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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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In the Matter of	)	
	)	
Promotion of Competitive Networks In Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 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 Rule Making 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	)	CC Docket No. 96-98

PETITION FOR RECONSIDERATION OF COMMONWEALTH EDISON COMPANY AND DUKE ENERGY CORPORATION

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PETITION FOR RECONSIDERATION OF COMMONWEALTH EDISON COMPANY AND DUKE ENERGY CORPORATION

Pursuant to Section 1.429 of the Commission's Rules, Commonwealth Edison Company and Duke Energy Corporation (collectively, the "Electric Utilities") respectfully submit the following Petition for Reconsideration of the access to rights-of-way rulings in the *First Report and Order* in the above-captioned proceeding.[1]

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[1] In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57,* FCC No. 00-366 (rel. Oct. 25, 2000) ("*First Report and Order*").

I. STATEMENT OF INTEREST

The Electric Utilities are investor-owned utilities engaged in the generation, transmission, distribution and sale of electric energy. Collectively, their service territories span multiple regions of the United States and together they provide electric service to millions of residential and business customers. The Electric Utilities own electric energy distribution systems that include distribution poles, conduit, ducts and rights-of-way, all of which are used to provide electric power service to their customers. Portions of this infrastructure, particularly distribution poles, are used in part, for wire communications. The Electric Utilities are subject to regulation by the Commission under the Pole Attachments Act, 47 U.S.C. § 224.

II. INTRODUCTION

The *First Report and Order* contains three holdings that the FCC should reconsider and reverse. First, the Commission should reconsider and reverse its holding that the FCC rules regarding access to in-building pathways apply generally to utility companies under 47 U.S.C. § 224, which includes electric utility companies, and not just to Incumbent Local Exchange Carriers under 47 U.S.C. § 251. *First Report and Order* at ¶ 78. Second, the Commission should reconsider and reverse its holding establishing a new federal definition of a "right-of-way" defined to include pathways inside buildings that are being used or have been specifically identified for use as part of a utility's transmission and distribution network. *Id.* at ¶ 82. Third, the Commission should reconsider and reverse its determination that a right-of-way as used in Section 224 includes property owned by a utility that the utility uses "in the manner of a right-of-way" as part of its transmission or distribution network. *Id.* at ¶ 83.

III. ARGUMENT

1. Access to Multi-Tenant Environments Should Be Addressed Through Section 251, Not Section 224.

If indeed there is a problem with regard to access to multi-tenant environments, the problem rests with building owners and/or incumbent LECs, not electric utilities. The Commission itself defined the source of the problem in the Notice of Proposed Rulemaking as

alleged obstructionist conduct by building owners and ILECs, and made no mention of electric utilities.[2] None of the more than 500 sets of comments submitted in this proceeding -- *not a single one* -- contains even a hint that electric utility companies are part of this alleged problem. Because electric utilities are not part of the problem, they should not be swept into the solution by applying Section 224 to MTE access. Rather, this issue should be addressed through the application of Section 251 to MTEs.

Section 251(b)(4) mandates access consistent with the requirements of Section 224,[3] but applies only to local exchange carriers, and not to electric utilities. While the Commission is still constrained by the statutory definitions imposed in Section 224, to the extent that the Commission wishes to address LEC behavior, Section 251 is a more appropriate route.

The notion that access problems to MTE's should be addressed under Section 251 and not Section 224 is firmly supported by the physical characteristics of electric service. In most cases, the wires and other equipment used by a utility to furnish electric service to MTEs stop at the street and thus do not even begin to address the question of intra-building access, which is the issue in this proceeding. In addition, where the electric utility facilities actually extend into the building, in most circumstances building codes prohibit the co-location of electric and communications wires in the same pathways for building and worker safety reasons. Accordingly, even assuming, *arguendo*, it would be appropriate to consider electric utilities as a

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[2] "In several proceedings before the Commission, a number of parties have argued that both *building owners* and *incumbent LECs* have obstructed competing telecommunications carriers from obtaining access on reasonable and nondiscriminatory terms to necessary facilities located within multiple unit premises." *NPRM* at ¶ 31 (emphasis added). "[W]e address herein several potential requirements to ensure that *incumbent LECs* and *property owners* do not unreasonably obstruct the availability of facilities-based competitive telecommunications services to customers located in multiple tenant environments." *NPRM* at ¶ 35 (emphasis added).

[3] Section 251(b)(4) provides that a local exchange carrier has "the duty to afford access to the poles, ducts, conduits and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms and conditions that are consistent with section 224."

potential part of the solution with respect to MTE access, as a practical matter the physical characteristics of the electric service makes the inclusion of electric utilities untenable.

2. The Commission Exceeded Its Congressional Grant Of Authority In Establishing A New Federal Definition of A Right-Of-Way.

The Commission exceeded its Congressional grant of power when it established a new federal definition of "right-of-way" to include, at minimum, in-building pathways that are being used or have been specifically identified for use as part of a utility's transmission and distribution network. *First Report and Order* at ¶ 82. It is axiomatic that where Congress uses a term such as "right-of-way" that has a settled meaning under common law, Congress is deemed to have incorporated the established meaning of the term into its statute. As the Supreme Court stated in *Morissette v. United States*, 342 U.S. 246, 263 (1952):

> [W]here Congress borrows terms of art in which are accumulated legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

This "cardinal rule" of statutory construction has been applied by the Supreme Court in an unbroken line of cases spanning two centuries.[4]

The term "right-of-way" as used in Section 224 is a prime example of this rule. The term is of ancient origin. Rights of way appear in the Twelve Tables of Rome. W. Buckland, *The*

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[4] *See, e.g., Beck v. Prupis*, 529 U.S. 494 (2000) (applying *Morissette* in the civil context to determine Congress's intent to compensate one "injured ...by reason of" a "conspiracy"); *Neder v. United States*, 527 U.S. 1, 21-22 (1999); *Salinas v. United States*, 522 U.S. 52 (1997)(interpreting Congress's use of "to conspire" by applying *Morissette's* standard of statutory construction for well settled legal terms); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992); *Taylor v. United States*, 495 U.S. 575, 592 (1990)(identifying the "maxim that a statutory term is generally presumed to have its common law meaning"); *Molzof v. United States*, 502 U.S. 301 (1992)(interpreting the term "punitive damages" in the Federal Tort Claims Act to be "term of art with a widely accepted common law meaning," and utilizing *Morissette's* "cardinal rule of statutory construction" to determine Congressional intent); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911) ("Where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense").

Main Institutions of Roman Private Law 152 (1931). The term has developed in the rich common law tradition of real property over centuries of use in England and in America.

A right-of-way is the right to pass over the land of another.[5] Under the rule of statutory construction announced in the *Morissette* line of cases, Congress is deemed to have incorporated this common law definition of "right-of-way" when it enacted the Pole Attachments Act in 1978. The FCC does not have the power to create a new definition of a right-of-way which goes beyond the boundaries of the extant common law definitions of the term.[6] While the Commission has stated that it does not believe that "state concerns with definitions of property interests, including public rights-of-way, will be harmed or affected" by its new federal definition of "right-of-way" under Section 224, that is entirely beside the point. The question is not whether the FCC's new federal definition of "right-of-way" will *harm* state law interests, but whether the FCC has the power in the first place to promulgate a new definition which departs from the common law meaning of the term. Under the *Morissette* line of cases, the FCC does not have this power. Accordingly, the FCC's effort to establish a new federal definition of "right-of-way" must be vacated.

3. The FCC Has No Power To Rule That Section 224 Covers Property Used In A Manner Equivalent To A Right-Of-Way.

The FCC's determination that Section 224 covers property used in a "manner equivalent to a right-of-way" also must be reversed. *First Report and Order* at ¶ 83. Congress announced a very clear and simple rule in Section 224. Where utilities own or control "poles, ducts, conduits or rights-of-way," utilities are required to provide access. By its terms, the statute applies to "rights-of-way," not to "property used in a manner equivalent to a right-of-way." Lacking a

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[5] Black's Law Dictionary, 6th Ed. (1990); *see also, e.g., People ex rel. E.P. Bryan v. State Board of Tax Commissioners*, 67 Misc. 508, 509 (N.Y. Sup. Ct. 1910), *aff'd* 127 N.Y.S. 858 (N.Y. App. Div. 1911); *Ryder v. Petrea*, 416 S.E.2d 686 (Va. 1992); *Fresno Street R.R. Co. v. Southern Pacific Co.*, 67 P. 773 (Cal. 1901).

[6] Most fundamentally, a right-of-way at common law denotes a right to pass over the *land* of another, not the right to pass *inside buildings*.

textual basis for its reading of the statute, the FCC purports to find support for its ruling in the fact that a "right-of-way" can denote not only the right to pass over the land of another, but also the land itself, and further that the statute covers rights-of-way "owned" or "controlled" by a utility. *First Report and Order* at ¶ 83. From these two provisions, the FCC concludes it has authority to regulate property the utility owns and uses in a manner equivalent to a right-of-way.

Here again, the FCC's interpretation is foreclosed under the "cardinal rule" of statutory construction announced in *Morissette v. United States*, 342 U.S. 246, 263 (1952) and related cases. At common law, a right-of-way and fee ownership are mutually exclusive property law concepts. An owner of land in fee simple *cannot* have a right-of-way in his own land, because all possible uses of an easement are contained in his general right of ownership.[7] You can have one or the other, a right-of-way or a fee simple. You can't have both. Congress is presumed as a matter of law to have understood this when it used the term "right-of-way" in Section 224. Accordingly, since a "right-of-way" cannot mean property owned by the utility, the FCC's determination that Section 224 covers property which a utility owns fee simple but uses in a manner equivalent to a right-of-way is an *impermissible* interpretation of the statute and must be reversed.

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[7] *See, e.g., Hidalgo County Water Control & Improv. Dist. v. Hippchen*, 233 F.2d 712 (5th Cir. 1956); *Rusk v. Grande*, 52 N.W.2d 548 (Mich. 1952); *Morton v. State*, 181 A.2d 831 (N.H. 1962). In other words, one cannot have a right-of-way in lands in which one holds fee simple title. *Othen v. Rosier*, 226 S.W.2d 622 (Tex. 1950).

IV. CONCLUSION

WHEREFORE, for these and such other reasons as may appear just to the Commission, the Electric Utilities respectfully request that the Commission reconsider the three rulings discussed above and to revise them in a manner consistent with the views expressed herein.

Respectfully submitted,

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Dated: January 22, 2001

CERTIFICATE OF SERVICE

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