APPENDIX B

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

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 1.400 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	)	CC Docket No. 96-98

To The Commission

REPLY COMMENTS OF FLORIDA POWER & LIGHT COMPANY

FLORIDA POWER & LIGHT COMPANY

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SUMMARY

The Comments show that the Commission should not adopt its proposals for mandatory access to MTE rooftops and in-building risers under section 224 of the Pole Attachments Act. The Commission should give strong consideration to the detailed Comments of the Real Access Alliance and the fact based survey and legal memoranda attached thereto. The Commission should avoid basing its ruling on allegation, supposition or citation of situations which are shown to be non-representative. Mere cheerleading for competitive access cannot support proposals which are jurisdictionally, constitutionally and practically deficient.

The Commission's proposals under section 224 are arbitrary and capricious. The Comments establish that the problem of access to MTEs, if any, lies with the MTE owners/managers. It has nothing to do with the electric utility. It has nothing to do with the gas, water or steam utilities which are also subject to the burdens of section 224. Some commenters identify the problem to be with the incumbent LECs. Facilities of the electric utility are generally outside the building and have no application to this NPRM.

The Commission can neither regulate the MTE owners/managers under section 224 nor eliminate the need for the consent of the MTE owners/managers for the physical addition of a facility to private property under section 224. Section 224 does not give the Commission jurisdiction over MTE owners/managers. Congress precisely and specifically identified the parties to whom section 224 applies. "Ancillary jurisdiction" cannot be used to enlarge the specific Congressional grant of jurisdiction by making private landowners subject to the utility

burdens under section 224.

The Commission's attempt to mandate access to MTE property by means of the facility owning utilities pursuant to section 224 fails. Utility installations on rooftops or in-building risers do not create a right-of-way and are not a right-of-way use. The Commission improperly bootstraps a definition to create a connection with section 224 through the term "right-of-way." It erroneously declares that "right-of-way" is the equivalent of an easement. The Commission improperly hybridizes the definitions of "right-of-way" (to pass) and "easement" (to use). The right of apportionment does not exist in the context of this section 224 rulemaking. As BellSouth stated, the Commission's definition of "right-of-way" is a "legalistic shellgame." FPL agrees with the Independent Cable & Telecommunications Association that section 224 does not apply to in-building risers and that the Commission has confused MDU access issues with pole attachment issues. The Commission's proposals under section 224 conflict with regulatory authority of state public service commissions.

The Commission has no jurisdiction to create a federal law of real property by adopting rules or guidelines as to what it means to "own or control" right-of-way. The Commission's proposals under section 224 would violate the fundamental principles of real property law.

The Commission's proposals under section 224 do not solve even a portion of the problem the Commission is addressing. Commenters offered more realistic alternative solutions.

The Commission should not adopt its section 224 proposals.

REPLY COMMENTS OF FLORIDA POWER & LIGHT COMPANY

I. THE COMMENTS DEMONSTRATE THAT THE COMMISSION HAS NO JURISDICTION TO MANDATE ACCESS TO ROOFTOPS OR IN-BUILDING RISERS UNDER SECTION 224(f) AND THE TERM "RIGHT-OF-WAY."

A. Section 224 Does Not Give the Commission Jurisdiction Over Non-utility Landowners or Inside Building Premises or on Rooftops.

The legislative history and plain language of the Pole Attachments Act, 47 U.S.C. § 224, show that the purpose and intent of that Act is to regulate pole attachment rates, terms and conditions between those entities expressly identified in section 224(a)(1), that is, between certain electric, gas, water, steam or other public utilities and the attaching cable television and telecommunications companies. Nowhere in the Pole Attachments Act is the Commission authorized to regulate the use that private owners/managers of multi-tenant environment(s) ("MTEs" or "MTE") or any other private person may make of their property or to regulate the compensation or terms and conditions that such a private person can charge or require for use of his or her building premises. It is significant that despite the Congressional goal behind the 1996 Telecommunications Act of promoting competition in the telecommunications industry, Congress did not change the limited and clearly defined entities over whom the Commission has jurisdiction to enforce the obligations and burdens of section 224. This fact is clear on the face of section 224 and is well documented in the Comments filed.[1] Statutory jurisdiction may not

[1]FPL, pp. 6; 8-9; Real Access Alliance, pp. 48-52; SBC Communications Inc., pp. 3-4; NPRM, ¶ ¶ 36; 52.

be changed by mere wishful thinking. As stated by BellSouth Corporation ("BellSouth"), the Commission's "broad reading of section 224 would extend the Commission's jurisdiction to persons and parties over whom it has no statutory authority."[2] Neither the theory of ancillary jurisdiction nor the Commission's attempt to eliminate the MTE owners/managers through seizing on the term "right-of-way" in section 224 can remedy this express statutory limitation on Commission jurisdiction.

In addition, the Commission has no jurisdiction over wireless facilities under section 224.[3]

B. The Commission May Not Rely on "Ancillary Jurisdiction" to Expand its Jurisdiction Under Section 224(f) and Enforce Section 224 Obligations as to Non-utility Entities.

Some CLECs suggest that the theory of "ancillary jurisdiction" allows for expansion of Commission jurisdiction under section 224 over entities not identified by Congress in section 224(a)(1).[4] They suggest that section 224 provides "authority" or "ancillary jurisdiction" or

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[2]BellSouth, p. 12, and footnote 38, citing *[a]ccord* Ness Statement at 1(building owners are a class of persons not otherwise regulated by the Commission).

[3]American Electric Power Service Corporation, pp. 21-23; FPL, pp. 3-4, case pending in the 11th Circuit, Gulf Power Company, et. al. v. Federal Communications Commission, Case No. 98-6222 (challenging inclusion of wireless facilities within section 224 jurisdiction) and Joint Petition of EEI and UTC for Clarification and/or Reconsideration, CS Docket No. 97-151, (April 13, 1998), pp.13-16.

[4] Level 3 Communications, for example, asserts on p. 10 of its Comments that because the Commission has, under other statutory authority, exercised jurisdiction over property of incumbent carriers and because the Commission "has already recognized that Section 224(f)(1) was enacted to ensure that 'no party can use its control of the enumerated facilities and property to impede . . . the installation and maintenance of telecommunications and cable equipment by

"reasonably ancillary jurisdiction" for the Commission to legislate where Congress did not and propose that the Commission adopt a national nondiscriminatory requirement for owners/managers in MTEs. WinStar Communications, Inc. ("WinStar") states that "[e]ven if Section 224 [provisions] were thought not to apply directly . . . [to Commission authority to adopt a federal nondiscriminatory MTE access rule], riser conduits, and NIDs owned or controlled by MTEs, are *reasonably ancillary* to the implementation of Section 224." [5] WinStar recognizes, that, in fact, intra-building wire, rise conduits, and NIDs are likely to be owned or controlled by MTE owners and not the utilities.[6]

Teligent, Inc. claims that "Sections 1, 2, 201, 224, 251 and 207 all provide direct bases of Commission jurisdiction to require nondiscriminatory MTE access for telecommunications carriers" and "also serve as the foundation for the exercise of ancillary jurisdiction."[7] Other commenters do not suggest such "ancillary jurisdiction" or Commission jurisdiction over private landlords arises under section 224. They rely on other sections, including sections 2(a) and 4(i) of the Communications Act to suggest that the Commission has "ancillary jurisdiction" to "legislate" where Congress did not and would have the Commission regulate the private

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those seeking to compete in those fields,'" it can assert jurisdiction over property and person not identified in section 224 and that "no party, including a building owner or manager, is immune from the access requirements set forth in Section 224."

[5]WinStar, p. 36. (Emphasis added.)

[6]WinStar, p. 55.

[7]Teligent, p. 51. See also RCN, pp. 22-26; NEXTLINK, pp. 3; 10-12.

landlords and in-building premises by proclaiming a nondiscriminatory build access regulation independent of section 224.[8]

As discussed by the Real Access Alliance, "the Commission's ancillary jurisdiction does not extend to entities over whom the Commission has no jurisdiction to begin with." Real Access Alliance at pp. 35-37. As discussed above and as acknowledged by the Commission,[9] the obligations and duties in section 224 run between certain utilities and certain attaching cable television and telecommunications companies. The Commission has no jurisdiction, ancillary or otherwise, over private landowners or owners/managers of MTEs under section 224 or over the inside wiring, duct, conduit or rooftops owned or controlled by these non-utility persons. Indeed, the Commission's efforts in expanding section 224 in this NPRM have been to remove the MTE owners/managers entirely from ownership or control of his or her property through broadening the definition of "right-of-way" and turning it into an easement equivalent.

The Commission erroneously assumes that "right-of-way" [which it has turned into an "easement equivalent"] is controlled by the utility so that the Commission, under section 224, can mandate attachment without the additional consent of the MTE owners/managers. The right to use the property, however, is limited to specific rights granted. [10] In the case of in-building

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[8]Adelphia Business Solutions.

[9]NPRM, ¶ 9.

[10] Real Access Alliance, Comments, p. 49, and attachment "Utility Access and Use Rights in the Real Property of Another"; KCPL, p. 3, FPL, pp. 10-12; 20-24; and footnote 23; Ameritech, pp. 2-3.

electric facilities, the electric tariffs would generally control. [11] Electric tariffs are approved by the state public service commissions and have the force and effect of law. Florida Power & Light Company v. Federal Energy Regulatory Commission, 660 F.2d 668 (5th Cir. 1981), cert. denied, sub nom. Fort Pierce Utilities Authority v. Federal Energy Regulatory Commission, 459 U.S. 1156 (1983).

C. The Commission's MTE Access Proposals Under Section 224 are Based on Faulty Premises and Invalid Definitions. Contrary to Commission Assumptions, "Right-of-Way" as Used in Section 224 Does Not Include Utility Installations on Rooftops or In-Building Risers; Nor Do Utilities "Own or Control" the Building Premises Used for Utility Purposes.

Because the Commission has no direct or ancillary jurisdiction over the MTE premises or over owners/managers under section 224 and because the owners/managers were identified by the competing telecommunications companies as the major problem in obtaining access to MTEs,[12] the Commission attempts to eliminate the MTE owners/managers altogether and find access directly under utility obligations in section 224 of the Pole Attachments Act. The Commission attempts to create real property rights and control of private premises by the utilities under section 224 where none exist.

In order to achieve any connection at all with section 224, the Commission has to first create the existence of a "right-of-way" on rooftops. The Commission "tentatively conclude[s]

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[11] American Electric Power Service Corporation, pp. 14-16.

[12] But see Real Access Alliance and the attached survey of actual conditions, "Real Access Alliance Executive Summary."

that the definition of "right-of-way" as including 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."[13] Then in circular reasoning and by means of verbal fiat, it concludes that "[w]e believe that a right to place an antenna on private property fits comfortably within this definition."[14] It is not enough to simply declare the existence of a right-of-way by means of bootstrapping definition. To find jurisdiction under section 224, not only must there be land to attach to, but the land must be used as right-of-way and the utility must own or control that right-of-way.

Here the Commission has another problem. The right to use land as a right-of-way both under common understanding, as well as according to the definition in Black's Law Dictionary, is a right to "pass over [the] land of another."[15] Black's Law Dictionary defines the term "easement" as "[a] right of use over the property of another."[16] Because the Commission needs the concept of "use" rather than merely to "pass," it has [erroneously] declared a right-of-way the equivalent of an easement.[17] The Commission then improperly combines the two distinct

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[13]NPRM, ¶ 42.

[14]Id.

[15]Black's Law Dictionary (6th ed.); See Real Access Alliance, Comments, pp. 49-50 and footnote 35 and attachment thereto of "Utility Access and Use Rights in the Real Property of Another," pp. 19-29 (the essential function of the right-of-way is to provide a required right of passage to transit an item across a parcel of land).

[16]Black's Law Dictionary (6th ed.).

[17]See discussion at FPL, pp. 6-7; footnote 12.

definitions into the following definition of right-of-way: "A right-of-way over another party's property has been understood in the case law as equivalent to an easement; that is, a right to use or pass over property of another."[18] (Emphasis added.)

The term "easement" is not once used in section 224. Nonetheless, in order to create property rights leading to [presumed] ownership or control, the Commission feels it must declare a right-of-way to be the equivalent of an easement. As BellSouth succinctly put it, this is nothing more than a "legalistic shellgame." BellSouth, p. 12. The same conclusion is set forth in the Comments of the Real Access Alliance and attachments thereto and in the FPL Comments.[19]

Not only is there no right-of-way/easement right on rooftops or in-building risers for purposes of section 224, but what right of use there is and whether there is ownership and control sufficient to permit third party use is determined by the grant itself and the laws of the state where the property is located including the rules and regulations of the state public service commission.[20]

FPL agrees with the Independent Cable & Telecommunications Association, (pp. 2-5) that section 224 does not apply to in-building risers and that the Commission has confused

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[18]NPRM, ¶ 42.

[19] Real Access Alliance, Comments, pp. 48-55 and the "Utility Access and Use Rights in the Real Property of Another" attachment thereto, in particular, pp. 19-20 (meaning of "right-of-way" and pp. 28-34, Part III, "Analysis of Utility Access and Use Rights." See also, FPL, pp. 14-24.

[20]FPL, pp. 22-24; Real Access Alliance, Comments, p. 49 and attachment "Utility Access and Use Rights in the Real Property of Another;" Joint Comments of UTC and EEI; p. 6; Ameritech, pp. 3-4. See also p. 4, supra.

MDU access issues with pole attachment issues and that Commission expansion of its jurisdiction in this area is unwarranted. [21]

Not only is the Commission's reasoning legally infirm, it is also factually infirm. As set forth in the Comments of American Electric Power Service Corporation, pp. 10-14, "in most cases, all of the electric . . . company-owned facilities terminate outside the building at locations such as a meter enclosure, padmounted transformer, customer-supplied weatherhead, or customer-supplied switchgear. In cases where the electric utility . . . facilities extend into the building, which occurs particularly in multi-story buildings of significant height, the . . . [electric] cables are run inside the building through raceways and space provided by the building owner, to utility-owned transformers in customer-supplied transformer vaults or installations." [22] "From this 'delivery' or 'demarcation' point to the customer premises, the electric wiring is owned by the customer, not the utility. This is a critical point, as it is important to recognize that the pathways occupied by the electric utility do not reach all the way to the customer. Rather, they extend only to the delivery point, *typically outside the building* . . . ."[23]

The legal and factual confusion of the Commission in attempting to expand section 224 duties, obligations and rights beyond the plain meaning of the statute is further demonstrated in

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[21]See also SBC Communications Inc., pp. 4-5 (rooftop and riser space does fit within established understanding of "poles, ducts, conduit and right-of-way"; inconsistent with other Commission established understanding of "poles, ducts, conduit and right-of-way"; inconsistent with other Commission rulings).

[22]American Electric Power Services Corporation, pp. 10-11.

[23]Id. at p. 11. See also, FPL, pp. 12-13.

the essentially irrelevant conclusion of the Commission that section 224 applies to "rights-of-way on private property."[24] A utility does not own or control public property nor does the utility typically own or control right-of-way on public property in that the public property typically is the right-of-way, e.g., road right-of-way. The utility would then obtain an administrative permit to construct facilities on this right-of-way. Since a utility or anyone else can never have an easement or right-of-way over its own property, the only property on which a utility has a right-of-way is the private property of another. It does not follow that because rights-of-way in section 224 may be over private property that section 224 applies in "end user premises in multiple tenant environments." Nor should the Commission change its prior determination that section 224 does not confer a general right of access to utility property.[25]

Comments of the competing telecommunications companies agreeing or "enthusiastically agreeing" with the Commission's [faulty] presumptions that installations of antennas on rooftops and in-building risers are rights-of-way under section 224 and which become easements or are otherwise under the ownership or control of the utility and thereby become subject to the Commission's interpretation that section 224 establishes mandatory access requirements which can be implemented without the consent of underlying fee owner are for the most part just that: expressions of wishful thinking and/or "pro-competitive" cheerleading.

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[24]NPRM, ¶ 39. [The Commission may be confusing the Cable Television Act with the Pole Attachments Act.]

[25]NPRM, ¶ 39. See American Electric Power Service Corporation, pp. 23-24; KCPL, pp. 2-3; Cinergy Corp., p. 8.

II. THE COMMISSION'S PROPOSALS FOR EXPANSION OF ITS PRIOR INTERPRETATION OF SECTION 224 ARE ARBITRARY AND CAPRICIOUS IN THAT THEY DO NOT SOLVE THE PROBLEM ADDRESSED.

A. Any Access Problem to MTEs is Not Caused By the Electric Utilities and Will Not Be Solved Under Section 224.

If there is a problem with access to MTEs, that problem is not caused by the electric companies. Nor is it caused by the gas, water, or steam utilities which are also subject to section 224 obligations. If a problem exists, the Comments of the competing telecommunications companies overwhelmingly demonstrate that it is caused by the MTE owners/managers or to a lesser extent, by the incumbent LEC.[26] The statement of Level 3 Communications, LLC., at

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[26]WinStar admits that it has successfully negotiated approximately 5, 500 MTE access agreements since 1994, but claims that "many MTE owners discriminate against CLECs every day by not allowing access to their MTEs, or by allowing such access only on economically unreasonable terms . . . ." p. 13.

Teligent suggests that all entry strategies must not rely heavily on the incumbent LEC's willingness to permit entry, p. 3, and claims that the majority of MTE owners are the cause of access problems, pp. 9-10.

RCN Corporation, p. 5; "RCN has experienced great difficulties with such access [to end-users in MTEs or MDUs] principally because ILECs and incumbent cable operators appear to use any opportunity to block entry by new competitors." It seeks access to "telephone inside wiring" not to inside electric facilities. Id. pp. 6-11. RCN would broaden Commission jurisdiction under section 224 to place section 224 obligations (contrary to statutory terms and apparently just in MTE and MDU environments) on incumbent operators. Id., p. 18, and have the Commission establish a federal mandatory access requirement based on sections (4)(i) and 303(r) of the Communications Act.

AT&T finds its alleged access problems are with the incumbent LECs and only some building owners, pp. 4-8.

NEXTLINK, considers its access problems due primarily to MTE owners. NEXTLINK, therefore, supports the Commission's proposals under section 224 which would remove the landlord/owner from having any say and place a mandatory access requirement on the incumbent LECs. (Electric, gas, water, steam utilities are not mentioned as part of the problem or solution.) pp. 2; 4-6; 7-8.

Adelphia Business Solutions, finds its access problem lies with building owners, pp. 2-9. Adelphia does not mention section 224 or electric utilities.

BlueStar Communications, Inc. requires access to ILEC facilities and believes that the Commission should expand its program of deregulation of inside wiring to multi-tenant buildings, pp. 2-3. BlueStar does not mention the electric utilities. BlueStar's only mention of section 224 is to merely state "At a minimum, new entrants must have access to the conduit in multi-tenant building. Under Section 224 of the 1996 Act and the rules for unbundled elements, the conduits are even more essential to reach tenants in such a building." p. 4.

Global Crossing LTD.'s main concern is the prohibition of exclusive contracts between MTE owners and telecommunications service providers, pp. 3-6. Global Crossing also sees the access solution as treating in-building house and riser cables as unbundled network elements, p. 7. Global does not mention electric, water, gas or steam companies as part of the access problem solution. Global does not mention section 224.

Dallas Wireless Broadband, L.P., does not consider electric utilities or section 224 part of the problem or solution. (It proposes three general rules; availability of cost-based UNEs, prohibition of exclusive ROEs and establishment of uniform criteria for locating and operating demarcation point facilities, p. 11.)

The Wireless Communications Association International, Inc. first proposes a remedy to rooftop and inside wiring access through amendment of Section 1.4000 of Commission's Rules in order to preempt state and local governments restrictions on fixed wireless antenna, pp. 7-14.

The Competition Policy Institute urges that the Commission adopt a broad definition of "control" to determine when a utility "owns or controls" right-of-way for purposes of section 224.

Fixed Wireless Communications Coalition identifies the problem of access as one with the MTE owners/managers.

page 3 of its Comments, sums up the Comments of the competing telecommunications companies; "[t]here are two major obstacles in the way of Level 3 obtaining access to such wiring or installing its own wiring--ILECs and building owners/landlords."

Several commenters did not comment on the Commission's proposals under section 224. The electric, gas, water and steam utilities--the majority of the utilities that bear the burden of section 224 obligations--were not even mentioned in most of the Comments of the competing telecommunications companies. Where the electric utility was mentioned, it was not specifically identified as part of the problem. There was not a single concrete example given of where an electric utility caused an access problem to MTEs or in-building risers. This is not surprising. Electric utilities and ownership of in-building wiring and risers are not only different from that of the incumbent LECs, but unique safety concerns prevent such "collocation." Electric utilities do not own or control right-of-way on rooftops or in-buildings.[27] FPL agrees with American Electric Power Service Corporation that there simply "is no basis for including electric utilities in the solution to this alleged problem, if mandatory access can be legally justified at all, it should be through the application of Section 251 to multi-tenant environments,

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Metromedia Fiber Network Services, Inc. states that its problem is with building owners that attempt to charge "unjust" compensation, p. 7.

[27] Metromedia Fiber Network Services, Inc. makes the fanciful and impractical suggestion that a utility under section 224 would deliberately purchase property (in effect, acknowledging that if the utility owned the property, it could not be right-of-way) in order to prevent or delay the competition, p. 4.

not Section 224." [28] Even those commenters who agree with the Commission's proposals for expanding its jurisdiction under section 224, agree that section 224 is only a minor and partial solution, if even that.[29]

As the detailed Comments of the Real Access Alliance and the studies attached thereto show, there is considerable concern that the Commission is basing this NPRM on mere allegations or on exceptions to the general practice and as such does not merit this heavy handed and unauthorized proposed regulation. It is arbitrary and capricious to attempt to solve the alleged problem under section 224 where there are substantial jurisdictional deficiencies, where the problem will not be solved because the majority of the utilities subject to section 224 jurisdiction are admittedly not the cause of the problem, and where the effects of any Commission ruling under section 224 will be far reaching and impact persons and environments well beyond the MTEs which are the subject of this NPRM. All entities will incur substantial costs, time and effort in opposing and/or defending the results of such Commission rulings which will do very little or nothing to solve the problem.

B. The Commission's Proposals Under Section 224 Fail to Impact the Alleged Cause of the Problem.

Because the owners/managers of the MTEs have been alleged to be the primary problem, the Commission attempts to eliminate the MTE owners/managers through expanding its

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[28]American Electric Power Service Corporation, p. 9.

[29]Winstar, Teligent, Bell Atlantic; AT&T; Global Crossing Ltd.; RCN; Level 3 Communications; Adelphia Business Solutions; Fixed Wireless Communications Coalition, etc.

jurisdiction under section 224 to MTEs. Because there is no express or indirect authority for this position, the Commission relies solely on the term "right-of-way" which appears in section 224 to accomplish this jurisdictional feat. As discussed above and in the Comments of the utilities subject to section 224 obligations, the Commission's proposals under section 224 do not survive legal analysis or practical implementation. Even if a utility has a "right-of-way" within the meaning of section 224, which it does not, the consent of the MTE owners/managers would still be required [30] and the entire purpose of relying on section 224 then fails.

C. Statutory Limitations Prevent the Commission from Adopting a Fully Nondiscriminatory Access Provision Under Section 224.

Because section 224 nondiscriminatory access obligations by express statutory terms do not apply to cable television companies or competing CLECs, Commission goals would not be met.[31]

D. The Commission Faces Overwhelming Jurisdictional and Constitutional Difficulties in Adopting Federal Guidelines or Rules Defining Ownership or Control of Real Property.

Whether the Commission is truly lost in the sometimes arcane and always fact specific law of real property or whether it simply does not understand or care that far reaching and wrenching disruptions would result from attempting to create a federal law of real property under section 224, its expansive interpretation of section 224 will not solve the problem posed in the

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[30] See FPL, pp. 22-24; footnote 33.

[31] Bell Atlantic, pp. 2; 7. See discussion at pp. 1-2, supra.

NPRM. Commission proposals under section 224 would violate the fundamental principle of real property that rights in real property arise from and are subject to state and local laws.[32]

The Commission has already recognized that the determination of whether a utility owns or controls a right-of-way is a matter of state law.[33] The Commission may not create a federal law of real property. [34] Even adopting federal "guidelines" or "control" necessarily would create a federal law of real property, as guideline would have no real practical application and would enmesh the Commission in further time consuming and ill-served complaint proceeding and litigation.[35] There are plenty of "guidelines" in existing rules. The creation of additional "guidelines" under section 224 would effect a constitutionally infirm attempt to create a federal law of real property. [36] Moreover, assuming *arguendo* that the Commission had such jurisdiction, such guidelines would constitute the type of micro-management and intensified complaint and litigation potential that the Commission has stated that it hopes to avoid. The Commission's proposal under section 224 interferes with the authority of state public service

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[32]Real Access Alliance, attachment, "Utility Access and Use Rights in the Real Property of Another," Part I, pp. 3-4.

[33]Local Competition First Report and Order, 11 FCC Rcd 15499, 16082, ¶ 1179.

[34]Real Access Alliance, attachment, "Utility Access and Use Rights in the Real Property of Another," Part I, pp. 3-4.

[35]Real Access Alliance, attachment, "Utility Access and Use Rights in the Real Property of Another," Part I, pp. 3-4.

[36]Joint Comments of EEI and UTC, pp. 6-9; Real Access Alliance, attachment, "Utility Access and Use Rights in the Real Property of Another," Part I, pp. 3-4.

commissions to regulate the electric utility service requirements.[37]

E. Section 224 Does Not Provide for Compensation to the MTE Owner.

The Commission has not escaped the constitutional takings problem in its proposals. The Commission (unnecessarily) has taken the position that section 224(f) requires mandatory access, not just nondiscriminatory access.[38] Because of the Commission's interpretation of section 224(f), it cannot escape the fact that there is a physical takings. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Gulf Power Company v. United States, 1999 WL 699763, (11th Cir., Sept. 9, 1999). The Commission cannot get rid of the need for the consent of the MTE owners/managers. The premise used in the OTARD ruling, even if valid, that the MTE owners/managers voluntarily gave up possession does not apply here. A right-of-way use (even an easement use) is a non-possessory use.[39] Further, commenters that suggest that the takings analysis should be made under a regulatory takings analysis rather than under the physical invasion analysis base that suggestion on a faulty premise; namely, that once an MTE owner/manager has let one telecommunications company in, it has let them all in because it has a choice in the first place whether to operate a commercial or residential MTE

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[37] See pp. 4-5, supra.

[38] NPRM, ¶ 36; Local Competition First Report and Order, supra at ¶ 1123. This interpretation of mandatory rather than just nondiscriminatory access has been challenged in the Petition for Reconsideration. FPL did not participate in the facial challenge to the constitutionality of section 224 in Gulf Power Company v. United States, 1999 WL 699763, (11th Cir., Sept. 9, 1999) and has consistently reserved its right to challenge the Commission's mandatory access interpretation of section 224(f)--an issue not yet directly presented to a court.

[39] See FPL, pp. 6-7; footnote 12.

without providing the tenants with any telecommunications service. That argument wrongly assumes that by "voluntarily" not providing telecommunications service, the MTE owner/manager has felt no or minimal economic impact and that the investment backed expectations of the MTE owner have not been seriously harmed under the Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) test for regulatory takings. [40]

Nor does the compensation issue under section 224 prevent the NPRM from resulting in an unconstitutional takings. The Commission's jurisdiction to set pole attachments rates under section 224 does not address or provide for compensating the MTE owners/managers. The statutory obligation and the Commission's rate making jurisdiction is between the competing cable and telecommunications companies on the one hand and the facility owning utility on the other. Moreover, even if utilities condemn rooftops or in-building premises, which they do not, nothing in section 224 authorizes the taking of MTE property or would allow a utility to condemn for another or different class of utility. The delegation of the sovereign power of eminent domain must be express. It is one of the "most onerous proceedings known to the law." Peavy-Wilson Lumber Co. v. Brevard County, 31 So.2d 483 (Fla. 1947). Absent a clear statutory authority, FPL is simply not authorized to exercise its state delegated power of eminent

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[40]Teligent, pp. 53-60. Contra Real Access Alliance, attachment, "Constitutional Analysis of the FCC's Notice of Proposed Rulemaking, FCC 99-141," p. 36 ("The Supreme Court has unequivocally held that 'investment-backed expectations' are the essence of the private property rights protected by the Takings Clause of the Fifth Amendment"). Nor is there fact based comment establishing that an MTE's investment backed expectations would survive the constitutional test if it let all telecommunications companies on its property under "equal" terms.

domain as ordered by the Commission.

F. More Reasonable Alternatives Exist.

Commenters have provided the Commission with a number of more effective alternatives to that of attempting to expand Commission jurisdiction under section 224. Suggestions include finding access under section 251 [American Electric Power Service Corporation; NEXTLINK]; allowing the real estate market to continue its demonstrated adaptation (Real Access Alliance); disallowing exclusive contracts between MTE owners/managers and telecommunications companies [Bell Atlantic; AT&T; Global Crossing Ltd.; RCN; Level 3 Communications; Adelphia Business Solutions; Fixed Wireless Communications Coalition; Teligent; WinStar]; finding ancillary jurisdiction not related to section 224; and encouraging MTE owners/managers to provide a more effective structure design by simply installing an additional PVC pipe [BellSouth].

CONCLUSION

FPL joins in the concern of the Real Access Alliance that Commission rulemaking be based on facts and sound legal analysis and that the Commission respect the limits of its own jurisdiction.[41] FPL respectfully suggests that the Commission should not adopt any of its proposals for expanding section 224 jurisdiction. FPL further requests that the Commission

[41]Real Access Alliance, Comments, pp. 10; 74-5.

proceed to timely completion of all pending rulemaking, including petitions for reconsideration, under section 224.

Respectfully submitted,

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September 27, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 1999, a true and correct copy of the Reply Comments of Florida Power & Light Company was served by overnight mail on:

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