BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

FLORIDA POWER & LIGHT COMPANY'S MOTION FOR PROTECTIVE ORDER FROM FLORIDA INTERNET AND TELEVISION, INC.'S NOTICE OF REMOTE DEPOSITION DUCES TECUM

Florida Power & Light Company ("FPL") requests that the Florida Public Service Commission ("the Commission") enter a Protective Order quashing Florida Internet and Television, Inc.'s ("FIT") Notice of Remote Deposition Duces Tecum ("the Notice"). A copy of the Notice is attached as Exhibit A. The Notice seeks to depose an FPL corporate representative on twelve pole attachment-specific "deposition matters" and seeks contemporaneous document production on August 5, 2021.[1] The Commission should enter a Protective Order and/or an Order quashing the Notice because:

(1) The Notice seeks discovery of irrelevant information. Pole attachment revenues are reflected in the March 12, 2021 Petition ("Petition") as a credit to customers. Thus, assuming for argument's sake FIT's allegations that FPL's pole attachment revenue projections are too high, then the consequence would be a reduction in said revenues, causing a decrease in the credit to customers and an *increase* in FPL's revenue requirements. FPL will not, however, take action to reduce that credit to its customers in this proceeding. Alternatively, if FPL's projections are accurate, then the pole attachment revenue credit will also remain unchanged. Either way, FPL's revenue requirement goes unaffected, rendering the proposed discovery irrelevant; and

(2) The Notice seeks discovery of irrelevant information not germane to this proceeding but that would be evaluated in a separate Commission proceeding recently authorized by the Florida Legislature. That proceeding renders FIT's proposed discovery premature, redundant, and irrelevant.

[1] FIT's simultaneous request for production of documents by August 5 also violates the Commission's April 8 Order Establishing Procedure and the Florida Rules of Civil Procedure. For reasons more thoroughly explained in FPL's Response to FIT's Motion to Compel, FPL should not be required to expedite document production.

STANDARD OF REVIEW

Under Florida Rule of Civil Procedure 1.280, the Commission may enter a protective order "for good cause shown" to "protect a party or person from annoyance . . . undue burden or expense that justice requires." Fla. R. Civ. P. 1.280(c). "In deciding whether a protective order is appropriate in a particular case, the court must balance the competing interests that would be served by granting discovery or by denying it." *Rasmussen v. South Florida Blood Services, Inc.*, 500 So.2d 533, 535 (Fla. 1987). "Discovery in civil cases must be relevant to the subject matter of the case, and must be admissible or reasonably calculated to lead to admissible evidence." *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, 944-945 (Fla. 2002).

ARGUMENT

FIT served its Notice on July 19, 2021. The Notice requests the deposition of an FPL corporate representative on twelve "deposition matters" focused on FPL's pole attachment rate, pole attachment revenue projections, and issues related thereto.[2] The Notice also requests contemporaneous production of documents responsive to FIT's discovery requests. The Notice

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[2] The twelve "deposition matters" request testimony on: (1) "pole attachment rental rates" from 2020-2023; (2) "projection of pole attachment rental revenue" for 2020, 2022, and 2023; (3) "the methodology and/or formula used by FPL to calculate its distribution pole attachment rental rate for 2019-2023"; (4) pole height for wood and non-wood poles booked to Account 364, a component in the FCC's pole attachment rate formula; (5) "the treatment of depreciation in the calculation of FPL's distribution pole attachment rates for 2019-2023"; (6) "replacement of existing distribution poles with taller poles" (pole height is also component of the FCC's pole attachment rate formula); (7) "the basis for the distribution pole rent revenue projections in the referenced MFR" for 2020; (8) "the basis for the distribution pole rent revenue projections in the referenced MFR" for 2022; (9) "the basis for the distribution pole rent revenue projections in the referenced MFR" for 2023; (10) "the total accumulated cost and number of units for each item listed below, including appurtenances, recorded in FPL's FERC Account 364 for Poles, towers and fixtures"; (11) for years 2019-2023, "the treatment of accumulated deferred taxes included in FPL's calculation of the annual distribution pole attachment rental rate"; (12) "intercorporate cost allocations between FPL and Gulf and any parent or subsidiary thereof that affected or may affect administrative and general expense accounts (Accounts 920 through 935) included in the FCC's formula for calculating pole attachment rates for the years 2019 to 2020 as forecasted by FPL."

should be quashed because: (1) no matter what discovery results from the Notice, the outcome of this electric base rate proceeding will not change; and (2) FIT will have a plenary opportunity to challenge FPL's pole attachment rate (and the underlying methodology for that rate) in an upcoming Commission proceeding specifically devoted to that issue as required by SB1944. Further, the premise for all of the "deposition matters" set forth in FIT's Notice is mistaken. FPL's pole attachment revenue projections are not based on an incorrect forward-looking implementation of the FCC rate formula because the projections are not based on a forward-looking implementation of the FCC rate formula (or any other formula) at all. FPL's pole attachment revenue projections are based on trends in total annual pole attachment revenues. Conducting the proposed deposition will not impact the outcome of this proceeding no matter what the discovery reveals. As such, it serves no purposes. Requiring FPL to participate in a deposition about pole attachment rates on the eve of trial is unduly burdensome at a best, and a complete waste of resources at worst.

1. FIT's Notice seeks discovery of irrelevant information because FPL's revenue requirement calculation will not change irrespective of the deposition testimony FIT seeks to elicit.

The purpose of this proceeding is to evaluate FPL's proposed base rate increase and unification of rates with the former Gulf Power Company ("Gulf"). FPL's revenue requirement calculation is a function of numerous factors, inputs and variables, of which pole attachment revenues, as a credit to the electric customer, are only one. FPL included its pole attachment revenue projection data (from both prior years and forward-looking test years) in its Minimum Filing Requirements, accounting for the revenue FPL obtains from attaching entities.[3] When FPL

[3] FPL has long maintained that it does not obtain true cost recovery from attaching entities under the FCC's pole attachment rate formula. Nothing in this Motion to Quash should be construed as a concession that FPL obtains full cost recovery from attaching entities for pole attachments under FCC rules or precedent. To the contrary, FPL believes the rates paid by attaching entities under

recovers costs from attaching entities through pole attachment revenues, FPL passes those amounts on to its electric customers, including FIT's members, in the form of revenue credits. These revenue credits put downward on FPL's overall revenue requirement. And, the greater those revenue credits, the greater the downward pressure on revenue requirements and customer bills. Conversely, the lower the credit, the greater the upward pressure on revenue requirements and customer bills.

FIT contends FPL's pole attachment rates, and its projected revenues from those rates, are too high. Specifically, FIT believes FPL's pole attachment revenue projections "are overstated based on FPL's imposition of unlawfully high rental rates." *See* FIT Pre-Hearing Statement at 2; *see also* FIT Motion to Compel at fn1 ("FIT's members believe that FPL's pole attachment revenue projections are greatly overstated and depend on the imposition of unlawful pole attachment rental rates."). The position is a paradox in this proceeding because, if the allegation is true, it would result in a reduced benefit for electric customers (including, ironically, FIT's members as electric ratepayers) and consequentially, a higher electric customer base rate. Nevertheless, FIT asserts the argument because it contends excessive pole attachment rates work a detriment to FIT's members as attaching entities.

In turn, FIT seeks a declaration, *in this proceeding*, that FPL's pole attachment rates are unjust and unreasonable. FIT expressly placed that issue before the Commission in its Pre-Hearing Statement where it proposed the following "FIT ADDITIONAL ISSUE":

FCC rules are insufficient to cover FPL's costs of deploying a reliable pole network and supporting and hosting attachments that rely on that pole network. FPL welcomes the opportunity to more fully explain and develop its arguments on this issue in a forthcoming Commission proceeding conducted pursuant to SB1944.

ISSUE FIT 2: Is FPL's annual pole attachment rates [sic] higher than permitted under applicable law and regulations?

FIT Position FIT believes that FPL's annual pole attachment rental rates exceed the maximum rate permitted under law, and as a result, FPL's projections of revenues from pole attachments are overstated. FIT has propounded discovery to FPL on the issues relevant to calculating the maximum lawful pole attachment rental rate, but FPL has not yet responded.

FIT Pre-Hearing Statement at 37-38.

FPL vehemently denies this allegation. However, to provide the Commission and other parties certainty on this issue, FPL commits to not amending the revenue requirement request or to decreasing the amount of the credit from pole attachment revenue FPL forecasted in its Minimum Filing Requirements in this proceeding. Alternatively, if FIT is wrong in its contention that the pole attachment revenue projections are too high – and FPL believes FIT is wrong – then FPL's pole attachment revenue data is correct and there will be no basis for any change in the data underlying the Petition. That is to say, the pole attachment revenue credit given to electric customers will again remain the same.

Furthermore, FIT wrongfully assumes that FPL's pole attachment revenue projections are based on forward-looking applications of the FCC (or some other) pole attachment rate formula. They are not. FPL's pole attachment revenue projections are based on the trend in changes to FPL's total annual pole attachment revenues. Thus, discovery on FPL's implementation of the FCC pole attachment rate formula will do nothing to impact the pole attachment revenue projections in FPL's Petition, again rendering the proposed discovery irrelevant.

In sum, the Notice should be quashed and the deposition prohibited because data regarding the calculation of the pole attachment rate will not change the outcome of this proceeding. As such, conducting this deposition will not lead to discovery of admissible evidence and the parties'

limited time and resources should not be taxed at a time when everyone is preparing for a trial that starts in about two weeks. The Notice should be quashed.

2. Whether FPL's pole attachment rates are permissible under applicable law is an issue reserved for a separate proceeding.

FPL already briefed the Commission on SB1944 and the forthcoming pole attachment proceeding(s) mandated by the Florida Legislature. FPL stands by the arguments made in its Response to FIT's Petition to Intervene and adopts and incorporates those here. Briefly though, SB1944 directs the Commission to complete the necessary certification requirements, detailed in 47 U.S.C. 224(c), to expressly divest the Federal Communications Commission ("FCC") of jurisdiction over the "rates, charges, terms and conditions of pole attachments" in Florida. Thereafter, the Commission will have ongoing jurisdiction over the rates, terms and conditions of pole attachments in Florida (including those between FPL and FIT members). As part of its new jurisdiction, SB1944 also directs the Commission to conduct pole attachment rate proceedings in which the Commission must allow all interested parties the ability to participate.[4] FIT should not be permitted to convert this proceeding into a premature pole attachment rate proceeding when a

[4] Section 3(f) of SB1944 states:

> (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.
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> SB1944, Section 3(f) (emphasis added).

forthcoming proceeding will afford them a better and more appropriate opportunity to conduct the discovery they seek now.

In its July 13 Order granting FIT's Petition to Intervene, the Commission expressly stated, "FPL's arguments that discovery propounded by FIT may stray beyond the scope of this proceeding will be entertained when and if they are raised by objections or appropriate motions filed with respect to specific discovery requests." *See* Doc. No. 07844-202 at 3. The time to consider those objections is now. FIT's Notice strays beyond the scope of this proceeding. Not one of the Notice's twelve identified "deposition matters" focuses on FIT's member interests as retail electric customers. *See* fn. 2, *supra.* FIT justifies its requested discovery by expressing "concern" that in future proceedings "FPL will assert that its pole attachment rental rates are now 'fixed' because the underlying rates are necessary to meet the revenue projections endorsed by the Commission." *See* FIT Pre-Hearing Statement at 3. In essence, the argument is that discovery in this proceeding is necessary because of a position FPL *might take in a subsequent proceeding*.

Aside from being unsupported by any legal precedent, the argument is entirely inconsistent with FIT's past practices (and that of other attaching entities). By its own admission, this is FIT's first participation in an FPL electric customer base rate case. In the forty-year history of FCC regulated pole attachment rates, neither FIT, nor its predecessor (Florida Cable Television Association), has ever "previously participated in an electric rate case before this Commission." Petition to Intervene at 7, ¶ 12. It is undisputed that the FCC's pole attachment rate formula applied to FPL in those past electric customer base rate proceedings. Yet, FIT never thought it appropriate to participate in FPL's prior electric base rate proceedings out of concern that FPL might later assert its pole attachment rental rates are now "fixed." In other words, FPL's prior electric customer base rate proceedings had no more or less bearing on pole attachment rates charged to

FIT members than the current proceeding. FIT's sudden appearance and tailored Notice in this proceeding casts significant doubt on both the need and propriety of the requested deposition.

FPL forecasted the true motivation for FIT's Petition to Intervene in its July 7 Response: "FIT's motivation for intervening in this proceeding (at least in part) is to seek information from the perspective of its interest in 'pole attachment rates', as opposed to its interest in retail rates and policies generally." *See* FPL Response to FIT Intervention at 5. That forecast has borne true. *See e.g.* FIT Pre-Hearing Statement Additional Issue 2, *supra*. The Notice should be quashed not only because it strays beyond the scope of this proceeding, but also because there is a forthcoming Commission proceeding devoted specifically to the issues FIT seeks to litigate now.[5] It also wastes significant resources that should be devoted to efficient resolution of this proceeding.

[5] Litigating any aspect of FPL's pole attachment rates in this proceeding arguably violates the provisions of SB1944 which requires that pole owners and attaching entities have the opportunity to participate in the Commission's first four pole attachment rate proceedings following the enactment of SB1944. Without Commission-issued notice that the propriety of FPL's pole attachment rates are at issue in this proceeding, pole owners and attaching entities will have been deprived of the opportunity to participate in in violation of SB1944. For example, had FPL known that a determination on pole attachment rates would be part and parcel of this proceeding, it would have engaged in discovery from FIT members and numerous other attaching entities – most of which are not parties to this proceeding. In reliance on the fact that this proceeding is a base rate proceeding, FPL did not engage in such discovery (nor did any of the other pole owners or attaching entities in Florida).

WHEREFORE, for the reasons set forth above, Florida Power & Light Company respectfully requests entry of a Protective Order quashing FIT's Notice of Remote Deposition Duces Tecum.

Respectfully submitted,

FLORIDA POWER & LIGHT COMPANY

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CERTIFICATE OF SERVICE
20210015-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 30th day of July 2021 to the following parties:

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