STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BELLSOUTH TELECOMMUNICATIONS, LLC,

Petitioner,

Case No. 22-0774RP

vs.

FLORIDA PUBLIC SERVICE COMMISSION,

Respondent,

and

FLORIDA POWER AND LIGHT COMPANY, DUKE ENERGY FLORIDA, AND TAMPA ELECTRIC COMPANY,

Intervenors.
_____/

FINAL ORDER

Administrative Law Judge Andrew D. Manko of the Division of Administrative Hearings ("DOAH") presided over the final hearing in this matter, pursuant to sections 120.56, 120.569, and 120.57, Florida Statutes (2021),[1] on April 19, 2022, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Jon C. Moyle, Esquire
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[1] All references to the Florida Statutes, the Florida Administrative Code, the United States Code, and the Code of Federal Regulations are to the 2021 versions.

For Respondent: Keith Charles Hetrick, General Counsel
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STATEMENT OF THE ISSUE

Whether Proposed Florida Administrative Code Rule 25-18.010 ("Proposed Rule") constitutes an invalid exercise of delegated legislative authority, in violation of section 120.52(8)(a), (c), (d), and (e).

PRELIMINARY STATEMENT

On March 11, 2022, Petitioner, Bellsouth Telecommunications ("AT&T"), filed its Petition for Administrative Determination of Invalidity of Proposed Rule 25-18.010. Based on the agreement of the parties, the undersigned scheduled the final administrative hearing for April 19, 2022.

On March 21, 2022, Intervenors, Florida Power & Light Company ("FPL"), Duke Energy Florida ("DEF"), and Tampa Electric Company ("TEC"), filed an Unopposed Motion for Leave to Intervene in support of Respondent. In an Order dated March 21, 2022, the undersigned granted that motion.

On April 15, 2022, the parties filed three motions: (1) Intervenors filed a Motion in Limine to exclude evidence as to the standards that may be applied in resolving pole attachment complaints, including Federal Communications Commission ("FCC") certification standards, regulations adopted in other

states, and expert testimony as to the interpretation of federal and state law; (2) Respondent filed a Motion in Limine to exclude evidence of the FCC standards; and (3) Petitioner filed a Motion for Official Recognition as to other states' regulations. Petitioner responded in opposition to the motions in limine on April 18, 2022. The undersigned granted the Motion for Official Recognition, but denied the motions in limine because evidence of the FCC's requirements, other states' rules, and expert testimony as to those issues was relevant to resolving Petitioner's argument that the Proposed Rule was invalid for not meeting the FCC's requirements.

The final hearing occurred in Tallahassee on April 19, 2022. Petitioner presented testimony from three witnesses: (1) Mark Peters, its area manager for regulatory relations; (2) Cayce Hinton, the director of Respondent's office of industry development and market analysis; and (3) Joe Garcia, a prior commissioner and U.S. Congressman. The undersigned accepted Mr. Peters and Mr. Garcia as expert witnesses over objection, while confirming that the undersigned would not consider—and, indeed, has not considered—any opinions as to how to interpret state and federal statutes and rules, which are legal issues exclusively within the undersigned's province.[2] Respondent also presented the testimony of Mr. Hinton, who was accepted as an expert without objection. Intervenors presented no witness testimony.

Petitioner's Exhibits 1 through 9 and 16 through 30 were admitted in evidence. Petitioner's proposed exhibits 10 through 15 were withdrawn;

[2] The undersigned reaffirms his decision to accept both witnesses as experts as to regulatory policy and telecommunications. Mr. Peters has the requisite experience and training to be deemed an expert in the telecommunications field and as to pole attachment regulation. Mr. Garcia has expertise in the telecommunications field generally, as a commissioner who dealt with the FCC, a U.S. Congressman working with constituents on telecommunications issues, and an employee of a company that dealt with telecommunications and utility rates and restructuring. Though his experience did not involve pole attachments, Mr. Garcia's expert testimony focused on general regulatory subjects with which he has expertise, such as rulemaking, federal delegation, and how regulations can impact regulated entities.

Petitioner's proposed exhibits 31 through 33, marked solely for impeachment purposes, were not admitted in evidence. Respondent's Exhibits 1 through 41 were admitted in evidence. Intervenors filed no exhibits.

A two-volume Transcript of the hearing was filed on April 21, 2022. The undersigned granted Petitioner's requests to extend the deadline to file proposed final orders ("PFOs") by three days and to enlarge their page limits. On May 2, 2022, the parties timely filed PFOs, which were duly considered in preparing this Final Order.

FINDINGS OF FACT

I. Parties and Standing

1. The Florida Public Service Commission ("Commission") is the state agency obligated to "regulate and enforce rates, charges, terms, and conditions of pole attachments … to ensure that such rates, charges, terms, and conditions are just and reasonable." § 366.04(8)(a), Fla. Stat. Pursuant to the requirement in section 366.04(8)(g) that it "propose procedural rules to administer and implement this subsection," the Commission approved the Proposed Rule, which is the subject of the challenge herein.

2. AT&T is a utility pole owner and an attaching entity. It owns over 470,000 utility poles in Florida, which it uses to provide voice, video, data, broadband, and other advanced telecommunications services, and on which it rents space to other companies, including electric utilities, cable companies, competitive telephone companies, and broadband and wireless providers. AT&T also affixes its facilities to poles owned by other companies in Florida, including over 640,000 poles owned by investor-owned electric utilities.

3. FPL, DEF, and TEC are public utilities subject to the jurisdiction of the Commission, including as pole-owning electric utilities and attaching entities whose facilities are affixed to poles owned by other companies.

4. The parties agree that AT&T, FPL, DEF, and TEC are substantially affected by the Proposed Rule within the meaning of section 120.56 because they are all subject to regulation thereunder as pole owners and attaching entities. Thus, AT&T has standing to challenge the Proposed Rule and FPL, DEF, and TEC have standing to participate in support of the Proposed Rule.

II. State Regulation of Pole Attachments Via Reverse Preemption

5. Pole attachments are "any attachment by a public utility, local exchange carrier communications services provider, broadband provider, or cable television operator to a pole, duct, conduit, or right-of-way owned or controlled by a pole owner." § 366.02(6), Fla. Stat. They include wiring, cable, and other equipment that are attached to poles to help distribute electric, cable, communications, and other services to consumers. For communications providers like AT&T, they include coaxial cables, terminals connecting main lines, and power supplies for cable. For public utilities like FPL, DEF, and TEC, they can include conductors, transformers, and capacity banks.

6. The FCC generally has jurisdiction with respect to pole attachment rates, terms, conditions, and access. 47 U.S.C. § 224(b). However, states are authorized to regulate such matters through reverse preemption. *Id.* § 224(c).

7. To reverse preempt in this field, a state must certify to the FCC 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.

Id. § 224(c)(2). Section 224(c)(3) confirms that a state is not considered to regulate pole attachment rates, terms, and conditions:

> **(A)** unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and
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> **(B)** with respect to any individual matter, unless the State takes final action on a complaint regarding such matter--
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> > **(i)** within 180 days after the complaint is filed with the State, or
> >
> > **(ii)** within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

8. Federal regulations detail how the FCC must handle complaints arising from states that have reverse preempted. Pursuant to 47 C.F.R. § 1.1405(a), the FCC must dismiss a complaint for "lack of jurisdiction in any case where a suitable certificate has been filed by a State pursuant to paragraph (b) of this section. Such certificate shall be conclusive proof of lack of jurisdiction of [the FCC]." Paragraph (b) of the regulation provides as follows:

> It will be rebuttably presumed that the state is not regulating pole attachments if the [FCC] does not receive certification from a state that:
>
> > (1) It regulates rates, terms and conditions for pole attachments;
> >
> > (2) In so regulating such rates, terms and conditions, the state has the authority to consider and does consider the interests of the consumers of the services offered via such attachments, as well as the interests of the consumers of the utility services; and
> >
> > (3) 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).

9. In other words, if a state has filed a certificate that meets the elements of paragraph (b), that serves as conclusive proof of reverse preemption and the FCC must dismiss the complaint for lack of jurisdiction. Conversely, if a state has filed a certificate but it fails to meet all three elements, there is a presumption—which is rebuttable—that the state has not reverse preempted and the FCC is not required to dismiss the complaint for lack of jurisdiction.

10. Even if a state has filed a suitable certificate, paragraph (f) of the regulation confirms that jurisdiction reverts to the FCC as to an individual complaint if the state fails to take final action:

> (1) Within 180 days after the complaint is filed with the state, or
>
> (2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

III. The Florida Legislature Authorized the Commission to Regulate Pole Attachments and, as Directed, It Approved the Proposed Rule

11. In 2021, Florida began the process of reverse preemption so that it could start regulating pole attachments. The Legislature added subsection (8) to section 366.04, which authorized the Commission to regulate pole attachments pursuant to the authority granted in 47 U.S.C. § 224.

12. Section 366.04(8), the implementing statute, provides as follows:

> (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).

(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.
>
> (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).

13. Pursuant to the Legislature's directive to "propose procedural rules to administer and implement this subsection," the Commission began the rulemaking process. It published a Notice of Development of Rulemaking for Rule 25-18.010 in the Florida Administrative Register ("FAR"). 47 Fla. Admin. Reg. 159 (Aug. 17, 2021). The Notice scheduled a rule development

workshop for September 1, 2021. Copies were sent to all interested persons, including the Office of Public Counsel ("OPC"), AT&T, FPL, DEF, and TEC.

14. Representatives for AT&T, FPL, DEF, and TEC attended the workshop. The Commission received several post-workshop comments.

15. Of particular relevance here, the comments addressed the issue of whether the Commission should adopt FCC methodologies for evaluating pole attachment rates, which are contained in 47 C.F.R. § 1.1406.[3] FPL, DEF, and TEC argued against including FCC methodologies in the Proposed Rule; the Florida Internet and Television Association ("FIT") advocated for their adoption. AT&T did not file a comment at that time.

16. In accordance with section 286.011, Florida Statutes, the Commission scheduled a public meeting to decide whether to propose the adoption of the Proposed Rule. In advance, the Commission's staff prepared a written memorandum, also called a staff recommendation. The Commission filed the recommendation in its public docketing system on October 21, 2021, in accordance with its usual practice and procedure.

17. The staff recommendation did not include the FCC methodology in the draft of the Proposed Rule. Staff reasoned that the implementing statute required the Commission to use the first four evidentiary hearings, at which all interested parties could participate, to establish reasonable and just rates; as such, adopting a methodology before conducting those statutorily required hearings would be premature.

18. The public meeting occurred on November 2, 2022. AT&T and FIT spoke in favor of adopting FCC methodologies; FPL spoke against adopting FCC methodologies. The Commission agreed to propose the adoption of the Proposed Rule as recommended by its staff.

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[3] The FCC regulation contains several formulas that apply depending on whether the attachment is made by a cable provider providing cable services, or a telecommunications carrier or cable operator providing telecommunications services, or to a conduit by a cable operator or telecommunications carrier, and whether the formulas for those attachments yield higher rates than other formulas contained within the regulation. 47 C.F.R. § 1.1406.

19. On November 4, 2021, the Commission published a Notice of Proposed Rule in the FAR. 47 Fla. Admin. Reg. 215 (Nov. 4, 2021). The Notice stated that, "[i]f requested within 21 days of the date of this notice, a hearing will be scheduled and announced in the FAR."

20. The Commission also issued a Notice of Adoption of the Proposed Rule (Order No. PSC-2021-0412-NOR-PU), which it sent to all interested parties, including OPC, AT&T, FPL, DEF, and TEC. It also sent the Notice to the rules ombudsman in the Executive Office of the Governor, who neither responded nor offered alternatives.

21. On the same day, the Commission submitted a letter to the Joint Administrative Procedures Committee with a copy of the Proposed Rule, a detailed written statement of the facts and circumstances justifying the Proposed Rule, a statement of the extent to which the Proposed Rule relates to federal standards or rules on the same subject, and a copy of the Notice of Proposed Rule published in the FAR.

22. The Commission scheduled a public hearing for February 1, 2022, to address suggested changes to the Proposed Rule. On January 25, 2022, the staff recommendation was filed on the Commission's docket.

23. The staff recommendation suggested changes to paragraphs (1)(f) and (4)(b) of the Proposed Rule. Initially, these two paragraphs required the complaint and response to merely explain the methodology that either party wanted the Commission to apply in establishing just and reasonable rates. More in line with section 366.04(8)(e), the suggested revisions required the parties to either identify the FCC orders or appellate decisions that should be applied or, if proposing an alternative cost-based approach, identify the methodology and explain how it would be just, reasonable, and in the public interest. Staff recommended these changes to give more specificity to the filing requirements and ensure that the Commission had the information necessary to fulfill its statutory duty under section 366.04(8).

24. On January 31, 2021, AT&T filed a comment suggesting six changes to paragraphs (1)(f) and (4)(b). The suggestions primarily substituted or added a few words to make the pleading requirements more precise. AT&T did not suggest that the Proposed Rule adopt FCC methodologies.

25. The Commission held the public hearing on February 1, 2022, but it did not vote on the suggested changes. Instead, it asked for the matter to be brought back at another public meeting to consider all evidence and argument, including those pertaining to AT&T's recent suggestions.

26. Pursuant to notice published in the FAR, the Commission scheduled a public hearing for March 1, 2022. 48 Fla. Admin. Reg. 30 (Feb. 14, 2022). On February 17, 2022, a staff recommendation was filed on the Commission's docket that recommended changes to paragraphs (1)(f) and (4)(b), including some suggested by AT&T. At the hearing on March 1, 2022, the Commission approved the staff recommended changes to paragraphs (1)(f) and (4)(b).

27. The final version of the Proposed Rule was published in the FAR. 48 Fla. Admin. Reg. 43 (Mar. 3, 2022). A "Notice of Change to Proposed Rule" (Order No. PSC-2022-0105-NOR-PU) was sent to all interested parties, including OPC, AT&T, FPL, DEF, and TEC.

28. As approved, the Proposed Rule provides as follows:

> 25-18.010 Pole Attachment Complaints
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> (1) A complaint filed with the Commission by a pole owner or attaching entity pursuant to Section 366.04(8), F.S., must contain:
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> (a) The name, address, email address, and telephone number of the complainant or complainant's attorney or qualified representative;
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> (b) A statement describing the facts that give rise to the complaint;
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> (c) Names of the party or parties against whom the complaint is filed;

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

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

(f) 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;

(g) If the complaint involves a dispute regarding rates or billing, a statement of the dollar amount in dispute, the dollar amount not in dispute, whether the amount not in dispute has been paid to the pole owner, and if not paid the reasons why not;

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

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

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

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

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

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

(b) 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.

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

> (6) The Commission will take final action on a complaint limited to denial of access relative to pole attachments at a Commission Conference no later than 180 days after the complaint's filing date as established under subsection (2) of this rule.
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> Rulemaking Authority 350.127(2), 366.04(8)(g) FS. Law Implemented 366.04(8) FS.

IV. AT&T's Challenge to the Proposed Rule

29. On March 11, 2022, AT&T filed its Petition challenging the Proposed Rule. As it argued at the hearing and in its PFO, AT&T contends that paragraphs (1)(f) and (4)(b) of the Proposed Rule are an invalid exercise of delegated legislative authority under section 120.52(8)(a), (c), (d), and (e). AT&T primarily argues that, by failing to adopt a methodology to evaluate pole attachment complaints, the challenged paragraphs are contrary to the implementing statute, vague, invalid for not following the applicable rulemaking procedures, and arbitrary and capricious.

30. Three witnesses testified at the hearing. The testimony provided background and context to the regulation of pole attachments, the rulemaking process, the reasons the Commission adopted the Proposed Rule without methodologies, and the purported problems associated with that decision. That said, the resolution of AT&T's challenge is largely based on the interpretation of section 366.04(8), the Proposed Rule, and provisions of federal statutes and regulations—legal questions exclusively within the undersigned's province. As such, no weight has been given to any opinion testimony on such purely legal issues.

31. Mr. Hinton, the director of the Commission's office of industry development and market analysis, testified in both cases-in-chief and spoke on behalf of the Commission as its party representative. He has worked at the Commission for 23 years and was heavily involved in drafting the Proposed Rule in conjunction with a technical analyst and the legal

department. He was approved as an expert without objection as to how the Commission processes complaints concerning rates, terms, conditions, and interconnection agreements between telecommunications companies.

32. Consistent with the findings above, Mr. Hinton credibly testified about the rulemaking process from the initial notice, the workshops, to the public hearings culminating in the approval of the Proposed Rule. He discussed changes to the Proposed Rule that were approved during the process based on comments from interested parties, including AT&T. He also confirmed that the Commission considered the interests of consumers, users, and subscribers in developing the Proposed Rule, in part by noting changes that were made to shorten the deadline for resolving complaints based on a denial of access.

33. Mr. Hinton explained that the Proposed Rule lays out the process for seeking to establish reasonable and just pole attachment rates, terms, conditions, and access. It sets forth the information that must be included in a complaint and response, the deadlines applicable to such pleadings, and the timeline for the resolution thereof. In essence, it creates an entry process for establishing pole attachment rates through an adjudicatory proceeding, much like the Commission resolves other types of rate issues.

34. Because the Legislature directed the Commission to adopt procedural rules, the Proposed Rule contains no substantive standards. Instead, as required by section 366.04(8)(e) and (f) and in line with paragraphs (1)(f) and (4)(b) of the Proposed Rule, the Commission will use the first four evidentiary hearings, in which all pole owners and attaching entities will be permitted to participate, to establish precedent on the issue of just and reasonable rates. Mr. Hinton confirmed that the Commission has not yet developed methodologies for evaluating pole attachment rates, as it has just started a steep learning process in this new area of regulation.

35. As it does in other rate cases, the Commission will base its decisions on the evidence presented, regulatory principles (such as nondiscriminatory, compensatory, and cost-based approaches), and precedent. In doing so, the

Commission—as the Legislature directed—will apply FCC orders, appellate decisions thereon, and the methodologies approved therein, unless a party that seeks approval of an alternative cost-based approach identifies the methodology and establishes by competent, substantial evidence that the alternative rate is just, reasonable, and in the public interest.

36. AT&T presented two experts in the fields of telecommunications and regulatory policy, Mr. Peters and Mr. Garcia. As detailed below, the experts offered background information about pole attachments and regulations in general, and they opined as to why the Proposed Rule's lack of substantive standards was problematic from a business perspective.

37. Mr. Peters, AT&T's area manager for regulatory relations, testified at length about his experience in the field of pole attachments, including the fact that he has testified seven times in pole attachment cases before the FCC and in other states. Mr. Peters discussed pole attachments, what sorts of equipment are placed on them, and how disputes concerning rates and access are resolved by the FCC, other states that have reverse preempted, or through voluntary agreements between pole owners and attaching entities.

38. Mr. Peters acknowledged that the Proposed Rule sets forth a clear process for resolving pole attachment complaints, the required information in a complaint and response, and the applicable deadlines. He confirmed that his concern was not about the procedure set forth in the Proposed Rule.

39. Rather, he disagreed with the lack of substance, namely, the failure to set forth standards or methodologies for how the Commission will resolve complaints, particularly as to alternative cost-based approaches. He detailed the methodologies included in the FCC regulation and discussed how several other states that have reverse preempted in this area have adopted similar methodologies in their regulations. In his opinion, the Commission's failure to do so here creates uncertainty as to how it will resolve disputes concerning access and rates, which could adversely affect regulated entities' investment decisions and their ability to resolve disputes amicably.

40. Nevertheless, he conceded that Florida is required to neither regulate pole attachments identically to other states nor adopt the FCC's methodologies in its rules. He also acknowledged that the Proposed Rule requires parties to identify the FCC orders that should be applied and, in the context of an alternative cost-based approach, that the Commission will resolve that issue only after an evidentiary hearing.

41. Mr. Garcia testified at length about his tenure as a commissioner with the Commission and his experience with the telecommunications industry as a U.S. Congressman and at an investment firm. He explained that the Commission's rules are critically important for regulated entities, as they create guardrails for participants that protect consumers.

42. Although he has no experience with pole attachments, he opined generally that the Proposed Rule's lack of substantive standards adversely affects the ability of regulated entities to know what their investment will be or predict the cost of service to consumers. He believes the lack of specificity allows the Commission to make case-by-case decisions that are not based on set methodologies and could lead to unfair results favoring more powerful companies. Conversely, the FCC's formulaic regulations rein in agency decision-making and help competitors know where they stand when they enter the market. He believes the Commission has the expertise to adopt a rule with specific standards and methodologies and should have done so.

43. Although Mr. Peters and Mr. Garcia offered credible testimony about their experience, pole attachments, and why in their view having more specificity would help entities from a business perspective, their opinions about the purported problems with the Proposed Rule were not very helpful in resolving the predominantly legal questions at issue. For one, as detailed below, the undersigned finds that the Proposed Rule complies with the statutory directive to adopt procedural rules and to use the first four evidentiary hearings to establish precedent on the issue of reasonable and

just rates. The Legislature required the Commission to make case-by-case decisions through chapter 120 evidentiary hearings.

44. The undersigned was not persuaded that the Proposed Rule creates the kind of uncertainty discussed by the witnesses. Indeed, section 366.04(8) generally requires the Commission to apply FCC orders and appellate decisions in evaluating just and reasonable rates, which would include approved methodologies applied to specific factual circumstances. Thus, regulated entities generally will be in the same position before the Commission as they would be before the FCC in arguing about the reasonableness of rates based on approved methodologies. And, although federal orders and rules need not be applied in an alternative cost-based rate situation, the Proposed Rule requires the parties to identify and explain the supporting methodology, in line with the implementing statute's unique process of requiring the parties to prove at a chapter 120 evidentiary hearing that the alternative is just, reasonable, and in the public interest.

45. Based on the weight of the credible evidence, the undersigned finds that the Commission properly engaged in rulemaking, considered the interests of regulated entities and their consumers, made changes to the rule based thereon, and ultimately approved the Proposed Rule based on that robust process. The Commission adopted a procedural rule and reasonably chose not to include methodologies so that it could develop precedent on those substantive standards through the unique adjudicatory process mandated by the Legislature. Accordingly, the undersigned cannot find that the Proposed Rule is illogical, unreasonable, despotic, or arbitrary and capricious.

CONCLUSIONS OF LAW

46. DOAH has jurisdiction over the subject matter and the parties to this proceeding. §§ 120.56, 120.569, and 120.57(1), Fla. Stat.

47. AT&T challenges paragraphs (1)(f) and (4)(b) of the Proposed Rule as an invalid exercise of delegated legislative authority, in violation of

section 120.52(8)(a), (c), (d), and (e). AT&T asserts that the failure to adopt a methodology for evaluating pole attachment complaints renders the Proposed Rule contrary to the implementing statute, vague, invalid for not following the applicable rulemaking procedures, and arbitrary and capricious.

48. Section 120.56(1)(a) provides that "any person substantially affected by … a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." Other substantially affected persons may join in the proceeding as intervenors. *Id.* § 120.56(1)(e).

49. To meet the "substantially affected" test, a person must prove by a preponderance of the evidence that the proposed rule "will result in a real and immediate injury in fact" and "that the alleged interest is within the zone of interest to be protected or regulated." *Jacoby v. Fla. Bd. of Med.*, 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

50. The parties stipulate that AT&T and Intervenors are substantially affected by the challenged provisions of the Proposed Rule. Thus, there is no dispute that AT&T has standing to challenge the Proposed Rule and Intervenors have standing to participate in defense of the Proposed Rule.

51. The Commission then must "prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised." § 120.56(2)(a), Fla. Stat. A preponderance of the evidence has been defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to provide a certain proposition. *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000). The Proposed Rule is not presumed to be valid or invalid. § 120.56(2)(c), Fla. Stat.

52. Section 120.52(8) defines an invalid exercise of delegated legislative authority as "action that goes beyond the powers, functions, and duties delegated by the Legislature," which includes any of the following:

> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
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> * * *
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> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
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> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational … .

53. First, AT&T contends that the Proposed Rule is invalid because it contravenes the implementing statute, in violation of section 120.52(8)(c).

54. "In interpreting statutory language, [one] begin[s] with the language of the statute." *Page v. Deutsche Bank Tr. Co. Americas*, 308 So. 3d 953, 958 (Fla. 2020). As the Florida Supreme Court has explained, "we 'adhere to the 'supremacy-of-text principle': 'The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.'" *Id.* (quoting *Advisory Op. to Governor re Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020)). And, if the text is unambiguous, courts "presume that a legislature says in a statute what it means and means in a statute what it says there." *Page*, 308 So. 3d at 958 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

55. Section 366.04(8)(b) and (g) direct the Commission to "propose procedural rules to administer and implement this subsection," "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" in developing such rules, and "provide its

certification to the [FCC] pursuant to 47 U.S.C. s. 224(c)(2)" once they are adopted. The statute creates a unique regulatory process by directing the Commission to "hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments" through chapter 120 formal administrative proceedings and to allow "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." § 366.04(8)(e) and (f), Fla. Stat.

56. The Proposed Rule is consistent with those express statutory dictates. Based on the Findings of Fact above, the Commission considered the interests of subscribers, users, and customers and made changes to the proposed language based thereon in developing the Proposed Rule. The Commission thereafter adopted a procedural rule setting forth a process for the resolution of pole attachment complaints, including the information to be included in a complaint and any response thereto, the deadlines associated with those pleadings, and the deadlines for the Commission to resolve such complaints. As dictated by the statute, the Proposed Rule requires the parties to either identify the FCC decisions, orders, and appellate decisions on which the Commission should rely or, if seeking approval of an alternative cost-based approach, explain the methodology therefor and how that approach is reasonable, just, and in the public interest. In short, the Proposed Rule adopts procedures governing pole attachment complaints that are consistent with, not in contravention of, the plain and unambiguous text of the statute. *See Fla. Prepaid Coll. Bd. v. Intuition Coll. Sav. Sols., LLC*, 330 So. 3d 93, 97-99 (Fla. 1st DCA 2021) (holding that an agency's rules did not modify, enlarge, or contravene the implementing law where the statute granted the agency "broad powers that specifically includes the adoption of procedures to govern contract dispute proceedings" and it adopted rules that "set forth the procedures to govern such contract dispute proceedings").

57. Nevertheless, AT&T argues that section 366.04(8) required the adoption of rules that meet federal certification standards and that the Proposed Rule falls short by: (1) failing to adopt a specific methodology for evaluating pole attachment rates; and (2) failing to reference the interests of subscribers, users of the services, and consumers of pole owners or providing a means for those interests to be heard within the adjudicatory process. These arguments must be rejected because they are inconsistent with the plain text of the implementing statute and the provisions of federal law.

58. As just discussed, the statute only required the Commission to adopt procedural rules to implement its regulatory authority and to consider the interests of consumers, users, and customers in developing those rules, which it did, and to file its certification with the FCC once those rules were adopted. Nowhere in the plain and unambiguous text of section 366.04(8) is there a requirement that the Commission adopt rules that meet federal certification standards, even if those standards required the adoption of a specific methodology or an avenue for subscribers, users, and consumers to be heard within the adjudicatory process (they do not, as explained below). Had the Legislature intended to impose such requirements, it knew how to do so. *See Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d 306, 315 (Fla. 2006) ("In the past, we have pointed to language in other statutes to show that the Legislature 'knows how to' accomplish what it has omitted in the statute in question.") (quoting *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000)).

59. For example, section 409.905(6)(b), Florida Statutes, required the Agency for Health Care Administration ("AHCA") to "implement a prospective payment methodology for establishing reimbursement rates for outpatient hospital services." And, AHCA's failure to follow that express directive and adopt a methodology rendered the rule invalid because it contravened the implementing statute. *S. Baptist Hosp. of Fla. v. Ag. for Health Care Admin.*, 270 So. 3d 488, 504 (Fla. 1st DCA 2019). Conversely here, the Legislature did not expressly require the Commission to adopt a

methodology so as to ensure compliance with federal standards, even though it knew how to impose such a requirement if it intended to do so.

60. It is true that section 366.04(8) grants the Commission the authority to regulate pole attachments and is an effort by the Legislature to reverse preempt in this area. But, to interpret section 366.04(8) as directing the Commission to adopt a rule that meets the federal certification standards requires the undersigned to improperly veer from the plain and unambiguous text and add words to the statute that the Legislature chose to omit. *See, e.g.*, *Fla. Hosp. v. Ag. for Health Care Admin.*, 823 So. 2d 844, 848 (Fla. 1st DCA 2002) ("Courts are not at liberty to add words to statutes that were not placed there by the Legislature."). Worse yet, that interpretation sets a dangerous precedent that could render a proposed rule invalid for contravening an implied directive that is not stated in the text of the implementing statute.

61. Section 366.04(8) cannot be interpreted to implicitly require that the Proposed Rule ensure successful certification with the FCC. However, even if an implicit requirement could be read into the statute, the Proposed Rule is sufficient to meet those standards.

62. Contrary to AT&T's argument, a state can become certified under federal law without adopting a specific methodology in a rule. A state is authorized to reverse preempt the regulation of pole attachment rates, terms, and conditions under 47 U.S.C. § 224(c), entitled "State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting state regulation." Section 224(c)(2) provides that a state seeking to regulate in this area must certify to the FCC that: (1) "it regulates such rates, terms, and conditions"; and (2) "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." Section 224(c)(3) confirms that a state cannot be deemed to be regulating pole attachment rates, terms, and conditions unless: (1) "the State has issued and

made effective rules and regulations implementing the State's regulatory authority over pole attachments"; and (2) as it relates to an individual matter, "the State takes final action on a complaint … within 180 days after the complaint is filed" or "within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint."

63. Importantly, there is no provision in section 224(c) that requires a state to adopt a specific methodology in its rules, much less to certify that it has done so. Thus, the Proposed Rule's failure to incorporate a specific methodology does not contravene section 366.04(8), even if that statute were interpreted to require compliance with the federal certification standards.

64. AT&T incorrectly suggests that federal law requires a state to adopt a methodology in its rules *to become certified* based on its interpretation of FCC regulations and the fact that other states that have successfully filed their certifications have adopted methodologies in their rules. However, the FCC regulation on which AT&T relies, 47 C.F.R. § 1.1405(b), solely focuses on how the FCC will handle a complaint where a state has certified that it is regulating in this area. That regulation provides that, if a complaint is filed with the FCC and the state failed to certify that its rules include a specific methodology, there is a *rebuttable* presumption that the state is not regulating pole attachments. The fact that the presumption is rebuttable confirms that a state can still be deemed to be regulating in this area by filing a certification that meets the dictates of section 224(c).

65. Although the FCC has approved certifications filed by other states that have adopted methodologies in their rules, that does not mean that every state is required to do so to become certified. Indeed, AT&T's witnesses acknowledged that Florida was not required to adopt either the FCC's methodologies or those adopted by other states. Further, the FCC has rejected similar arguments about the sufficiency of a state's certification, finding that it lacked jurisdiction where the certification met the dictates of

section 224(c) and the party had failed to exhaust its state administrative remedies before filing a complaint with the FCC. As the FCC noted:

> While we believe that a regulatory scheme should be specific enough to put the parties on notice as to how a complaint will be handled, we will not look behind a certification unless we have evidence that a party is unable to file a complaint with the state Commission or the state Commission has failed to act on a complaint within the prescribed period.

In the Matter of Cert. by the Md. Pub. Serv. Comm'n Concerning Regul. of Cable Television Pole Attachments, No. ENF-85-46, 1986 WL 291472, at *2 (OHMSV Apr. 8, 1986); *accord In the Matter of Cert. by the La. Pub. Serv. Comm'n Concerning Regul. of Cable Television Pole Attachments*, 1 F.C.C. Rcd. 522 (1986) (approving Louisiana's certification, despite the state's failure to adopt a specific methodology in a rule, because it met the formal requirements of section 224(c), no evidence had been presented that a party had been unable to file a complaint with the state based on a failure of its procedures or that the state had failed to timely resolve complaints, and, in such circumstances, the FCC would neither "prejudge a state's regulatory scheme for pole attachments once the state has filed a certification" nor "look behind a certification").

66. AT&T also argues that the Proposed Rule "makes no mention of consumer interests or how they will be addressed in complaint proceedings," which is required under federal law. Even if section 366.04(8) could be interpreted as implicitly directing the Commission to ensure that the Proposed Rule meets federal certification requirements (it should not), the argument is not supported by the plain language of 47 U.S.C. § 224(c). Section 224(c) does not require a state to mention in a rule the interests of consumers, subscribers, or users or provide a means for them to be heard within the complaint process; rather, the law merely requires the state to certify that it has "the authority to consider and does consider" those

interests in regulating pole attachments and to generally adopt rules concerning its regulatory authority. Section 224(c) leaves it to the state to decide how they will consider those interests in regulating pole attachments.

67. Consistent with that discretion, the Legislature directed the Commission to: (1) consider those interests in developing procedural rules, which the Findings of Fact above establish is exactly what it did in developing the Proposed Rule; (2) allow all pole owners and attaching entities to participate in the first four adjudicatory hearings, whereby their interests—and, *a fortiorari*, the interests of their users, subscribers, and consumers—can be considered as the Commission develops precedent for how it will regulate pole attachments in the future; and (3) ensure that the rates approved are just, reasonable, and, in the context of an alternative rate, in the public interest. Because the statute requires the Commission to consider the interests of consumers, users, and subscribers in developing its rules, allow all interested parties to appear in the first four precedent-setting hearings, and ensure rates are reasonable and just (and in the public interest as to alternative rates), the undersigned cannot conclude that the Proposed Rule's failure to more specifically address those interests undermines the Commission's ability to successfully file its certification.

68. Based on the Findings of Fact, the Commission established by a preponderance of the evidence that the Proposed Rule does not contravene the implementing statute. Thus, the Proposed Rule is not invalid under section 120.52(8)(c).

69. Second, AT&T contends that the Proposed Rule is vague, fails to establish adequate standards, and vests unbridled discretion in the agency based on its failure to adopt methodologies or criteria for resolving pole attachment complaints, in violation of section 120.52(8)(d).

70. "An administrative rule is invalid under section 120.52(8)(d) if it requires the performance of an act in terms that are so vague that men of common intelligence must guess at its meaning." *SW. Fla. Water Mgmt. Dist.*

v. Charlotte Cnty., 774 So. 2d 903, 915 (Fla. 2d DCA 2001). "The fundamental concern of the vagueness doctrine is that people be placed on notice of what conduct is illegal." *State v. Rawlins*, 623 So. 2d 598, 600 (Fla. 5th DCA 1993). However, where the challenged rule is not penal in nature, "the fundamental concern of the vagueness doctrine is not threatened." *Fla. E. Coast Indus., Inc. v. State, Dep't of Cmty. Affs.*, 677 So. 2d 357, 362 (Fla. 1st DCA 1996).

71. A proposed rule is also invalid if it "creates discretion not articulated in the statute it implements." *Fla. Pub. Serv. Comm'n v. Fla. Waterworks Ass'n*, 731 So. 2d 836, 843 (Fla. 1st DCA 1999) (quoting *Cortes v. Bd. of Regents,* 655 So. 2d 132, 138 (Fla. 1st DCA 1995)). As previously stated:

> An administrative rule which creates discretion not articulated in the statute it implements must specify the basis on which the discretion is to be exercised. Otherwise the "lack of ... standards ... for the exercise of discretion vested under the ... rule renders it incapable of understanding ... and incapable of application in a manner susceptible of review."

Cortes, 655 So. 2d at 138 (quoting *State v. Couch,* 507 So. 2d 702 (Fla. 1st DCA 1987)) (omissions in original). "[N]o rule is properly invalidated simply because 'governing statutes, not the challenged rule, confer ... discretion.'" *Fla. Waterworks Ass'n*, 731 So. 2d at 843 (quoting *Cortes*, 655 So. 2d at 138).

72. Further, "Florida courts have previously recognized that executive agencies may exercise some discretion without breaching their authority." *Fla. E. Coast Indus.*, 677 So. 2d at 361. Because "it may not always be practical or desirable to draft detailed or specific legislation," the Legislature may allow an agency "to administer legislative policy since the agency possesses the expertise and flexibility to deal with complex and fluid conditions." *Id.* An agency's discretion is not considered to be unbridled where its rules, albeit lacking in specific criteria, provide an adjudicatory process and its decisions are subject to judicial review. *See id.* at 360-61 (holding that

rules concerning urban sprawl did not vest unbridled discretion where the implementing statute granted the agency discretion and such discretion was constrained by an adjudicatory process for evaluating urban sprawl plans and the fact that the agency's decisions were subject to judicial review).

73. As directed by the implementing statute, the Commission adopted a procedural rule setting forth the process by which it will evaluate pole attachment complaints. The Proposed Rule identifies the information the parties must include in a complaint and response, the deadlines for filing such pleadings, and the timeline within which the Commission must resolve such complaints. There is nothing in the Proposed Rule that is ambiguous, confusing, or requires a person of common intelligence to guess at what is required to engage in the complaint process—a point conceded by AT&T's witness. The Proposed Rule also does not threaten the fundamental concern of the vagueness doctrine because it is not penal.

74. The Proposed Rule also does not grant the Commission unbridled discretion. Section 366.04(8) directed the Commission to adopt a procedural rule to resolve pole attachment complaints and mandated the use of a unique adjudicatory process to establish precedent on the establishment of rates. The Proposed Rule creates no more discretion than already granted by the Legislature in section 366.04(8).

75. Moreover, section 366.04(8) requires the Commission to apply FCC orders and appellate decisions reviewing such orders in determining just and reasonable rates, terms, and conditions. It cannot be ignored that those federal decisions will detail the approved methodologies and criteria that may be used to resolve pole attachment complaints. The Commission's discretion is, thus, not unbridled, but rather constrained by the statutory requirement to apply federal decisions in resolving complaints. That fact also undermines any suggestion that the Proposed Rule is vague given that the federal decisions that the Commission must apply detail the methodologies and criteria approved by the FCC.

76. AT&T relies heavily on the fact that section 366.04(8) authorizes the Commission to approve alternative cost-based rates without applying federal decisions. However, section 366.04(8) precludes the Commission from doing so unless a party establishes by competent, substantial evidence that they are just, reasonable, and in the public interest in a chapter 120 evidentiary proceeding. Thus, even with alternative rates, the Commission's discretion is constrained by the statutorily mandated adjudicatory process (including the first four such proceedings being open to all interested parties) and the fact that its decisions are subject to judicial review under section 120.68. *See Fla. E. Coast Indus.*, 677 So. 2d at 361-62 (holding that urban sprawl rules did not vest unbridled discretion in agency where, among other things, there is an adjudicatory process in place for evaluating urban sprawl plans and such decisions were subject to judicial review).

77. Based on the Findings of Fact, the Commission established by a preponderance of the evidence that the Proposed Rule is not invalid under section 120.52(8)(d) for being vague, failing to establish adequate standards for agency decisions, or vesting unbridled discretion in the Commission. The Proposed Rule followed the statutory directives, clearly sets forth the process for filing and resolving complaints, and grants the Commission no more discretion than already granted by the Legislature.

78. Third, AT&T contends that the Proposed Rule as invalid because the Commission failed to materially follow the applicable rulemaking procedures, in violation of section 120.52(8)(a).

79. An invalid exercise of delegated authority under section 120.52(8)(a) typically exists where the agency fails to materially follow the statutory procedures in promulgating the rule being challenged, such as timely and adequately publishing notices, accepting comments, and holding public hearings. *See, e.g.*, *Fernandez v. Dep't of Health*, 223 So. 3d 1055, 1058 (Fla. 1st DCA 2017) (holding that proposed rule was not invalid where, among other things, the evidence confirmed that the agency followed the applicable

rulemaking procedures by publishing notices, accepting comments from interested parties, holding ten public hearings, and publishing the revised proposed rule). It is about the propriety of the rulemaking process, rather than the substance of the rule as proposed.

80. Here, AT&T conceded at the hearing that it was not challenging the Commission's *process* in adopting the Proposed Rule. That alone undermines any suggestion that the Proposed Rule is invalid under section 120.52(8)(a).

81. Nevertheless, AT&T argues that the law required the Commission to adopt substantive criteria in the Proposed Rule, which was feasible, because it cannot evaluate rate complaints based on unadopted criteria. AT&T is correct that "[a]n agency statement that meets the Chapter 120 definition of a rule, but which has not been promulgated in accord with section 120.54 'constitutes an invalid exercise of delegated legislative authority and, therefore, is unenforceable.'" *Coventry First, LLC v. State, Off. of Ins. Regul.*, 38 So. 3d 200, 203 (Fla. 1st DCA 2010) (quoting *Dep't of Rev. v. Vanjaria Enters., Inc.,* 675 So. 2d 252 (Fla. 5th DCA 1996)).

82. However, this is not an unadopted rule challenge. The evidence confirmed that the Commission has not yet evaluated any complaints or developed methodologies that it may apply in the future. Rather, it intends to follow the unique process mandated by section 366.04(8)(f)—*i.e.*, opening up the first four hearings to all interested parties to provide "precedent on the establishment of pole attachment rates"—to gain substantive knowledge in this new area of regulation so that it can develop the methodologies it will apply going forward. Even if AT&T's argument on this issue were viable under section 120.52(8)(a), it must be rejected because the Commission has not yet developed a specific methodology that could be deemed an agency statement required to be adopted in a rule.

83. Based on the Findings of Fact, the Commission established by a preponderance of the evidence that it complied with the rulemaking procedures; thus, the Proposed Rule is not invalid under section 120.52(8)(a).

84. Fourth, AT&T contends that the Proposed Rule is arbitrary and capricious, in violation of section 120.52(8)(e), because the Commission made no meaningful effort to develop methodologies in the Proposed Rule, which is required under federal law and creates uncertainty in this field of regulation.

85. "A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational." § 120.52(8)(e), Fla. Stat. A determination is not arbitrary or capricious if it is justifiable "under any analysis that a reasonable person would use to reach a decision of similar importance." *Dravo Basic Materials Co. v. Dep't of Transp.*, 602 So. 2d 632, 635 n.3 (Fla. 2d DCA 1992).

86. As previously discussed, the Legislature did not direct the Commission to adopt a specific methodology in its procedural rule. Instead, it opted for a unique adjudicatory process in which the Commission will use the first four hearings to develop precedent for use in subsequent cases. Within that adjudicatory process, the Commission must generally apply FCC and federal appellate decisions in evaluating rates, which are based on the methodologies included in the FCC regulations. And, if a party requests an alternative cost-based rate, the Proposed Rule requires that party to explain why the methodology supports the alternative rate so the issue can be resolved in a chapter 120 evidentiary proceeding, as required by the implementing statute.

87. AT&T lastly suggests that the Commission's future decisions on rate complaints will be arbitrary and capricious because the regulated community has no knowledge of what methodologies will be used. However, it would be improper at this point "to speculate that the [Commission] will act arbitrarily and capriciously when the [Proposed] rule does not mandate such result and can be applied reasonably." *Fla. Prepaid Coll. Bd. v. Intuition Coll. Sav. Sols., LLC*, 330 So. 3d 93, 97-99 (Fla. 1st DCA 2021). This is particularly so where the Proposed Rule simply tracks the Legislature's directive to use the first four hearings to develop precedent on the issue of reasonable and just rates. *See Hasper v. Dep't of Admin.*, 459 So. 2d 398, 400 (Fla. 1st DCA 1984)

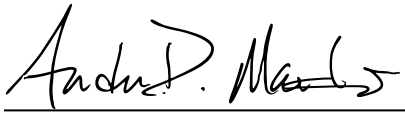
(holding that a rule is not rendered invalid merely because an agency may erroneously apply it in the future, particularly where the rule does not mandate an application contrary to the enabling statute). AT&T's argument is a premature attempt to speculate that the Commission will ultimately act in an arbitrary and capricious manner in the future, which is not a viable attack on the validity of the Proposed Rule.

88. Based on the Findings of Fact, the Commission established by a preponderance of the evidence that the Proposed Rule is not arbitrary or capricious. The Commission adopted a procedural rule that follows the statutory directive to use the first four evidentiary hearings to establish precedent on reasonable and just rates. The Legislature did not direct the Commission to adopt a methodology and it did not act illogically, unreasonably, or irrationally in refusing to do so. *See generally Bayonet Point Hosp., Inc. v. Dep't of HRS*, 490 So. 2d 1318, 1320 (Fla. 1st DCA 1986) (noting that "[t]he agency rulemaking function involves the exercise of discretion and this court will not substitute its judgment for that of the agency on an issue of discretion, unless the statutes mandate the adoption of the requested rule."). Thus, the Proposed Rule is not invalid under section 120.52(8)(e).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Proposed Rule 25-18.010 does not constitute an invalid exercise of delegated legislative authority as to the objections raised by Petitioner. Therefore, it is ORDERED that the Petition is Dismissed.

DONE AND ORDERED this 18th day of May, 2022, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.