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July 28, 2006

Mrs. Blanca S. Bayó
Director, Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

In re: Docket No. 060172-EU - 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

Docket No. 061073-EU - Proposed amendments to rules regarding overhead electric facilities to allow more stringent construction standards than required by National Electric Safety Code

Dear Ms. Bayo:

Enclosed is BellSouth Telecommunications, Inc.'s Request for Scheduling of a Public Hearing Pursuant to Florida Statutes § 120.54(3)(c)(1) and Rule 28-103.004, Florida Administrative Code, which we ask that you file in the captioned dockets.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Manuel A. Gurdian

cc: All Parties of Record
Jerry D. Hendrix
E. Earl Edenfield, Jr.
James Meza III

CERTIFICATE OF SERVICE
DOCKET NO. 060172/060173-EU

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via First Class U.S. Mail and/or Electronic Mail and facsimile (where applicable) this 28th day of July, 2006 to the following Interested Persons:

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FLORIDA PUBLIC SERVICE COMMISSION

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	)	Docket No. 060172-EU
Proposed amendments to rules regarding overhead electric facilities to allow more stringent construction standards than required by National Electric Safety Code	)	Docket No. 060173-EU
	)	Filed: July 28, 2006

BELLSOUTH'S REQUEST FOR SCHEDULING OF A PUBLIC HEARING PURSUANT TO FLORIDA STATUTES § 120.54(3)(c)(1) AND RULE 28-103.004, FLORIDA ADMINISTRATIVE CODE

BellSouth Telecommunications, Inc. ("BellSouth"), pursuant to Rule 28-103.004, Florida Administrative Code, and Florida Statutes § 120.54(3)(c)(1), hereby timely requests the Florida Public Service Commission ("Commission") to schedule a public hearing on all issues related to proposed new Rules 25-6.0341, 25-6.0342, and Rule 25-6.0343, and proposed amendments to Rules 25-6.034, 25-6.064, and 25-6.078, and 25-6.115, Florida Administrative Code (collectively "Proposed Rules").[1] In support of its request, BellSouth states as follows:

INTRODUCTION

1. BellSouth is an incumbent local exchange company doing business in the State of Florida whose regulated operations are subject to the jurisdiction of the Commission pursuant to Chapter 364, Florida Statutes.

[1] BellSouth acknowledges that the Commission, *sua sponte*, set proposed Rules 25-6.0341, 25-6.0342, and 25-6.0343 directly for hearing in Order No. PSC-06-0610-PCO-EU. However, in abundance of caution and in order to preserve all of BellSouth's procedural rights, BellSouth seeks a public hearing on these proposed rules with this Request for Hearing.

2. BellSouth's principal place of business is 675 West Peachtree Street, N.E., Suite 4500, Atlanta, Georgia 30375. Pleadings and process may be served upon:

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3. The Commission is currently engaged in rulemaking proceedings in Docket No. 060173-EU and Docket No. 060172-EU. According to the Commission, the new rules and amendments being considered in these dockets "are intended to strengthen Florida's electrical infrastructure and decrease restoration times following extreme weather events." Order No. PSC-06-0610-PCO-EU. The Proposed Rules were published in the Florida Administrative Weekly on July 7, 2006.

4. Florida Statutes § 120.54(3)(c)(1) provides:

> If the intended action concerns any rule other than one relating exclusively to procedure or practice, the agency shall, on the request of any affected person received within 21 days after the publication of the notice of intended agency action, give affected persons an opportunity to present evidence and argument on all issues under consideration. The agency..., if requested by an affected person, shall schedule a public hearing on the rule. Any material pertinent to the issues under consideration submitted to the agency within 21 days after the date of publication of the notice or submitted at a public

hearing shall be considered by the agency and made a part of the record of the rulemaking proceeding.

5. Similarly, Rule 28-103.004(3), Florida Administrative Code, provides that an "agency must conduct a public hearing if the proposed rule does not relate exclusively to practice or procedure, and if an affected person timely submits a written request." *See also Cortese v. School Bd. of Palm Beach County*, 425 So.2d 554 (Fla. 4th DCA 1982) (Persons who are "affected" may present evidence and argument, and request a public hearing during the more informal proceedings for adoption of a proposed rule).

6. Pursuant to Section 120.54(3)(c)(1), Florida Statutes, and Rule 28-103.004, Florida Administrative Code, BellSouth has timely filed this request for public hearing.

7. As stated in more detail below, BellSouth is affected by the Proposed Rules because:

a. BellSouth owns approximately 459,000 poles in the state of Florida, with 307,459 of these bearing attachments (lines, transformers, etc.) by electric utilities.

b. BellSouth's lines and facilities are attached to approximately 756,000 electric utility poles, including those owned by investor-owned companies, municipal electrics, and rural electric cooperatives, throughout the state of Florida.

c. BellSouth has joint use and license agreements with electric utility, cable, and communications providers for installation and operation of equipment on utility poles.

BELLSOUTH REQUESTS A PUBLIC HEARING ON THE FOLLOWING PROPOSED RULES

8. In general, the Proposed Rules fail to take into account the national uniform standards currently governing pole construction and attachments and, unacceptably, render the electric utilities the policy makers. The Proposed Rules will demonstrably affect BellSouth's pole attachment rental rates and operational burdens and potentially impact service and reliability. Additionally and critically, unlike the electric utility monopolies that can pass any increased costs in complying with the Proposed Rules to their customers via rate of return regulation, BellSouth is price-regulated and thus would be economically disadvantaged in complying with the Proposed Rules.

25-6.034

9. Section 25-6.034(2) allows each electric utility to establish and maintain its own construction standards for overhead and underground facilities. In providing for company-by-company standards, the Commission eviscerates the National Electric Safety Code ("NESC") as the uniform national standard by which power and telephone companies operate. Further, the proposed rule localizes decision-making over the national telecommunications network. The fact that each electric utility may set differing standards will impact the design and construction processes of the attaching entities, like BellSouth. This will likely translate into increased costs and may impact service reliability for BellSouth.

10. Section 25-6.034(4)(b) expressly grandfathers electric facilities constructed prior to the 2002 version of the NESC, providing that such facilities

are governed by the edition of the NESC in effect at the time of the initial construction. The specific reference to electric facilities implies that no such grandfathering protection is contemplated for the facilities of other pole users. As is standard in joint use agreements, the attachments of *all* pole users should be governed by the version of the NESC that was in effect when the attachment was placed.

11. This section could also be read to justify or even require random inspections of third-party attachments by the electric companies to ensure *maintenance* of attachments in compliance with the latest version of the Code, allowing the electric companies to demand upgrades of attachments or changing out of poles, potentially at considerable ongoing (capital and expense) cost to attachers, like BellSouth.

12. Section 25-6.034(5) provides that each electric utility will establish guidelines and procedures governing the applicability and use of extreme wind loading standards to enhance reliability and reduce restoration costs and outage times for three different enumerated classes of construction: new construction, "major planned work" and "critical infrastructure facilities."

13. To the extent that existing joint use or pole attachment agreements require attaching entities to contribute to the cost of pole replacements and upgrade plant to current NESC standards, there is a potential for electric utilities to attempt to use Proposed Rule 25-6.034(5) to shift all of the costs to others.

14. Moreover, the proposed rule is overbroad and vague as neither "major planned work" nor "critical infrastructure facilities" are defined. Planned

work that is "major" could include distance in feet or miles, number of lanes, length of construction or some other factor. Similarly, "critical infrastructure facilities" could include electrical substations, gas stations, community hospitals or neighborhood walk-in care facilities. The difference would directly and significantly impact BellSouth's costs. In both instances, again, this section disregards the advantages of uniform standards for pole construction and attachments and gives electric utilities carte blanche over pole attachments.

15. Section 25-6.034(6) requires electric utilities to establish guidelines and procedures to prevent damage to underground and overhead facilities from flooding and storm surges. The Commission should consider the impact of the proposed rule on all entities in these geographical areas with underground and overhead facilities, not just electric utilities.

16. Section 25-6.034(7) requires the electric utilities to "seek input" from other entities and provides that all disputes shall be resolved by the Commission. However, BellSouth is concerned that this provision does not adequately protect the interests of BellSouth or other attaching entities as the electric utilities are not required to collaborate with or obtain the consent of the attaching entities in developing and establishing construction standards for overhead and underground facilities. Further, as more fully discussed below, the Commission does not have jurisdiction to regulate pole attachment construction or disputes.

25-6.0341

17. Proposed Rule 25-6.0341 calls for electric utilities, as a general rule, to place overhead and underground distribution facilities adjacent to public roads in the front of customers' premises. Depending on the situation, this would require BellSouth to expend significant time, manpower and cost to obtain an easement from the property owner (as the new owner of the electric company's pole), or relocate and install new facilities in public rights-of-way. Proposed Rule 25-6.0341 fails to consider the additional costs of purchasing old used poles, the administrative costs attendant thereto and additional increased pole inspection costs.

18. Proposed Rule 25-6.0341 also fails to take into account the significant potential for cable cuts, facility damage, attendant outages and public safety issues that will likely arise when the electric utilities seek to place facilities beneath the significant number of BellSouth facilities that already exist in front easements or in the public rights-of-way.

19. At an absolute minimum, subsection (3) of Proposed Rule 25-6.0341, relating to aerial and underground conversions, should be limited to situations where both power and telecommunications are converting aerial facilities underground to allow for coordination of safe placement and mutually cost-efficient work efforts.

25-6.0342

20. Proposed Rule 25-6.0342 requires electric utilities to establish and maintain standards and procedures for attachments by others to transmission

and distribution poles. Critically, this provision mandates that the Attachment Standards and Procedures "meet or exceed the NESC...and other applicable standards imposed by state and federal law" so that attachments do not, among other things, impair the safety or reliability of the electric system; exceed pole loading capacity; and to assure that third party facilities are "constructed, installed, maintained, and operated in accordance with generally accepted engineering practices for the utility's service territory." Further, the section prohibits attachments that do not comply with the electric utility's Attachment Standards and Procedures.

21. First, the Commission does not have jurisdiction over pole attachments and, thus, the Commission does not have the authority to adopt Proposed Rule 25-6.0342 to the extent it regulates said attachments. *See* Teleprompter Corp. v. Hawkins, 384 So. 2d 648 (Fla. 1980). The issue of the Commission's authority over pole attachments was squarely before the Florida Supreme Court in 1980 when it decided Teleprompter Corp. v. Hawkins. In deciding this issue, the Supreme Court addressed 47 U.S.C.§ 224, which is the federal statute granting the Federal Communications Commission ("FCC") authority to regulate pole attachments. Under 47 U.S.C. § 224, the FCC has jurisdiction over pole attachments unless a state commission certifies the following to the FCC: (1) that it regulates rates, terms, and conditions for pole attachments; and (2) that in so regulating such rates, term, 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. *See* 47 U.S.C. § 224 (c)(2).

22. In Hawkins, the Commission, pursuant to 47 U.S.C. § 224, notified the FCC that it had authority to regulate pole attachment agreements. This declaration of authority was challenged on the grounds that the Commission did not have the authority under Florida law to regulate the agreements or the interests of cable subscribers. In quashing the Commission's certification, the Florida Supreme Court relied on the Commission's own prior finding in Southern Bell Tel. & Tel. Co., 65 PUR 3d 117, 119-20 (Fla.Pub.Serv.Comm'n 1966) that it lacked authority over pole attachments:

> In 1913, when the Florida legislature enacted a comprehensive plan for the regulation of telephone and telegraph companies in this state, and conferred upon the commission authority to administer the act and to prescribe rules and regulations appropriate to the exercise of the powers conferred therein, the science of television transmission and the business of operating community antenna television systems were not in existence. The 1913 Florida legislature, therefore, could not have envisioned much less have intended to regulate and control the television transmission facilities and services with which we are concerned....*We must conclude...that the Florida Public Service Commission has no jurisdiction or authority over the operations of community antenna television systems and the rates they charge, or the service they provide to their customers.*

Id. at 649-50 (emphasis added).

23. Using this analysis, the Court recognized that the legislature had not subsequently conferred any relevant jurisdiction upon the Commission between 1913 and 1980. Accordingly, the Court found that the Commission

lacked jurisdiction over pole attachments. Likewise, there has been no statutory grant of jurisdiction over pole attachments since 1980. As such, the Commission lacks jurisdiction over pole attachments, and the Commission should consider this lack of jurisdiction in evaluating whether it can adopt Proposed Rule 25-6.0342.

24. Second, Proposed Rule 25-6.0342 is, at best, premature and, at worst, renders prior Orders of this Commission a nullity. Just five (5) months ago, the Commission ordered the electric utilities (and telecommunications companies) to inspect their poles every 8 years and report their findings. *See In re: Proposal to require investor-owned electric utilities to implement ten-year wood pole inspection* program, Docket No. 060078-EI, Order No. PSC-06-0144-PAA-EI (Issued February 27, 2006). In ordering these pole inspections, the Commission expressly required the electric utilities to conduct "both remaining strength assessments as well as pole attachment loading assessments." *Id* at p.8.

25. Further, the Commission imposed significant and detailed reporting requirements upon the parties. The Commission ordered submission of an initial "comprehensive wood pole inspection plan" in order to "understand the nature of each electric IOU's pole inspection program on a going-forward basis." *Id.* at p.9. The Commission declared: "By requiring that such programs be provided in advance of the pole inspection data collection period, we can be assured that any issues that may arise...can be brought to our immediate attention." *Id.*

26. The Commission also mandated an annual report of pole inspections, to contain:

> 1) A review of the methods the company used to determines NESC compliance for strength and structural integrity of the wood poles included in the previous year's annual inspections, taking into account pole loading where required;
>
> * * *
>
> 3) Summary data and results of the company's previous year's transmission and distribution wood pole inspections, addressing the strength, structural integrity, and loading requirements of the NESC.

Id. at p. 10.

27. Per the above-referenced Commission Order, the first report is due March 1, 2007. Yet, without the benefit of even the first report submitted or any data collected and analyzed, Proposed Rule25-6.0342 requires electric utilities to adopt pole load capacity and engineering standards and procedures.

28. Third, to the extent this provision mandates that the Attachment Standards and Procedures "meet or exceed the NESC," it unnecessarily implicates and complicates a revision that is currently underway. The Proposed Rules are based upon the 2002 NESC guidelines. These guidelines are updated on a five-year cycle, such that the next update can be expected in 2007. Since the electric utilities have to establish their construction standards within six months from the adoption of the Proposed Rules, it would appear more efficient and appropriate at a minimum to await the issuance of the 2007 NESC guidelines to obviate another mandate from this Commission for revisions to newly-issued standards.

29. Fourth, like previous sections, Proposed Rule 25-6.0342 disregards the advantages of uniform standards for pole construction and attachments and gives electric utilities carte blanche over pole attachments. While problems have occurred with certain providers failing to comply with applicable safety requirements when installing pole attachments, these problems are fairly isolated and do not warrant drastic changes to the current procedures in place to ensure safety and reliability uniformly. Additionally, the chief stress on the distribution infrastructure results from the significant load placed by the power industry—not telephone or cable. Moreover, additional factors (such as vegetation) affect the reliability of electric infrastructure. Addressing only attachments paints a misleading, lopsided picture.

30. For example, Proposed Rule 25-6.0342 could also be read to justify, or even require, random inspections of third-party attachments by the electric utilities to ensure attachments comply with the latest version of the NESC. Electric utilities could demand upgrading/rearranging/removing of attachments, or changing out of poles, potentially at considerable cost (capital and expense) to the other attachers. Not only would such a requirement shift significant costs to the attaching entities, but it could affect existing joint use and pole attachment agreements that already govern this subject matter.

31. Finally, to the extent that joint use agreements expressly address, among other things, which entity is responsible to pay for the costs of upgrades, replacement, and taller/stronger poles, the Proposed Rules could have an unintended consequence. Specifically, while BellSouth does not concede the

argument and specifically claims that such an argument would be inappropriate[2], the electric utilities could attempt to use the Commission's Proposed Rules to claim that, under a joint use agreement, BellSouth is responsible for some portion of the costs of the upgrades -- costs that the electric utilities ordinarily pay -- despite the fact that BellSouth would not be the cost-causer nor the beneficiary of the taller or stronger poles. Such efforts clearly should not be countenanced and must be prohibited.

25-6.0343

32. Section 25-6.0343 allows each municipal electric utility and rural electric cooperative to establish and maintain its own construction standards for overhead and underground facilities, including Attachment Standards and Procedures, again creating a lack of uniformity. Since BellSouth serves areas in which investor owned utilities, municipal electric utilities and rural electric cooperatives serve customers, BellSouth could ostensibly be required to adhere to differing standards within one wire center or municipality. Additionally, the fact that each electric utility may set differing standards will impact the design and construction processes of the attaching entities, which will likely translate into increased costs and may impact service reliability.

33. As discussed more fully above, the Commission does not have jurisdiction over pole attachments and, thus, the Commission does not have the authority to adopt Proposed Rule 25-6.0343(3), which addresses third party

[2] By acknowledging the existence of this argument, BellSouth does not concede it or believe that it is appropriate. In fact, in an abundance of caution, BellSouth denies the argument and reserves all rights and defenses associated with its Joint Use Agreements and any claim that the Proposed Rules impact said agreements.

Attachment Standards and Procedures, to the extent it regulates said attachments. *See* Teleprompter Corp. v. Hawkins, 384 So. 2d 648 (Fla. 1980).

25-6.064

34. Section 25-6.064 requires an investor-owned electric utility to calculate amounts due as contributions-in-aid-of-construction from customers who request new facilities or upgraded facilities. As an attacher that pays pole rental fees, the ILEC pays a portion of the electric utility's costs when the electric utility installs a taller or stronger pole or new pole of the same class. To ensure that pole rental rates are not further skewed, BellSouth should receive a credit or reduction against the historical cost of the electric utility's average pole cost for the customers' contribution-in-aid-of-construction and payments by other attachers.

25-6.078

35. To the extent a utility's policy filed pursuant to Proposed Rule 25-6.078 affects the installation of underground facilities in new subdivisions or the utility's charges for conversion implicates new construction, BellSouth has the same concerns with Proposed Rule 25-6.078 that are discussed above with regard to Proposed Rule 25-6.034.

25-6.115

36. BellSouth recognizes that several electric utilities have tariffs on recovering the costs of converting facilities. Proposed Rule 25-6.115 incorporates language on Undergrounding Fee Options that includes the recovery of the costs of converting facilities from the customer. However, this Rule does not take into

account that, unlike the electric utility monopolies that can pass along any costs incurred in conversion to their customers via rate of return regulation, BellSouth is price-regulated and will be economically and competitively disadvantaged in adding such costs to the bills of its customers. Thus, the distinction between the rate of return regulated industry and the price regulated industry merits a distinction in the manner in which such charges are handled.

CONCLUSION

Based upon the foregoing, it is clear that the interests of BellSouth are affected by the Proposed Rules. Moreover, it is also clear that the Commission, in order to make a fully informed decision, must initiate the requested public hearing which will unequivocally yield a more complete record and understanding of the issues and potential solutions.

WHEREFORE, BellSouth requests that a public hearing pursuant to Section 120.54(3)(c)(1), Florida Statutes, and Rule 28-103.004, Florida Administrative Code, be held before the Commission and that the parties to the hearing be permitted the opportunity to present evidence, argument and oral statements on the Proposed Rules.

Respectfully submitted this 28th day of July, 2006.

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