

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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Case No. 99-15160-GG  
Consolidated with 00-10257-JJ, 00-11027-G,  
00-11071-G, 00-11193-G, 00-11300-G,  
00-11452-G

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SOUTHERN COMPANY, *ET AL.*,  
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,  
*Respondents.*

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ON PETITION FOR REVIEW OF AN ORDER OF  
THE FEDERAL COMMUNICATIONS COMMISSION

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**REPLY BRIEF OF PETITIONER FLORIDA POWER & LIGHT  
COMPANY**

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**CERTIFICATION OF TYPE-SIZE AND STYLE**

This Reply Brief of Florida Power & Light Company has been produced using 14 point Times New Roman style type, not proportionally spaced.

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**ARGUMENT**

**I. Respondents' "Gap" Theory Is Full of Holes: The Plain Statutory Language Shows That Congress As Part Of The FCC's General Rulemaking Authority Did Not Delegate Express Or Implied Jurisdiction To The FCC To Adopt Or Enforce Access Rules And Regulations As To The Third Party Takings Rights And Duties Created In 47 U.S.C. §§ 224(f)(1) and (f)(2).**

Respondents admit that the Federal Communications Commission ("FCC") has no express jurisdiction under the Pole Attachments Act authorizing FCC access rulemaking and that the access rules constitute the majority of the issues on appeal.

The FCC relies on the "silence" of Congress in the FCC's general rulemaking power in 47 U.S.C. § 224(b) and on alleged "silence" or "gaps" in § 224(f) to assume access "gap" jurisdiction and to reach the deferential review standard under the second prong of *Chevron*. (FCC, p. 15, "Congress clearly has not spoken to most of the precise issues on appeal here"); (FCC, p. 15, "Congress did not speak directly to many of the Pole Attachment [sic] Act's new mandatory-access requirements, but left numerous spaces and gaps for the FCC to fill"); (FCC p. 16, "The gaps in the Pole Attachment [sic] Act . . . are a source of discretion for the FCC"); (AT&T, p. 14, "Congress elected to leave gaps in the regulatory framework for the FCC to fill"); (NCTA, p. 4, "Court should defer to the FCC on the Commission's rulings of five related issues"); (WorldCom, p. 12, "the Act does not impose any limits on the FCC's authority with respect to . . . [pole attachment] practices . . . [including ] [electric utility] engineering and operational decisions").

The FCC's assumption of "gap jurisdiction" under 47 U.S.C. §§ 224(b) and 224(f) to regulate mandatory access to the electric utility plant, enforce the duty of the electric utility to provide mandatory nondiscriminatory access to its poles, ducts, conduits and rights-of-way and make determinations and enforcement orders as to the electric plant and operations fails under the plain statutory language. It fails under the principles of *Chevron*, and it fails under the very cases relied on by Respondents.

In reviewing a statute under the first prong of *Chevron* to determine the plain statutory language, a court must place the provision in context, interpreting the statute to create a symmetrical and coherent regulatory scheme, and be guided by common sense as to the manner in which Congress is likely to delegate a policy decision of economic and political magnitude to an administrative agency. *Food and Drug Administration v. Brown & Williamson Tobacco Corporation*, 120 S. Ct. 1291, 1294-1295, 1314-1316 (2000). Where a statute provides a right of mandatory physical access onto the property of another, it should be narrowly construed. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). This is particularly true where as here the takings rights are exercised against those with equal or greater public powers and criticality. *See United States v. Carmack*, 329 U.S. 230, 243, n. 13 (1946), *pet. rehrq. denied*, 329 U.S. 834 (1947).

**1. Delegation Of Jurisdiction To Make Determinations Necessary To Administering or Enforcing A Third Party Takings Right Must Be Express.**

The FCC assumes "gap jurisdiction" where none exists. Congress under § 224(b) has not delegated to the FCC initial authority to adopt rules and regulations with respect to the mandatory nondiscriminatory access rights and

duties in § 224(f)(1)<sup>1</sup> and 224(f)(2). The FCC relies on the principle of "gap jurisdiction" both to create jurisdiction that was not delegated in the first place and then to create additional policy by identifying "specific issues" to fill in the perceived "gaps." Under the FCC's "gap" theory, its rulemaking powers are unlimited if such rules are in any way related to pole attachments.

Delegation of the sovereign power of a takings right must be express. The delegation to an agency of the sovereign power to make determinations regarding takings rights and duties and to enforce those rights and duties must also be express. Such agency authority cannot be presumed or assumed from the statutory silence in a delegation of general jurisdiction to regulate rates, terms, and conditions.

The cases relied on by Respondents support Petitioners and not the FCC. In *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 421-22 (1992),<sup>2</sup> the Supreme Court reviewed an agency exercise of an expressly delegated

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<sup>1</sup> See *Gulf Power Company v. United States*, 187 F.3d 1324 (11<sup>th</sup> Cir. 1999) (§ 224(f)(1) requires mandatory access and constitutes a takings.)

<sup>2</sup> Hereinafter cited as "Boston." Relied on by FCC, p. 17; NCTA, p. 32; AT&T, p. 23; WorldCom, p. 13. Only AT&T, pursuant to 11<sup>th</sup> Cir. R. 28-2, indicated cases on which it primarily relied. Only AT&T correctly identifies Florida Power &

authority to determine the "need" or necessity for a takings of railroad property. In 45 U.S.C. § 545(d)(1),<sup>3</sup> Congress delegated a limited sovereign power of condemnation to Amtrak, a nongovernmental and private entity which was formed for the purpose of providing intercity and commuter rail service:

"The Corporation is authorized . . . (B) to acquire any right-of-way, land, or other property . . . which is required [for] intercity rail passenger service; by the exercise of the right of eminent domain, in . . . the district court of the United States for the judicial district in which such property is located . . . ."

(Emphasis added.)

Congress then distinguished between Amtrak's right to take "any" property and Amtrak's right to take "property owned by a railroad and required for intercity rail

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Light Company ("Florida Power & Light" or "FPL"). All other Respondents incorrectly refer to "FPL" as "Florida Power." "Florida Power" is commonly understood to be Florida Power Corporation, an unrelated investor owned electric utility which is not a party to this appeal. FPL did not join in *Gulf I* or in the compensation argument of Gulf Power Company in *Gulf II*.

<sup>3</sup> 47 U.S.C. §§ 545 and 562 were repealed by Act July, 1994, P. L. 103-272, § 7(b), 108 Stat. 1379 as part of a transfer of the general subject matter to 49 U.S.C.S. § 20101, *et. seq.* This brief refers to the pre-1994 section numbers and statute as referenced in the *Boston* case, supra.

passenger service." For this second and specifically limited class of property, Congress expressly delegated to the Interstate Commerce Commission ("ICC") jurisdiction to make determinations as to whether the Corporation actually "required" the railroad property, and once having made this determination, to order the "conveyance thereof from the railroad to the Corporation." *See* 45 U.S.C. § 562(d)(1) (1992)(Corporation may apply to the Commission for an order establishing need and requiring conveyance). Congress further specifically described limitations on the takings power of the Corporation which the ICC must consider before issuing an order requiring conveyance of property. *See* 45 U.S.C. § 562(d)(1)(A) and (B). Congress also further expressly provided that, after having made the above determinations, "the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation." *See* 45 U.S.C. § 562(d)(1). This express statutory delegation of initial and limited jurisdiction to make determinations involving the exercise of the right of one private entity to take the property of another private entity is far different from the delegation in 47 U.S.C. § 224(b) of general jurisdiction to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." Contrary to the claims of Respondents, the *Boston* case does not stand for the proposition that an agency may assume jurisdiction to authorize and

enforce a takings right by merely filing in alleged statutory "gaps" in a grant of general rulemaking authority.

The case of *AT&T Corporation v. Federal Communications Commission*, 220 F.3d 607 (D.C. Cir. 2000) also contains an express delegation by Congress to the agency. Here Congress expressly authorized the FCC to consider various specified factors in approving an application by a Bell operating company to provide in-region long distance service pursuant to 47 U.S.C. § 271. The framework of the express delegation of authority to make determinations affecting access rights and duties is very similar to that in the *Boston* case, *supra*. Section 271(d)(1) is entitled "Application to Commission." It provides that "On and after the date of enactment of the Telecommunications Act of 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State . . . ." Section 271(d)(3) provides that "the Commission shall issue a written determination approving or denying the authorization requested in the application . . ." and that "[t]he Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds [A through C]." In addition, Congress expressly provided in 47 U.S.C. § 271(d)(4) that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." Subsection (c)(2)(B) contains a

checklist defining what the Bell companies must be providing in way of nondiscriminatory access in order for Commission approval to enter into the provision of interLATA services. Subparagraph iv of that checklist requires that the Bell company be proving access and interconnection to "[l]ocal loop transmission from the central office to the customer's premises . . . ." The court deferred to the FCC's discretion in performing its expressly delegated jurisdiction and duty to evaluate a BOC's overall loop performance to provide nondiscriminatory access to network elements as part of the requirement for granting the application. The court held that while the FCC could neither limit nor extend terms used in the checklist, it could give content to the statute by defining nondiscriminatory access to unbundled local loops to reasonably mean access to overall loop performance. While on its face, this might appear to support Respondents position, it does not. First, the court specifically stated that it was addressing the nondiscriminatory requirement as used in § 271 and under a very specific delegated authority to review applications of Bell companies to provide interLATA service. Second, the court found that the FCC had not limited or extended the term "local loop transmission" as prohibited in the statute. *AT&T v. FCC*, 220 F.3d 607, 624, *supra*. Third, in 47 U.S.C. § 271, the FCC's jurisdiction is one of review as to what the Bell company has done in terms of providing access it is not one of regulating or enforcing a takings right or duty of mandatory access.

(Compare *AT&T Communications of Virginia, Inc. v. Bell Atlantic-Virginia, Inc.*, discussed *infra*.) Fourth and most important for purposes of the case at bar, the telecommunication cases are also inapposite, in that, Congress expressly provided in § 224(f)(2) that an electric utility could deny access for reasons of insufficient capacity, or for reasons of safety, reliability and generally applicable engineering purposes.

In *AT&T Communications of Virginia, Inc. v. Bell Atlantic-Virginia, Inc.*, 197 F.3d 663 (4<sup>th</sup> Cir. 1999), the court reviewed the FCC's determinations as to access to network elements of ILECs through the interconnection and bundling requirements of 47 U.S.C. §§ 251(c)(3) and 251(c)(6). Like the two cases above, § 251 contains an express delegation of initial authority and direction to the agency to make determinations as to access rights and duties created in that particular section. Congress expressly provided in § 251(d)(1) that "within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." Congress also expressly provided in § 251(d)(2) that "[i]n determining what network elements should be made available for purposes of subsection [251](c)(3), the Commission shall consider, at a minimum, whether-(A) access . . . is necessary; and (B) the failure to provide access . . . would impair the ability of the telecommunications carrier seeking access to provide the services

that it seeks to offer." This express delegation of authorization of an agency to authorize takings is nearly identical to the framework which Congress created in 45 U.S.C. § 545(d)(1). In both instances the agency that had the general regulatory authority (and general powers of rulemaking) over both the taker and takee was granted additional and specific authority to make determinations as to the need for the takings and to consider the effect of granting access (45 U.S.C. § 545(d)) or the effect of a failure to grant access (47 U.S.C. § 251(d)(2)). There is no such express delegation in § 224. The FCC may not assume such powers through the silence of Congress. Congress has not delegated jurisdiction to the FCC to regulate electric utility capacity, safety, reliability and engineering requirements.

In *Gonzalez v. Reno*, 212 F.3d 1338 (11<sup>th</sup> Cir. 2000), *pet. rehrq. denied, en banc*, 215 F.3d 1243 (11<sup>th</sup> Cir. 2000) relied on by Respondent AT&T, there was no question that Congress had delegated to the Immigration and Naturalization Service jurisdiction to review applications for asylum.

In *GTE Service Corporation v. FCC*, 205 F.3d 416, 421 (D.C. Cir. 2000), the court also addressed issues arising under § 251 of the 1996 Telecommunications Act. The court cited 47 U.S.C. § 251(d)(1) in stating "[t]here is no doubt here that Congress has delegated to the FCC the authority to issue regulations implementing § 251(c)(6)." *Id.* at 421. Again, Congress when faced with access or takings issues implicating constitutional rights did not rely on the

general rulemaking authority that the FCC has over telecommunications companies, but expressly delegated to the FCC additional and express jurisdiction and directions to make determinations with respect to the particular access issues involved. In *GTE, supra*, the meaning of the term "necessity" arises not in the context of § 251(c)(3) as it did in *AT&T Virginia v. Bell-Atlantic, supra*, but in context of the necessity for collocation. The court in determining what would be within the realm of reasonableness for a showing of "necessary" under § 251(c)(6) cited the determination of the Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) that in order for an ILEC to be subject to the burden or duty of access or unbundling under § 251(c)(3), the telecommunications company seeking access must establish some necessity -- essentially not that there was absolute necessity but that there were no reasonable alternatives. The *GTE* court found that the FCC was not free even under an expressly delegated authority to extend or modify the duty to provide access to a third party beyond that authorized by the statute and that the FCC could not "in the name of efficiency" add to or expand the plain statutory terms creating the duty to allow collocation. *Id.* at 424.

The *GTE* case is further instructive in that the case points out that Congress in creating the ILEC's duty of collocation, recognized that the FCC even as to the telecommunications companies [and even though the FCC had been regulating pole attachments since 1978], left determinations involving technical expertise as

to the physical facilities to the state public service commissions. Congress provided in § 251(c)(6) that the ILEC could provide for "virtual" rather than "physical collocation" if the ILEC "demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations." (Emphasis added.)

**2. The Harsh And Invasive Nature Of A Physical Takings Requires That Delegation To Make Takings Determinations Must Be Express.**

The exercise of the power of eminent domain and mandated physical occupation of the property of another is one of the most onerous and invasive proceedings known to the law. *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982) (physical occupation is the most serious form of invasion of an owner's property rights); *Peavy-Wilson Lumber Company v. Brevard County*, 159 Fla. 311, 31 So. 2d 483 (1947). The power to exclude has traditionally been considered one of the most treasured stands in an owner's bundle of property rights.<sup>4</sup> *Loretto, supra*, at 435; *Gulf Power Company v. United States*, 187 F.3d 1324, 1331 (11<sup>th</sup> Cir. 1999).

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<sup>4</sup> The FCC adds a novel twist to takings law and adds insult to injury by requiring the electric utility to make the property desirable for mandatory takings in the first place by expanding its capacity.

Accordingly, there must be a clear and express delegation of the power of eminent domain or right to physical access of the property of another. *See National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264-65, n. 3 (2d Cir. 1987), *cert. denied, sub nom, Hagar v. National R.R. Passenger Corp.*, 484 U.S. 954 (1987). (Amtrak as nongovernmental body has only powers of eminent domain specifically delegated.) There must also be an express delegation to an agency to make takings determinations and authorizations. *See* 47 U.S.C. § 251(d); 47 U.S.C. § 271; 45 U.S.C. § 562(d).

**3. The Takings Right Of A Nongovernmental Entity And Agency Jurisdiction To Make Determinations In The Exercise And Enforcement Of That Right Is Particularly Limited Where Takings Rights Are Exercised Against Those With Equal Or Greater Public Powers And Necessity.**

The Supreme Court has recognized that special care and limitations are required when a takings involves two private entities each with takings or eminent domain powers of their own and that an agency with authority and jurisdiction to administer and enforce statutes granting takings powers to nongovernmental entities cannot in the exercise of that authority assume the same latitude that it has in exercising the sovereign power for itself. In *United States v. Carmack, supra*, n.13, the court stated:

[Statutory language authorizing] officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself . . . is a general authorization which carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication. A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. (Emphasis added.)

The 1996 amendments to 47 U.S.C. § 224, as well as what Congress did not amend in § 224, show on their face that Congress recognized the unique and critical nature of the electric utility infrastructure, as it has historically. (Southern Company, pp. 9-10.) A sufficient, reliable and cost effective source of electric power is vital to the national public welfare and safety. In addition, all other utility or critical infrastructures are at some point dependent upon a source of electric power. That pole attachments are a major factor in the ability of the electric utility to meet such needs has been widely and dramatically evidenced in numerous wind, ice and rain storms, or floods, as well as in numerous personal injury and property

damage cases. To the electric utility access to its facilities is about preserving and maintaining the integrity and operational capabilities of the electric system<sup>5</sup>.

The FCC is not free to interpret a general delegation of rulemaking authority to enforce rates, terms, and conditions of pole attachment as a delegation of jurisdiction to administer and enforce takings rights and duties of third parties particularly against electric utilities. Nor once having assumed such jurisdiction is the FCC free to fill in "gaps" as if itself had been granted the takings right.

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<sup>5</sup> If an improperly loaded pole falls or a "technically qualified" but inexperienced worker makes a mistake an entire geographical area is without power. Outages often must be scheduled to accommodate increase in capacity or additional attachment or construction. For national reliability concerns about the electric grid, *see generally* (a)[www.eia.doe.gov/emeu/security/pastelec.html](http://www.eia.doe.gov/emeu/security/pastelec.html); (b) [www.policy.energy.gov/electricity/postfinal.pdf](http://www.policy.energy.gov/electricity/postfinal.pdf); (c)[www.fema.gov/disasters](http://www.fema.gov/disasters); and (d) [www.securitymanagement.com/library/iatf.html](http://www.securitymanagement.com/library/iatf.html).

**II. The Congressional Intent Is Shown In The Plain Language of 47 U.S.C. § 224 And Addition Of §§ 224(f) and 224(e) And Changes Made To § 224 (c) But Not To §§ 224(b)(1) And § 224(b)(2).**

Congress in 1996 adopted § 224(f)(2) as an equal part of 47 U.S.C. § 224, a section largely ignored by Respondents. At the same time, Congress did not change either § 224(b)(1) or § 224(b)(2). Even in 1996, Congress considered regulation of the attached wireline "the attachment" as distinct from regulation of the right of nondiscriminatory access.

As part of the 1996 amendments, Congress amended the Pole Attachments Act to end the competitive advantage of cable companies with respect to pole attachment rates and to ensure that pole owners would not give any attaching entity preferential or discriminatory access rights, including any telecommunications affiliate or subsidiary of the pole owners. (*Southern Company*, p. 14.) Congress added § 224(f) providing:

§ 224(f)(1). 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.

§ 224(f)(2). Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way on a non-