, e.g., *1998 Implementation Order*, 13 FCC Rcd at 6796, ¶ 34; *FCC 2011 Order*, 26 FCC Rcd. 5240, ¶¶ 135-154.

⁷ See, e.g., *FCC 2011 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.”)

⁸ FIT recognizes that the signing of SB 1944 on June 29, 2021 could change that. However, regardless of whether pole attachment rates are subject to regulation by the FCC (currently) or this Commission (potentially in the future), FIT’s members have an interest in this proceeding because the Commission oversees investment amounts and other factors, such as storm hardening requirements, that affect the regulated pole rates paid by FIT members, whether those rates are set by the FCC or this Commission.

significantly impact the pole attachment rental rates that FPL and Gulf may lawfully charge under FCC regulations. For example, issues relevant to FPL's lawful pole rates that overlap with this rate case include, but are not limited to, its allocation of costs to pole related accounts, its accounting for investment in pole hardening, its treatment of accumulated deferred income taxes resulting from the 2017 Tax Cuts and Jobs Act ("TCJA"), and its projection of revenues from pole attachment rents. FIT members currently pay FPL and Gulf millions of dollars annually for both electricity and pole attachment rent. FIT members require reasonably priced electricity and pole attachment rates and policies to effectively compete and provide services to their respective Florida customers.

10. In this docket, the Commission will decide whether to approve the proposed unification of FPL and Gulf, as well as FPL's request for a general rate increase. In its March 12, 2021, Petition for Base Rate Increase and Rate Unification ("FPL Petition"), FPL proposes a four-year rate plan to run from 2022 through 2025 consisting of the following:

(i) an increase in rates and charges sufficient to generate additional total annual revenues of \$1,108 million to be effective January 1, 2022; (ii) a subsequent year adjustment of \$607 million to be effective January 1, 2023 ("2023 SYA"); (iii) a Solar Base Rate Adjustment ("SoBRA") mechanism that authorizes FPL to recover costs associated with the installation and operation of up to an aggregate of 1,788 megawatts ("MW") of cost-effective solar generation in 2024 and 2025; (iv) a mechanism to address the possibility that changes to corporate tax laws might be enacted under the new presidential administration; (v) the continuation of the reserve surplus amortization mechanism ("RSAM") that has been an integral part of FPL's last three multi-year rate plans; (vi) the continuation of the storm cost recovery mechanism approved as part of FPL's 2016 rate settlement; and (vii) the authority to accelerate amortization of unprotected excess accumulated deferred income taxes resulting from the 2017 Tax Cuts and Jobs Act ("TCJA").

FPL Petition, at 1-2 (footnotes omitted). FPL also proposes a return on common equity ("ROE") range of 200 basis points based upon an 11.50% midpoint for rate setting purposes, with the

11.50% ROE based upon a cost of equity of 11.0% and a one-half percent performance incentive. FPL Petition, at 2.

11. Accordingly, in this case the Commission will decide an appropriate rate of return and cost of capital for FPL, whether rate increases are justified, how any rate increases shall be allocated to the individual customer classes, how the Gulf customers shall be integrated into FPL's rates and tariff structure, and other rate and policy decisions that will be in effect for the next four years. Together, the Commission's actions in this docket will directly affect and impact each of the FIT members within the FPL and Gulf service areas. Accordingly, FIT is entitled to intervene to protect its members' substantial interests in receiving safe, adequate, and reliable electric service and pole attachments, at fair, just, and reasonable rates.

12. **Association Standing.** The subject matter of this proceeding is well within FIT's established scope of interest and activity. FIT routinely appears on behalf of its members' interests in a variety of legislative, regulatory⁹, and judicial proceedings. While FIT has not recently participated in a proceeding before this Commission, FIT has a long history of participation on behalf of its members in various prior PSC proceedings under its predecessor corporate entity, Florida Cable Television Association ("FCTA"). *See, e.g.*, Florida PSC Docket No. 19880069, Order No. 24831, *Order Authorizing Intervention* (July 19, 1991); Docket No. 19880423, Order No. 20314 *Order Authorizing Intervention* (Nov. 16, 1988); Docket No. 19910757, Order No. 24852 (July 25, 1991); Docket No. 19920260, Order No. PSC-1992-0466-PCO-TL, *Order Authorizing Intervention* (June 8, 1992); Docket No. 19980696, Order No. PSC-1998-0965-PCO-

⁹ For example, FIT is presently participating in an ongoing rulemaking proceeding before the Florida Department of Transportation regarding rights of way usage which is another critical access issue like pole attachments for FIT members.

TO (July 16, 1998). Indeed, FIT (then FCTA) intervened and participated in the PSC's 2006-2007 proceedings addressing pole hardening rules, specifically based on its members' interest in pole attachments.¹⁰ Although FIT has not previously participated in an electric rate case before this Commission, the fact that each and every FIT member is presently an electric customer and pole attacher of FPL and/or Gulf across the FPL-Gulf service area is enough to demonstrate FIT's standing under Florida law.

13. Under Florida law, to establish standing as an association representing its members' substantial interests, under *Florida Home Builders Ass'n v. Dep't of Labor and Employment Security*, 412 So.2d 351, 353-54 (Fla. 1982), an association such as FIT must demonstrate three things: (A) that a substantial number of its members, although not necessarily a majority, are substantially affected by the agency's decisions; (B) that the intervention by the association is within the association's general scope of interest and activity; and (C) that the relief requested is of a type appropriate for an association to obtain on behalf of its members.

14. FIT satisfies all of these associational standing requirements.

a. (A) Each of the FIT members are located in the FPL-Gulf service area and receive electric service from FPL-Gulf pursuant to Commission-approved retail rates. And as mentioned above, FIT members also utilize FPL and/or Gulf poles

¹⁰ See, e.g., Docket Nos. 060172-EU/060173-EU, *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/Re: Proposed amendments to rules regarding overhead electric facilities to allow more stringent construction standards than required by National Electric Safety Code*; Docket No. 060198-EI *In re: Requirement for investor-owned electric utilities to file ongoing storm preparedness plans and implementation cost estimates*; Docket No. 060531; see also *Addendum to the July 2007 Report to the Legislature on Enhancing the Reliability of Florida's Distribution and Transmission Grids During Extreme Weather*, Summary of Commission Actions May 1, 2007 – Dec. 15, 2007, at 3 (FL PSC Feb. 1, 2008) (discussing FCTA's intervention and participation in hearings).

pursuant to pole attachment agreements that are historically and currently regulated by federal law; the annual pole attachment rates are calculated using formulas that depend on cost and revenue items that are at issue in this case. As such, each FIT member that receives electricity from FPL and Gulf or that attaches to poles owned by FPL and Gulf will be affected by the outcome of this case. *See Agrico Chem. Co. v. Dep't of Env't Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

b. (B) FIT exists to represent its members' interests in various venues, including matters before the Florida Public Service Commission, as demonstrated by FIT's previous participation (at the time under the name FCTA) in matters before the PSC relevant to members' pole attachments, among other issues.

c. (C) Finally, the relief requested by FIT is of the type appropriate for it to receive on behalf of its members pursuant to Rule 28-106.205(1), Florida Administrative Code. FIT seeks to intervene as a party of record with full rights to participate in all of the proceedings in this docket. FIT members are electric customers and pole attachers who will be affected by the outcome of this proceeding. FIT's participation as the only representative of broadband internet and cable television providers is appropriate to ensure that the rates charged to FIT's members for electric services and pole attachments (which rates are directly impacted by the allocation of costs and revenues that are at issue in this proceeding) are fair, just, and reasonable. While FIT shall take the case as it finds it, FIT intends to conduct such discovery as is permitted hereafter and to raise issues of material fact based upon what FPL seeks and how the relief requested in this docket

substantially affects FIT's members, all of which are the types of matters that this proceeding is designed to protect.

15. **Notice of Proceeding.** FIT received notice of this docket informally through its monitoring of Commission dockets.

16. **Disputed Issues of Material Fact.** FIT expects that the disputed issues of material fact will continue to be identified and refined in the course of these proceedings. Based upon FIT's present review of the proceedings and its own member interests, the disputed issues of material fact currently include, but are not limited to, the following:

- a. What are the appropriate jurisdictional values of the Companies' Plant in Service, Accumulated Depreciation, and Rate Base for setting the Companies' rates to be effective as of January 1, 2022?
- b. What are the appropriate jurisdictional values of FPL's operation and maintenance expenses for setting FPL's rates in this case?
- c. What is the appropriate capital structure for FPL for the purpose of setting the Companies' rates in this case?
- d. What is the appropriate rate of return on equity for FPL for the purpose of setting the Companies' rates in this case?
- e. What are the appropriate billing determinants to be used in setting FPL's rates in this case?
- f. What are the appropriate rates to be charged by FPL for its services to each customer class?
- g. Whether FPL has properly and accurately allocated costs to utility pole-related accounts, including but not limited to whether it has properly treated

accumulated deferred income taxes resulting from the TCJA, whether it has properly and accurately accounted for the height of its poles, and whether it has accurately stated its revenues from pole attachment rentals?

h. What are the reasonable and appropriate mechanisms for consolidating the rates of FPL and Gulf and migrating Gulf's customers to those rates?

FIT reserves all rights to raise additional issues in accordance with the Commission's rules and the Order Establishing Procedure and such other applicable orders in this matter.

17. **Statement of Ultimate Facts Alleged and at Issue.** The alleged ultimate facts include, but are not limited to, the following:

a. Whether FPL has met its burden to prove that their existing rates and charges are not fair, just, and reasonable?

b. Whether FPL has met its burden to prove that it is entitled to any rate increases?

18. **Rules and Statutes Justifying Relief.** The rules and statutes that entitle FIT to intervene and participate in this case include but are not limited to Sections 120.569, 120.57(1), 366.04(1), 366.04(1), 366.05(1), 366.06, and 366.07, Florida Statutes, and Rules 28-106.201 and 28-106.205, Florida Administrative Code.

19. **Statement Required by Rule 28-106.204(3), Florida Administrative Code.** Counsel for FIT has conferred with counsel for FPL and other parties of record via an email to all parties' representatives sent on June 29, 2021. FPL responded to FIT as follows, "FPL cannot state a definitive position until review of the petition, so no position at this time until we can review it FPL reserves its right to file a response in opposition subsequent to that review." Those other parties that have responded either take no position or state no objection.

20. **Relief Requested.** FIT requests that it be permitted to intervene as a full party of record in this docket.

WHEREFORE, Florida Internet and Television Association, Inc. requests that the Commission enter an order allowing it to intervene as a full party of record in this docket.

RESPECTFULLY SUBMITTED this 30th day of June, 2021.

/s/ Floyd R. Self

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of foregoing has been served by electronic mail to the following on this 30th day of June, 2021:

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