



FPL

Florida Power & Light Company, P.O. Box 029100, Miami, FL 33102-9100

(305) 552-3929

DOCKET FILE COPY ORIGINAL

August 25, 1999

Via Federal Express

Magalie R. Salas, Secretary
Federal Communications Commission
1919 M. Street, N.W.
Room 222
Washington, D.C. 20554

RECEIVED
AUG 26 1999
FCC MAIL ROOM

RE: In the Matter of Promotion of Competitive Networks, et. al.
WT Docket No. 99-217

FPL Matter No.: 40482

Dear Secretary Salas:

Enclosed please find an original and six copies of the Comments by Florida Power & Light Company ("FPL") in the above matter for filing with the Commission.

A copy of the front page is enclosed for you to date stamp and return to the undersigned in the stamped, self-addressed envelope.

Thank you.

Very truly yours,

Jean G. Howard
Senior Attorney

JGH:gr

Enclosures

cc: International Transcription Services, Inc.

No. of Copies rec'd 0+6
List ABCDE

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of)
)
Promotion of Competitive Networks)
in Local Telecommunications Markets)
)
Wireless Communications Association)
International, Inc. Petition for)
Rulemaking to Amend Section 1.400 of)
the Commission's Rules to Preempt)
Restrictions on Subscriber Premises)
Reception or Transmission Antennas)
Designed to Provide Fixed Wireless)
Services)
)
Cellular Telecommunications Industry)
Association Petition for Rulemaking)
and Amendment of the Commission's)
Rules to Preempt State and Local)
Imposition of Discriminatory And/Or)
Excessive Taxes and Assessments)
)
Implementation of the Local Competition)
Provisions in the Telecommunications)
Act of 1996)
)

WT Docket No. 99-217

RECEIVED
AUG 26 1999
FCC MAIL ROOM

CC Docket No. 96-98

To The Commission

COMMENTS OF FLORIDA POWER & LIGHT COMPANY

FLORIDA POWER & LIGHT COMPANY

By: Jean G. Howard
9250 West Flagler Street
Miami, Florida 33174
Telephone: (305)552-3929
Facsimile: (305)552-4153

Its Attorney

August 27, 1999

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	iii
STATEMENT OF INTEREST	2
INTRODUCTION	3
COMMENTS	5
I. The Commission Has No Jurisdiction To Mandate Access to Privately Owned Rooftops or Building Risers for Antenna and Other Telecommunications Facilities.. . . .	5
A. Section 224 Rights and Obligations Do Not Run Between the Competitor Telecommunications Companies and the Private Landowners. . . .	8
B. Section 224 Was Not Intended to Accomplish Commission Goals of Rooftop and Inside Building Access, in that, Section 224 Does Not Directly Provide for Such Access and is Not a Preemptive Statute.. . . .	9
C. The Commission's Goals for Wireless Attachments to Rooftops Cannot Be Advanced by Regulating the Electric Utility Under Section 224 in that the Electric Utility Does Not "Own or Control" "Rights-of-Way" on Rooftops or Inside Buildings Which Are Necessary to Accomplish such Goals.	12
II. Neither The Law of Real Property Nor Common Usage Supports the Commission's Conclusion That The Installation of a Utility Facility Which Is Part of the Utility Transmission or Distribution Network Creates a Right-of-Way Owned or Controlled by the Utility.. . . .	14
A. The Commission's Conclusion as to the Meaning of Right-of-Way in Section 224 Confuses the "Right" with the "Land".. . . .	14
B. The Terms "Right-of-Way" and "Easement" are not Equivalent.	16

TABLE OF CONTENTS (CONT'D)

	<u>Page</u>
C. Congress by Use of the Term "Right-of-Way" in Section 224 Did Not Create a Federal Real Property Right of Apportionment which would Allow for Third Parties to Piggyback on the Rights of the Easement Holder..	22
III. The Determination of Whether a Utility Owns or Controls a Right-of-Way in Order to Allow Third Party Attachment Is a Matter of State Real Property Law Outside the Jurisdiction of the Commission.	24
IV. Commission Delay In Ruling on Petitions for Reconsideration as Well as Ruling on the Same or Inextricably Related Issues Arising under Section 224 Has Resulted in a Violation of Section 224 and Due Process Rights..	25
V. Conclusion	27

SUMMARY

The Commission's proposal impermissibly changes the scope of section 224, misapplies the law of real property, is not in accord with utility installations inside buildings in multi-tenant environments, creates a federal law of real property and fails of its essential purpose in that section 224 is not a preemptive statute, does not create a direct federal right of access, and discourages rather than encourages facilities based competition. In addition, the Commission has failed to timely address the same issues already before it, creates further unnecessary delay and expense both for itself and for all parties concerned, has violated section 224(e)(1) and raised due process concerns under 5 U.S.C. § 555(b).

In seeking to help wireless providers gain access to multi-tenant environments and thus promote competing telecommunications technologies and at the same time avoid constitutional takings infirmities, the Commission searches for a vehicle and lands on the term "right-of-way" in 47 U.S.C. § 224, the Pole Attachments Act. These three little words cannot bear such a burden.

Commission jurisdiction under section 224 is limited to regulating pole attachment rates and conditions as between certain utilities and the attaching cable television systems and competing telecommunications providers. It does not extend to mandating access to private rooftops or in building risers, thereby effectively regulating the private landowners. Section 224 rights and obligations do not run between the competitor

telecommunications companies and the private landlords. The Commission, therefore, must, in effect, get rid of the landlord.

The Commission attempts to do so by taking the term "right-of-way" out of context of section 224 and forcing a definition upon that term which would bootstrap Commission jurisdiction. The Commission comes up with a circular definition of "right-of-way" turning any property on which a utility has installed a utility facility into a right-of-way and making the utility the owner or controller of that "right-of-way." The Commission then declares that the property-turned right-of-way is the equivalent of an easement. Next, the Commission assumes that if it is the equivalent of an easement, there must be an easement or easement equivalent rights. The utility, the Commission believes, then would have a right to apportion out those easement rights and would give telecommunications providers the right to install their facilities in such "easement" without additional consent of the landlord. With the landlord gone (having lost his or her control of the premises by means of Commission definition) and because the Commission has done this under section 224, the Commission believes that it can mandate such access to the utility facility or in the area of that facility without violating the constitutional prohibition against takings. Such reasoning fails at every step.

The mere installation of a utility facility does not create a right-of-way. The electric utility does not own or control the building premises on which its facilities are installed. The term

right-of-way can be understood only in context of its use--here as used in section 224. The Commission confuses the "right" with the land. A right-of-way is not the equivalent of an easement. Without the creation of a direct federal law of real property, the utility will not have ownership or control of the area so as apportion rights of use to others. The Commission has no jurisdiction to create a federal law of real property. The takings concern remains.

Florida Power & Light Company suggests that the Commission withdraw the Notice of Proposed Rulemaking as to section III, subsection B, Access to Buildings and Rooftops, asserting jurisdiction under section 224.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Promotion of Competitive Networks)	WT Docket No. 99-217
in Local Telecommunications Markets)	
)	
Wireless Communications Association)	
International, Inc. Petition for)	
Rulemaking to Amend Section 1.400 of)	
the Commission's Rules to Preempt)	
Restrictions on Subscriber Premises)	
Reception or Transmission Antennas)	
Designed to Provide Fixed Wireless)	
Services)	
)	
Cellular Telecommunications Industry)	
Association Petition for Rulemaking)	
and Amendment of the Commission's)	
Rules to Preempt State and Local)	
Imposition of Discriminatory And/Or)	
Excessive Taxes and Assessments)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications)	
Act of 1996)	
)	

To The Commission

COMMENTS OF FLORIDA POWER & LIGHT COMPANY

Florida Power & Light Company ("FPL"), through its undersigned counsel and pursuant to sections 1.415 and 1.49 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), respectfully submits the following comments in response to the above-captioned Notice of Proposed Rulemaking. ¹

¹Released July 7, 1999, and hereinafter referred to as "NPRM."

STATEMENT OF INTEREST

1. FPL is a corporation organized and existing under the laws of the State of Florida and is a principal subsidiary of FPL Group, Inc. FPL is regulated by the Florida Public Service Commission ("FPSC"). FPL's service territory covers 27,600 square miles in all or part of 35 Florida counties along most of the east coast of Florida and the west coast south of the Tampa Bay area, including the municipalities of Miami, Ft. Lauderdale, West Palm Beach, Daytona Beach and Sarasota. Florida law provides that the FPSC has exclusive jurisdiction to prescribe and enforce safety standards for the electric transmission and distribution facilities in the State of Florida. The Florida legislature has adopted the National Electrical Safety Code ("NESC") as the initial standards of the Florida electric utilities and has determined that the FPSC is the administrative authority referred to in the NESC.² The FPSC does not regulate pole attachment rates. FPL, therefore, is subject to pole attachment rate regulation by the Commission under the federal Pole Attachments Act, 47 U.S.C. § 224, as amended (hereinafter referred to as "section 224"). FPL has a vital interest in, and is directly affected by, those portions of the Commission's NPRM which address the meaning of "right-of-way" as used in section 224(f).

²Section 366.04(6), Florida Statutes (1997).

2. FPL, through its Attorneys, McDermott, Will & Emery and as one of the "Infrastructure Owners", filed comments, reply comments and a petition for reconsideration in In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-98, released April 19, 1996.³ FPL is also a party in Gulf Power Company, et. al. v. Federal Communications Commission, Case No. 98-6222 and consolidated cases, pending in the United States Court of Appeals for the Eleventh Circuit.

INTRODUCTION

3. In this rulemaking, the Commission seeks to facilitate the development of competitive telecommunications networks and, in particular, to facilitate access to rights-of-way, building, rooftops, and facilities in multi-tenant environments for wireless telecommunications carriers for the installation of antenna facilities. The Commission seeks additional comments to its First Report and Order, released August 8, 1996⁴ (reconsideration pending) as to the contentions of WinStar in its Petition for Reconsideration filed in that Notice of Proposed Rulemaking on September 30, 1996 that under section 224, a "LEC must allow

³See note 8 infra.

⁴Local Competition Order, 11 FCC Rcd. 15499 (1996).

telecommunications carriers [including the wireless carriers] access . . . to rooftop facilities and related riser conduits that the LEC owns or controls."⁵ The Commission specifically seeks comment as to whether such access is required to riser conduit and privately granted rights-of-way, owned or controlled by utilities in multi-tenant environments such as apartment, office buildings, office parks, shopping centers and manufactured housing communities.

4. The Commission affirms its prior interpretation of section 224 that: (a) the nondiscriminatory access provisions of section 224, includes access for facilities used to provide wireless telecommunications services;⁶ and (b) that a utility is required to exercise its state sovereign power of eminent domain where necessary to expand an existing right-of-way in order to accommodate a request for access by a cable television system or a competitor telecommunications company.⁷ FPL continues to oppose these determinations as well as the Commission's interpretation of section 224(f) as requiring mandatory rather than just

⁵NPRM, ¶ 38.

⁶NPRM, ¶ 36.

⁷NPRM, ¶ 46.

nondiscriminatory access.⁸

5. In its attempt to regulate wireless facilities installed on private rooftops and inside buildings, the Commission proposes a unique definition of "right-of-way" under section 224. FPL opposes the Commission's tentative conclusions relating to its interpretation of right-of-way and assumption of jurisdiction under section 224.

6. Without waiving any of its prior comments and objections to the Commission's interpretation or those that may be raised on appeal and incorporating those comments and objections herein, FPL provides the following comments.

COMMENTS

I. The Commission Has No Jurisdiction To Mandate Access to Privately Owned Rooftops or Building Risers for Antenna and Other Telecommunications Facilities.

7. In its conclusions in this NPRM, the Commission impermissibly and fundamentally changes the scheme of section

⁸See *American Electric Power Service Corporation, et. al., Comments*, CC Docket 98-98 at 5-10 (May 20, 1996); *Florida Power & Light Company, Petition for Reconsideration*, CC Docket No. 96-98 (Sept. 30, 1996).

224.⁹ First, from one of regulating the conditions of pole attachment between certain utilities and certain cable television and competitor telecommunications companies to one of regulating relations between private landlords and telecommunications companies in multi-tenant environments. And second, from one of regulating attachments of linear facilities to similar linear facilities of the utility outside building premises to one of regulating rooftops and inside building access in privately owned multi-tenant environments for attachments of wireless facilities.¹⁰

8. The Commission seeks to accomplish this transformation by taking the term "right-of-way" out of context of section 224 and redefining the term in such a manner as it hopes will effectively remove the fee owner from owning or controlling his or her real property¹¹--similar to what the Commission attempted to do

⁹See, e.g., MCI Telecommunications Corporation v. American Telephone and Telegraph Company, 114 S.Ct. 2223 (1994); Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1067 (D.C. Cir. 1998) (Commission in interpreting its own jurisdiction is bound by plain meaning of statute). See Gulf Power Company, et. al. v. Federal Communications Commission, Case No. 98-6222, appeal pending before the United States Courts of Appeals for the Eleventh Circuit (challenging the inclusion of wireless facilities within section 224).

¹⁰NPRM, ¶ 28.

¹¹The Commission will have then addressed the complaint of WinStar's Vice President for Real Estate that many building owners and/or building management are requesting payment for installing facilities on rooftops and/or hookups which WinStar

in its OTARD ruling.¹² Here, the Commission's ground is even more tenuous. One could say totally without basis. The Commission finds that the installation of a utility facility in or on a building has in itself created a "right-of-way." That this "right-of-way" is the equivalent of an easement. That since it now is an "easement," it must be under the ownership and control of the utility. That any attachment to that right-of-way, now easement, must fall under the section 224 jurisdiction of the Commission. That [because the Commission has determined that the ownership and control of the desired property is now with the utility] the utility can apportion the "rights" "granted to it" to third parties without the further consent of the landlord. And,

thinks is too much. NPRM, ¶ 31. The Commission apparently knows that unless it can accomplish this slight of hand of removing the landlord from negotiations about use of the landlord's property, its rules will effect an unconstitutional takings as found in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), NPRM, ¶ 47, and it will have no jurisdiction under section 224--even assuming it has jurisdiction over wireless attachments, which it does not.

¹²See NPRM, ¶ 59 and FNs 149-150. (The OTARD rulings are also pending reconsideration, FN 155) See also OTARD, Second Report and Order, 13 FCC Rcd. 23874, released November 20, 1998, ¶s 19-29, concluding that because a lease creates a possessory interest in the fee--a possessory interest which the landlord voluntarily gave up by virtue of leasing the premises,-- interpreting section 207 to prohibit restriction by landlords for installation of over-the-air reception devices on rental property--does not constitute a takings of property. Unlike a leasehold interest, an easement, even if one could be found, creates no possessory interest, but merely a right of use. See discussion infra at notes 22, 31.

ergo, the takings concerns of Loretto v. Teleprompter,¹³ are satisfied. Each step of this "logic" is subject to attack. Section 224 and the law of real property do not support placing such a burden on the three little words "right-of-way."

A. Section 224 Rights and Obligations Do Not Run Between the Competitor Telecommunications Companies and the Private Landowners.

9. The Commission's jurisdiction under section 224(b) is to regulate rates, terms and conditions for pole attachments. Nowhere does section 224 authorize the Commission, either directly or indirectly, to subject private persons to FCC jurisdiction and regulation with respect to pole attachments. Moreover, Commission regulation of private contracts between multi-tenant landlords and telecommunications providers would harm, not promote, facilities based competition.¹⁴

10. Those who must bear the burden of the Commission's jurisdiction over rate regulation are limited to those entities defined in section 224(a)(1), i.e., to a "utility" which is "a local exchange carrier or an electric, gas, water, steam, or other

¹³ Note 11, supra.

¹⁴ See Joint Comments of UTC and EEI (August 27, 1999) filed in this NPRM.

public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." Those who benefit from the rate regulation purpose of section 224 are those already subject to Commission jurisdiction and expressly defined in section 224(a)(4) as a "cable television system" and a provider of telecommunications service, except for the incumbent local exchange carrier. The Commission itself recognizes that the rights and obligations created under section 224 run between utilities on the one hand, and cable television systems and telecommunications carriers on the other hand.¹⁵ In order to make section 224 apply to private rooftops and buildings, therefore, the Commission has to remove the private owner of that rooftop and building from the picture.

B. Section 224 Was Not Intended to Accomplish Commission Goals of Rooftop and Inside Building Access, in that, Section 224 Does Not Directly Provide for Such Access and is Not a Preemptive Statute.

11. Congress, in section 224(c), expressly limited Commission jurisdiction over pole attachments, including access, to those states which do not regulate rates, terms and conditions, or access to poles, ducts, conduits, and rights-of-way as provided

¹⁵NPRM, ¶ 36.

in subsection (f) for pole attachments.¹⁶ If Congress had intended to address the Commission's concern that the wireless competitive service providers have the ability to access their potential customers in multi-tenant environments, it is more likely it would have done so directly rather than under section 224. The introduction of Senate Bill 1301 on June 29, 1999 is itself a Congressional recognition that no federal statutory framework exists for mandating access to rooftops or buildings for wireless facilities and an implicit recognition that such access is not provided for under section 224.¹⁷ By legislating as to federally owned public property only, the Bill further evidences the Congressional intent not to interfere with private property rights or to create a federal law of real property. Where Congress has intended to create a preemptive federal right of access, it has done so directly and without express reservation of access jurisdiction to states.¹⁸

¹⁶Section 224(c) provides: "Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State." (Emphasis added.)

¹⁷This Bill would create a federal statutory right of nondiscriminatory access to federal buildings and is a "direct access" Bill. It is not based on the law of easements or a definition of right-of-way.

¹⁸See, e.g., Senate Bill 1301, Id. See also Section 207 of the Telecommunications Act of 1996 (directing the Commission to

"[w]ithin 180 days after the date of enactment [to] promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services"). See 47 U.S.C. § 541(a)(2), The Cable Communications Policy Act of 1984 ("Cable Act") creating a federal right of access applicable in all states for cable television companies to public road rights-of-way and dedicated utility easements (i.e., to the public--and, therefore, not within private buildings--for the public utility use as in the legal sense of dedication) and providing, "[a]ny franchise [which a local government grants to a cable television company] shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses" See, e.g., Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169 (4th Cir. 1993) ("dedicated easement" means dedicated to the public); UACC-Midwest, Inc. v. Occidental Development, Ltd., 1991 U.S. Dist Lexis 4163 (W.D. Mich. 1991) (no indication that Congress intended to grant a right of access over property simply because of existence of utility transmission lines; no access to interior in that no easements exist as to the building's interior); Cable Investments, Inc. v. Woolley, 867 F.2d 151(3d Cir. 1989) (no access to multi-unit dwelling); Cable Associates, Inc. v. The Town & Country Management Corporation, 709 F.Supp. 582 (E.D. Pa. 1989) (no access into building through private telephone company easement); Century Southwest Cable Television, Inc. v. CIIF Associates, 33 F.3d 1068 (9th Cir. 1994) (leaving issue undecided as there was no evidence of easements inside building); Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600 (11th Cir.), cert. denied, 506 U.S. 862 (1992) (no access to interior of multi-unit apartment building). See also Multi-Channel TV Cable Company v. Charlottesville Quality Cable Corporation, 65 F.3d 1113 (4th Cir. 1995) (no access for cable company to multi-dwelling unit under state law through utility easements, in that, utility easements did not extend into interior of building); Gerstein v. Axtell, 960 P.2d 599 (Alaska 1998) ("not deciding" issue but citing Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., supra, anyway in holding on appeal from lower court that section 541(a)(2) does not authorize cable franchise to construct cable system on easement owned by electric utility without payment of compensation moot where cable company exercised its power of

C. The Commission's Goals for Wireless Attachments to Rooftops Cannot Be Advanced by Regulating the Electric Utility Under Section 224 in that the Electric Utility Does Not "Own or Control" "Rights-of-Way" on Rooftops or Inside Buildings Which Are Necessary to Accomplish such Goals.

12. FPL's ownership and control of its electric wiring does not extend beyond the meter. FPL may have electric wiring

eminent domain and paid landowner \$500 for use of utility easement).

Courts which found a right of access by a cable television company under the Cable Act to easements or rights-of-way dedicated for compatible use did so by finding that the term "dedicated for compatible use" meant dedicated in the legal sense as in "dedicated to the public," e.g., by plat. See Centel Cable Television Company of Florida v. Thos. J. White Development Corporation, 902 F.2d 905 (11th Cir. 1990), holding that cable franchisee had implied right of action against real estate developer under Cable Act for access to utility easements outside of building dedicated to compatible use and citing Florida plat law providing for use of dedicated utility easements by cable television; Centel Cable Television Company of Florida v. Admiral's Cove Associates, Ltd., 835 F.2d 1359 (11th Cir. 1988), holding that implied right of action existed under Cable Act and, therefore, cable company could seek injunction to allow use of utility easements created by plat in new subdivision; Centel Cable Television Company of Florida v. Burg & Divosta Corporation, 712 F.Supp. 176 (S.D. Fla. 1988), holding that under Cable Act any private agreements to restrict construction of cable in public rights-of-way and dedicated easements until subdivision is fully developed cannot be justified. See also Timberlake Plantation Company v. County of Lexington, 431 S.E.2d 573 (S.C. 1993) (dedication must be made to the use of the public exclusively); Burnham v. Davis Islands, 87 So.2d 97 (Fla. 1956) ("dedication" may only be to the public for a public purpose use and not to an individual for private use). Cf. Houston Lighting and Power Company v. Texas, 925 S.W.2d 312 (Tex. App. 1996) (dedication for use and benefit of the public for utility purposes cannot be used for any other purpose). This NPRM involves only private property.

installed in a concrete encased duct system and an electric vault in a multi-tenant building. These facilities, however, are not considered as installed in a "right-of-way" owned or controlled by the utility. A vault in multi-tenant environments is typically a small room. It is neither a right-of-way nor a right-of-way use. Wiring to a customer's premises is simply a condition of receiving electric service and would typically be by parol license (unless underground and outside the building in which case an easement would be obtained). The electric utility may have use of the premises, but the ownership and control of the premises remain with the building owner.

13. In addition, concerns for capacity, safety, reliability and engineering purposes relating to attachments by third parties to those types of facilities would preclude forced access, even if the fee owner had no objection or did not attempt to charge what the attachee felt were exorbitant rates.¹⁹

¹⁹See 47 U.S.C. § 224(f)(2). For example, such installations could cause the electric utility to lose certain exemptions under the National Electrical Code ("NEC") for certain utility construction when such exemptions are critical for engineering purposes. Safety in the electric vault is a major concern of FPL as well as of the NEC and NESC. The reliability of the electric system is likely to be affected in that, electric conduit, unlike poles does not excess space. Typically in a multi-tenant environment, an electric utility riser might have six ducts. On the bottom floors, five of those ducts are occupied by electric cable. The sixth duct is necessary in case one of the electric cables should fail. Rather than have the building customers

II. Neither The Law of Real Property Nor Common Usage Supports the Commission's Conclusion That The Installation of a Utility Facility Which Is Part of the Utility Transmission or Distribution Network Creates a Right-of-Way Owned or Controlled by the Utility.

A. The Commission's Conclusion as to the Meaning of Right-of-Way in Section 224 Confuses the "Right" with the "Land."

14. The Commission's tentative conclusion that the "definition of "right-of-way" . . . includ[es] a publicly or privately granted right to place a transmit or receive antenna on public or private premises is consistent with the common usage of the term" [NPRM, ¶ 42] is taken out of context of section 224 and confuses the "right" with the "land" itself. The Pole Attachments Act places a duty on the utility to allow nondiscriminatory access to its linear facilities consisting of certain poles, duct, and conduit and right-of-way for attachment by certain telecommunications and cable companies.²⁰ The Commission attempts to bootstrap its own jurisdiction by defining "right-of-way" as

without electric service, the sixth duct serves as the required reliability backup and allows for the pulling of a new cable through that duct. Further, as a matter of NESC requirements and sound engineering requirements, telecommunications conduit and electric conduit cannot exist in the same duct. Once a duct is used to carry telecommunications cable, it can no longer be used for electric purposes.

²⁰Section 224(f)(1) relied on by the Commission, provides: "A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."

the "grant" or "right" itself and then itself creating the right by using its own definition to conclude that "a right to place an antenna on private property fits comfortably within this definition". In so doing the Commission not only continues to incorrectly assert jurisdiction over antennae installations,²¹ but also fails to correctly apply the law of real property and misstates the common understanding of the term right-of-way.

15. The term "right-of-way" has no precise legal meaning and can be defined only within the context of its use--in this case, the meaning of the term as used in the Pole Attachments Act. The term "right-of-way" is never used in section 224 other than in the phrase "pole, duct, conduit, or right-of-way owned or controlled by [the utility]." This phrase refers only to the linear facilities of the utility, i.e., those used for wireline communication.

16. The Commission confuses the physical thing which may be attached to with the right or grant of attachment itself. A "pole" is not a grant or right to place an antenna on the property of another, but a wood or concrete pole. A "duct" is not a grant or right to place an antenna on the property of another, but a

²¹See note 9, supra.

physical raceway composed of pvc pipes encased by a larger pvc pipe, concrete or soil. A "conduit" is not a grant or right to place an antenna on the property of another, but is a pvc pipe. And, in the plain meaning of the statute, a "right-of-way" is not a right or grant to place an antenna on the property of another, but is the physical land itself. The land itself, the dimensions of that land, says nothing about what legal rights may be exercised on that land or who owns or controls that land.

B. The Terms "Right-of-Way" and "Easement" are not Equivalent.

17. The Commission's conclusion that a right-of-way and easement are the same [NPRM, ¶ 42], is also out of context, misleading, and has no application to section 224. Unlike the term "easement," the term "right-of-way" has no specific legal definition or requirement apart from the context in which it is used.

18. The term right-of-way is broader than the term easement. Not all rights-of-way are easements. Nor are all easements rights-of-way.²² The physical right-of-way which constitutes a corridor

²²Black's Law Dictionary, 1191 ("right-of-way") and 457 ("easement") (5th Ed.). "Traditionally the permitted kinds of uses were limited, the most important being rights of way and rights concerning flowing waters." Id at 457. (Emphasis added.)

running between, through or along several land parcels owned by others may be owned in fee or it may be created by means of one or more easements (whether granted, dedicated, implied or by prescription--as those terms are legally used), licenses, permits, privileges, or other consents or any mixture thereof. Examples of where the term "right-of-way" is commonly used to indicate an assembled corridor of various parcels, include road right-of-way, railroad right-of-way and utility right-of-way. In the case of a service drop to or in a particular premise, the right is typically by implied or oral consent of the landowner as a condition of receiving service.

19. The term right-of-way commonly refers to the use to which use the land is put as well as to the land itself²³--as in the case of section 224. To use land as a right-of-way means to travel or pass through the land, to enter from one side and exit

See also Jon W. Bruce and James W. Ely, Jr., The Law of Easements and Licenses in Land, revised edition (1995), Chapter 1 ("Nature of Easements"), ¶ 1.06[2], distinguishing right-of-way as just one type of easement use (easements, e.g., may be created for use for right-of-way, road, railway, cemetery plot, church, park, school, etc.).

²³This is how it is used in section 224. See Joy v. City of St. Louis, 138 U.S. 1, 44 (1891) ("the term 'right of way' has a twofold signification. It sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed"). See also Black's Law Dictionary, supra at 1191.

from another. Only in this limited sense of a similar use actually being made of the land can a right-of-way be deemed to be similar to--not the equivalent of--an easement.²⁴ A right-

²⁴The cases cited by the Commission in support of its contention that an easement is the equivalent of a right-of-way are inapplicable to section 224 and do not, in fact, stand for such a generalized statement. Those cases interpret specific language of conveyance to determine whether the legal interest acquired in the lands constituting the right-of-way was fee or easement. In Joy v. City of St. Louis, 138 U.S. 1, 44 (1891), the court in addressing the issue of whether one railroad could enforce a contract allowing it use a railroad right-of-way held by another railroad over public property simply identified the legal interest that had been created by agreement as that of a mere right-of-way or an easement as opposed to a fee-owned interest. As the court explained in Buhl v. U.S. Sprint Communications Company, 840 S.W.2d 904, 907 (Tenn. 1992), "A 'right of way' in its legal and generally accepted meaning in reference to a railroad company's interest in land is a mere easement for railroad purposes in the lands of others; and therefore, as a general rule, where land obtained by purchase or agreement is conveyed by an instrument which purports to convey a right of way only, it does not convey title to the land itself, but the railroad company acquires a mere easement in the land for right of way purposes." quoting 51 C.J. § 203, p. 539. Thus in the context of a document conveying an interest in real property where only the term "right-of-way" is used and there is no use of the term "fee simple" or other language indicating more than an easement interest was intended to be conveyed, the term right-of-way has been held to have conveyed an easement interest and therefore, in that context, to be the same as an easement. In finding that the railroad company had not obtained the rights to the underlying oil and minerals in the conveyance of "the right-of-way" to a railroad company, the court in Great Northern Ry. Co. v. United States, 315 U.S. 262, (1942) looked at the language of the conveyance and found that where the conveyance contained language that "all such lands over which such right of way shall pass shall be disposed of subject to such right of way" or an easement rather than a fee interest was conveyed.

Similarly in determining the legal nature of a grant in order to determine whether under Virginia law compensation was

of-way, for example, may be the right across one property of another to provide access to the adjacent (dominant) parcel (such as right of ingress/egress); it may be a platted utility easement crossing several parcels of land or it may consist of a long corridor adjacent to or slicing through several parcels of land, crossing neighborhoods, and running through local government or even state jurisdictions. While one or more easements attached end-to-end could constitute a right-of-way corridor, an easement itself refers to the particular right on a particular parcel. Legally, however, one can never have an easement on one's own property as the interests in real property merge into the fee simple title.²⁵

20. Similarly, though a right-of-way may be owned in fee, one can never have a right-of-way over one's own property. Where

due for the taking of that interest, the court in Board of County Supervisors of Prince William County v. United States, 48 F.3d 520 (Fed. Cir. 1995), cert. denied, 116 S.Ct. 61 (1995), noted that "It is not clear exactly what the trial court meant . . . by the term 'rights of way in fee simple,' since that could refer either to a fee simple estate or to an easement . . . but not [to] both." The court determined that the interest that had been conveyed for street use was fee simple and not an easement right-of-way.

²⁵Ralph E. Boyer, Florida Real Estate Transactions, 1997, Vol. 4, § 110.10[3] ("Interests Re Estates") (easement terminates by unity of title resulting from fact that the easement is merged into the larger estate in fee).

the sole purpose of the fee-owned property is not for use as right-of-way, but where the owner has on the fee-owned property, lines or walks or drives in order to access a particular building on his or her own property for his or her own use, such use, even in the broadest sense and common usage, is not considered a right-of-way use, because it is not a use of way over another's property.²⁶

21. While an easement may grant a right to pass over the land of another and thus, grant use for right-of-way purposes, an easement may also grant a use of land of another that is not a right-of-way use, as an easement for stockpiling construction materials or for constructing a water or radio tower or for cemetery purposes.²⁷ Such uses "sit." They do not travel or pass over to the servient estate and are not considered right-of-way uses.

²⁶For example, where the document of conveyance evidences an intent that the land will be used for other than just right-of-way, such as for building purposes as well, courts have found an intent to deed the fee interest. See Baird v. Southern Ry. Co., 166 S.W.2d 617 (Tenn. 1942); Nashville, Chattanooga & St. Louis Railway v. Bell, 39 S.W.2d 1026 (Tenn. 1931) (shape of land conveyed and intent for use to include depot, indicated intent was not to convey a right-of-way interest, but a fee interest).

²⁷See also note 22, supra.

22. An easement, like the term "right-of-way," may refer to the land itself. However, unlike the term "right-of-way," an easement is also a precisely defined legal right. It is a right that will exist only if very specific and well defined criteria have been met.²⁸ If created by express grant, the statute of frauds must be satisfied.²⁹ An easement is a legal right to use real property owned by another. This right of use is incapable of existence separate and apart from the land to which it is attached, and, therefore, it is considered an interest in the land itself. Because an easement is a right to use the land of another, it is said to be a nonpossessory right.³⁰ In this respect, and others depending upon the nature of the easement, an easement interest is different from a lease interest in that a leasehold creates a possessory interest in the land itself.³¹

²⁸ See generally Jon W. Bruce and James W. Ely, Jr., The Law of Easements and Licenses in Land, revised edition (1995), Chapter 3 ("Creation of Easements by Express Provision"); Chapter 4 ("Creation of Easements by Implication"); and Chapter 5 ("Creation of Easements by Prescription").

²⁹ See, e.g., Florida Statutes § 689.01 (1997) (requiring an instrument in writing signed in the presence of two subscribing witnesses for creation of easement by express grant).

³⁰ Jon W. Bruce and James W. Ely, Jr., The Law of Easements and Licenses in Land, revised edition (1995), Chapter 1, ¶ 1.01.

³¹ Id. at ¶ 1.01 (easement is a nonpossessory interest in the land of another). Compare Ralph E. Boyer, supra, note 25, at § 50.04[2][b] (In a leasehold a tenant has a right to exclusive possession of an area).

C. Congress by Use of the Term "Right-of-Way" in Section 224 Did Not Create a Federal Real Property Right of Apportionment which would Allow for Third Parties to Piggyback on the Rights of the Easement Holder.

23. Only where the terms of an easement expressly provide for use by a third party or where the terms of the easement are such to find that the parties intended the right to include for apportionment, would a third party be able to piggyback on the rights of the easement holder without the further consent of the fee owner.

24. The right to apportionment of an easement is found by looking at the easement terms and conditions. A court which finds that a pole owner or utility owner can allow a third party to attach its facilities to the poles or conduits of another company without the additional consent of the landowner, is likely to do so on the basis of "apportionment" of an easement in gross.³²

25. Other than finding that a use by a third party must not increase the burden on the land and must be of a similar or same

³²An easement in gross is one which lacks a dominant tenant and is generally of a commercial nature. Champaign National Bank v. Illinois Power Company, 465 N.E.2d 1016 (Ill. App. 1984). See also Johnson v. Higley, 977 P.2d 1209 (Utah App. 1999) (describing easement in gross). See generally Jon W. Bruce and James W. Ely, Jr., The Law of Easements and Licenses in Land, ¶ 9.03[1] through 9.05[1] (rev. 1995).

use (e.g., wireline) courts are mixed as to whether certain terms of the easement provide a utility with a right of apportionment and even as to whether an easement in gross may be apportioned.³³

³³ See The Law of Easements and Licenses in Land, Id., Chapter 9. Cases finding that holders of a telephone or electric easement could allow a third party to attach or use "similar" wireline facilities without additional consent of or payment to the owner of the servient estate on basis of apportionment include: Hise v. BARC Electric Cooperative, 492 S.E.2d 154 (Vir. 1997), (quoting from Restatement of Property § 493 cmt. b: "When an easement in gross is created by prescription, the question of its apportionability is decided in the light of the reasonable expectation of the parties concerned in its creation as inferred from the nature of the use by which it was created"); Cousins v. Alabama Power Company, 597 So.2d 683 (Ala. 1992); Thornton Properties v. Alabama Power Company, 550 So.2d 1024 (Ala. App. 1989); Salvaty v. Falcon Cable Television, 212 Cal. Rptr. 31 (Cal. App. 1985); Henley v. Continental Cablevision of St. Louis County, Inc., 692 S.W.2d 825 (Mo. App. 1985); Centel Cable Television Company of Ohio, Inc. v. Cook, 567 N.E.2d 1010 (Ohio 1991); Witteman v. Jack Barry Cable TV, 228 Cal. Rptr. 584 (Cal. App. 1986); Jolliff v. Hardin Cable Television Co., 269 N.E.2d 588 (Ohio 1971); Hoffman v. Capitol Cablevision System, Inc., 383 N.Y.S.2d 674 (N.Y. Sup. Ct. App. Div. 1976). None of these cases involved rooftops or easements inside building premises. In some situations there was also a state access law; e.g., Salvaty, supra.

Recently, courts have determined the right of a utility to allow third party use of an easement not on the basis of apportionment, but on taking an increasingly strict view of the nature of the use. In McDonald v. Mississippi Power Company, 732 So.2d 893 (Miss. 1999), for example, the Mississippi Supreme Court took an extreme position, directly contrary to the Alabama Supreme Court in Cousins, supra, when it reversed the trial court and held that the easement terms did not permit an electric utility to sublet capacity or space on its fiber optic lines to others--even though it found that such facilities were a permitted use under the easement and such use created no additional burden on the land. Where the easement provided that the power company has a right to install and maintain telephone lines to be used in connection with the providing of electrical services to its customers, the court found (without mentioning

III. The Determination of Whether a Utility Owns or Controls a Right-of-Way in Order to Allow Third Party Attachment Is a Matter of State Real Property Law Outside the Jurisdiction of the Commission.

26. The determination of whether a utility owns or sufficiently controls an easement or a right-of-way in order to allow a third party attachment is a matter of state real property law and is outside the jurisdiction of the Commission. Ownership, control, rights in and transferability of or pertaining to real property is governed by state, not federal law.³⁴

the "apportionment") that, apparently, the parties had not intended the utility to have the right of apportionment and the use was limited to uses in connection with electric service. See also Bell Atlantic Mobile Systems, Inc. v. Zoning Hearing Board of the Township of O'Hara, 676 A.2d 1255, 1268-70 (Pa. Commw. 1996) (easement grant which provided for "access . . . for the construction and operation of its water system, and said right of way shall include, among other things, . . ." does not allow for access to construct wireless antenna on water tower; use for cellular phone equipment is not merely advance in technology, but a different use, not related to the original purpose and, therefore outside the scope of easement. See also Orange County, Inc. v. Citgo Pipeline Company, 934 S.W.2d 472 (Tex. App. 1996) writ denied (June 12, 1997) (discussion of "easement" in gross). Compare cases finding that an easement in gross was not apportionable; Gilder v. Mitchell, 668 A.2d 879 (Me. 1995); Tupper v. Dorchester County, 487 S.E.2d 187 (S.C. 1997); McDaniel v. Calvert, 875 S.W.2d 482 (Tex. App. 1994).

³⁴See Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, 429 U.S. 363, 378 (1977), citing Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944); Swift v. Tyson, 16 Pet. 1 (1842); United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973).

IV. Commission Delay In Ruling on Petitions for Reconsideration as Well as Ruling on the Same or Inextricably Related Issues Arising under Section 224 Has Resulted in a Violation of Section 224 and Due Process Rights.

27. On September 30, 1996, FPL timely filed a Petition for Reconsideration, CC Docket No. 96-98 and the pole attachments Docket Nos. CS 97-98 and CS 97-151. Instead of ruling on these petitions, including the issues of mandatory access and whether the antenna attachments of the wireless carriers fall within section 224 jurisdiction, the Commission, at the request of WinStar,³⁵ initiated new rulemaking procedures re-addressing old issues and raising new issues and attempting to expand its jurisdiction under section 224 farther than even the Commission originally thought it extended.

28. The Commission has failed to meet the Congressional mandate in section 224(e)(1) that it "shall, no later than 2 years after [February 8, 1998] . . . prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services" In part this failure is due to the Commission's mistaken position that wireless attachments, including attachments

³⁵NPRM, ¶ 38.

to rooftops, fall within the statutory pole attachment formula.³⁶

29. The failure to meet the statutory deadline, the delay in final agency resolution and the issuing of this new notice of proposed rulemaking on the meaning of right-of-way in section 224 more than three years after adoption of the Telecommunications Act of 1996 and three prior notices of proposed rulemaking under section 224³⁷ constitute unreasonable delay and a violation of FPL's due process rights. See 5 U.S.C. § 555(b) (agency must conclude matter within a reasonable time).

³⁶See paragraphs 4, 9, supra. Even the Commission had to admit that "[t]here are potential difficulties in applying the Commission's rules to wireless pole attachments. . . ." (In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777 (1998), ¶ 41) and that the wireless attachments are "unique." (Id. at ¶ 42.)

³⁷See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182 (rel. April 19, 1996), 61 Fed. Reg. 18311 (Apr. 25, 1996) (NPRM), petition for reconsideration pending; In the Matter of Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, Notice of Proposed Rulemaking, FCC 97-94 (rel. March 14, 1997), 12 FCC Rcd. 7449 (1997); and In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, (rel. August 12, 1997), 12 FCC Rcd. 11725 (1997).

V. Conclusion.

30. The Commission's goals in this NPRM cannot be met through section 224. In attempting to regulate rates which private landowners not subject to section 224 may charge for access for wireless service providers to their private property in multi-tenant environments, the Commission exceeds its jurisdiction under section 224. The Commission's interpretation of the term "right-of-way" as used in section 224 is erroneous. If adopted, it will affect not just multi-tenant environments, but all "rights-of-way" under section 224 and create a federal law of real property. The Commission does not avoid the takings concerns, in that, it cannot successfully establish that in allowing a utility who is subject to section 224 to install a facility on a rooftop, the landlord has given up a possessory and controlling interest in the premises.

Florida Power & Light Company
August 27, 1999

In the Matter of Promotion of Competitive Networks, et. al.
WT Docket No. 99-217;
CC Docket No. 96-98; FCC 99-141

WHEREFORE, FPL urges the Commission to avoid further unnecessary delay and expense both to itself and to affected parties and to withdraw its proposals under section III, subsection B, Access to Buildings and Rooftops, of this NPRM.

Respectfully submitted,

FLORIDA POWER & LIGHT COMPANY

By: 
Jean G. Howard
9250 West Flagler Street
Miami, Florida 33174
Telephone: (305) 552-3929
Facsimile: (305) 552-4153

Its Attorney

August 27, 1999