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May 12, 2006

**ELECTRONIC FILING**
Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket Nos. 060355-EI

Dear Ms. Bayó:

Enclosed for filing on behalf of T-Mobile South LLC is an electronic version of T-Mobile's Response in Opposition to FPL's Petition for Emergency Rulemaking and Alternative Request For Declaratory Statement in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self

FRS/amb
Enclosure

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| In re: Petition for emergency rule or, alternatively, For declaratory statement prohibiting wireless attachments in electric supply space by Florida Power & Light Company | ) ) ) ) ) | Docket No. 060355-EI Filed: May 12, 2006 |

**T-MOBILE'S RESPONSE IN OPPOSITION TO FPL'S PETITION FOR EMERGENCY RULEMAKING AND ALTERNATIVE REQUEST FOR DECLARATORY STATEMENT**

T-MOBILE SOUTH LLC ("T-Mobile"), pursuant to Sections 120.54(4) and 120.565, Florida Statutes, and Rules 28-103.006, 28-105.001-105.003, and 28-106.203, Florida Administrative Code, hereby responds in opposition to the Florida Power and Light Company ("FPL") Petition for Emergency Rule or, Alternatively, Declaratory Statement (hereinafter, "Petition"). T-Mobile respectfully requests that the Florida Public Service Commission ("Commission") dismiss the Petition as there is no basis under Florida law for the issuance of an emergency rule and the Petition does not lawfully comply with the requirements of chapter 120, Florida Statutes, for the issuance of a declaratory statement. In addition, this Commission does not have the jurisdiction to address the subject matter of the Petition as the issues identified therein, to the extent there is any dispute, lie exclusively with the Federal Communications Commission ("FCC") pursuant to the Pole Attachment Act, 47 U.S.C. § 224. As grounds for denying the emergency rule and alternative request for declaratory, T-Mobile states:

## I. Background Facts, History, and the Pole Attachment Act

1. T-Mobile is a wireless telecommunications provider offering voice and data services throughout the state of Florida pursuant to licenses granted by the FCC. T-Mobile is also a "telecommunications carrier" that provides "telecommunication service" as those terms are defined at 47 U.S.C. §153(44) & (46).[1]

2. This proceeding was initiated on April 24, 2006, when Florida Power and Light Company ("FPL") filed its Petition for Emergency Rule or, Alternatively, Declaratory Statement (hereinafter, "Petition"). In essence, FPL seeks the issuance of an emergency rule to prohibit wireless telecommunications attachments in the "electric supply space" of its electric utility distribution poles or to the top of such poles. Alternatively, FPL asks for this Commission to declare that T-Mobile is prohibited from attaching its wireless telecommunications devices to the top of FPL's poles until the Commission concludes its review of strengthening standards, including any action that may be taken in Docket No. 060173-EU. As is more fully discussed below, FPL has failed to meet the legal standards for both the issuance of an emergency rule or a declaratory statement, and to the extent there is any dispute regarding pole attachments to FPL's electric utility distribution poles, such matters are reserved to the FCC under the Pole Attachment Act, 47 USC § 224, and the regulations adopted by the FCC, 47 C.F.R. 1.1401, et. seq.

3. While FPL is quite clear that T-Mobile's request for a pole attachment agreement is the reason FPL is now seeking the emergency rule or a declaratory statement, FPL did not serve T-Mobile or any other entity with its Petition. T-Mobile first learned of the Petition on or about April 25, 2006. On May 3, 2006, T-Mobile filed its petition for intervention

[1] Maps showing T-Mobile's coverage areas in Florida and other states can be found on the internet at http://www.t-mobile.com/coverage/default.asp.

and notice of opposition, and therein T-Mobile indicated that it would respond to FPL's petition by May 15, 2006.

4. As the Petition relates, T-Mobile first contacted FPL in May 2004 regarding T-Mobile's desire to utilize the Pole Attachment Act to attach its equipment to FPL electric utility distribution poles. *See* Petition, Exhibit D, Negotiation Timeline Attachment. In the ensuing two years, T-Mobile has been diligent, and extremely patient, in attempting to conduct good faith negotiations with FPL to secure a pole attachment agreement so that T-Mobile can attach its telecommunications service equipment to FPL electric utility distribution poles.

5. Since FPL did not have its own form template pole attachment agreement, to help jump start the process T-Mobile sent to FPL its draft pole attachment agreement in June 2004. Notwithstanding T-Mobile providing this document, FPL did not respond with its own draft agreement until May 2005, but when FPL transmitted its draft agreement it did not include any prices or the referenced and highly relevant exhibits. The final missing exhibit to the draft pole attachment agreement, the critical Exhibit D, the Directory and Permit Application Process Manual, was not supplied until March 31, 2006, almost two years after T-Mobile's initial request to FPL. *See* Petition, Exhibit C, letter from Raymond A. Kowalski to Maria Browne. FPL's March 31, 2006, letter came in response to Maria Browne's letter of March 6, 2006, to Mr. Ken Gilbert of FPL, conveying T-Mobile's frustration at FPL's continuing delay in providing access to its poles. *See* Petition, Exhibit D.

6. T-Mobile's request to FPL was made pursuant to the Pole Attachment Act, the federal statute that today governs this process as a part of the broader, integrated regulatory

scheme designed to promote telecommunications competition and rapid deployment of advanced technologies. *See, e.g.,* Pub. L. No. 104-104, Preamble; S. Rep. No. 104-230, 104th Cong., 2d Sess. at 1.

7. Congress first enacted the Pole Attachment Act as a solution to the danger that anticompetitive practices by utilities would thwart the development of cable television service. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). Overwhelming evidence of utility overreaching to capture or frustrate the development of cable television as a national communications network was presented during extensive Congressional hearings in 1976 and 1977. *See Cable Television Regulation Oversight: Hearings Before the Subcomm. on Communications of the Comm. on Interstate & Foreign Commerce,* Parts 1 & 2, 94th Cong., 2d Sess. (1976); *Pole Attachment: Hearings on H.R. 15372 and H.R. 15268 Before the Subcomm. on Communications of the House Comm. on Interstate & Foreign Commerce*, 94th Cong., 2d Sess. (1976); *Communications Act Amendments of 1977: Hearings on S. 1547 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess. (1977) ("1977 S. Comm."). Utility abuses were far more serious than mere unjustified pole rent overcharges; they included attempts to "take over" distribution of signals, and the outright prohibitions of attachments, despite the fact that the communications space on utility poles was surplus and cable did not consume or preempt pole space needed for utility purposes. *See* 1977 S. Comm. at 35.

8. In 1996, Congress expanded the provisions of Section 224 to protect telecommunications carriers, including wireless carriers, as well as cable television providers. *See* Pub. L. 104-104. Thus, for purposes of Florida law T-Mobile, as a commercial mobile radio

service ("CMRS") provider, is not a "telecommunications company" subject to the jurisdiction of the Florida PSC. However, for purposes of federal law T-Mobile is a "provider of telecommunications service" that is authorized under the Pole Attachment Act to attach its telecommunications equipment to electric utility poles. Section 364.02(14), Florida Statutes (exempting CMRS providers from the definition of a telecommunications company for purposes of FPSC regulation); Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rule and Policies Governing Pole Attachments, *Report and Order*, 13 FCC Rcd 6777, 6798-99 ¶¶ 39-41 (1998) (recognizing that wireless providers are "telecommunication carriers" under 47 U.S.C. § 224 and therefore entitled to access to the poles); *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002) (upholding wireless providers' attachment rights).

9. In its present form, the Pole Attachment Act establishes a system whereby jurisdiction over pole attachment matters would be conferred in the first instance on the FCC. Section 224(b) of the Communications Act of 1934, as amended (the "Communications Act") provides that "the FCC shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. § 224(b)(1). In the alternative, Section 224(c) provides that "in any case where [pole attachment] matters are regulated by a State" then the FCC will not have jurisdiction over such matters. However, it is not enough that a state articulates a desire to regulate pole attachments, the state must certify to the FCC that it has rules and regulations governing pole attachments. Thus, only when

a state public utility commission certifies that it regulates pole attachment matters can it, by operation of law, assume jurisdiction and thereby supplant federal jurisdiction over such matters. *See* 47 C.F.R. § 1.1414. The Commission has not so certified, meaning that the FCC has jurisdiction over pole attachments in the State of Florida. *See States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd1498 (1992).

10. The FCC has resolved hundreds of pole attachment disputes in accordance with these procedures, including disputes with Florida pole owning utilities. *See, e.g., Time Warner Entertainment/Advance-Newhouse Partnership v. Florida Power & Light Company*, 14 FCC 9149 (rel. June 9, 1999); A*merican Cablesystems of Florida, Ltd. v. Florida Power and Light Co.*, 10 FCC Rcd 10934 (June 15, 1995); *Cablevision Industries Of Middle Florida, Inc., v. Florida Power Corp.*, 4 FCC Rcd 2579 (March 27, 1989); *Comcast Cablevision Of Perry, Inc., Complainant, v. Florida Power Corporation*, 4 FCC Rcd 2577 (March 27, 1989). It is well-settled that the FCC has the authority to invalidate unjust and unreasonable rates, terms, or conditions. Any attempt to force an attaching party to waive its rights and remedies under Section 224 of the Communications Act is a *per se* violation of those rights. *See Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd 9563, ¶ 5 (2000), *vacated by settlement* 17 FCC Rcd 24414, ¶ 19 (2002) (noting that in issuing the vacatur, the FCC specifically stated that its decision did not "reflect any disagreement with or reconsideration of any of the findings or conclusions contained in" *Cavalier Tel. LLC v. Virginia Elec. & Power Co.*); *Implementation of Section 703(e) of the Telecommunications Act of 1996,* 13 FCC Rcd 6777, ¶ 21 (1998).

11. The FCC has routinely reminded utility pole owners that under the Pole Attachment Act overages or denial of access for wireless pole attachments may have serious

anticompetitive effects on telecommunications competition.[2] More recently, based upon allegations by wireless companies, wireline competitive local exchange carriers, and cable operators that utilities are routinely and flagrantly refusing to provide just, reasonable, and nondiscriminatory access to poles, the FCC is gathering information on whether to revisit the present federal pole attachment regime in light of such concerns and the dramatic changes to the competitive landscape over the last few years. *See, In the Matter of the Petition of The United States Telecom Association For a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures,* FCC Docket RM-11293; and *In the Matter of the Petition for Rulemaking of Fibertech Networks, LLC,* FCC Docket RM-11303.

12. In general terms, with respect to T-Mobile's request for pole attachments and the substantive concerns that FPL raises in its Petition, T-Mobile does not dispute the value or importance of an improved electric utility infrastructure that can better survive the storms such as we have experienced these last two hurricane seasons. While T-Mobile's own network is not as extensive a network of poles and other infrastructure as FPL's network, T-Mobile well appreciates the necessity of a weather-worthy network, and is thus equally interested in ensuring that its attachments do not overload a pole. In many situations, wireless telecommunications companies provide the only operational communications network after a storm, and such continuing functionality has increasingly become an alternative source of communication for both emergency

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[2] *Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers With Access to Utility Poles At Reasonable Rates."* Public Notice DA 04-4046, released December 23, 2004. FPL's Petition dismisses this Notice as "not binding precedent" but the purpose of the Notice was to remind utilities of the FCC's 1999 decision to not prohibit wireless antennas on the top of poles, which is binding precedent.

responders as well as electric utility restoration crews. But once FPL and T-Mobile have a pole attachment agreement, and once the parties start the process to identify specific poles and equipment that T-Mobile wants to attach to, if FPL has a basis for denying access to a pole or prohibiting the attachment of certain equipment then the Pole Attachment Act provides a forum before the FCC for FPL to raise its objections and for T-Mobile to challenge such a denial. 47 U.S.C. § 224(b).

13. By seeking to attach its antennas to the top of FPL distribution poles, T-Mobile is doing so in an effort to further expand the reliability of its own network when the availability of new tower and antenna locations is very limited, notwithstanding FPL's assertions to the contrary. T-Mobile certainly is not proposing to make the electric utility infrastructure any less reliable, as any threat to a pole that has T-Mobile attached equipment would only make its own network less reliable if the pole was not engineered to handle such equipment.

14. While this Commission is free to continue its investigations into potential new requirements for the hardening of electric utility infrastructure, it must adopt rules or policies that would not violate applicable state and federal law. [3] This docket is not the proper forum for addressing either the more general questions raised by FPL nor the specific negotiations still ongoing between FPL and T-Mobile. As is more fully discussed below, as a matter of Florida law FPL has failed to demonstrate a basis for this

[3] For example, FPL's statement that it will seek a blanket prohibition on antennas at the top of electric utility distribution poles would clearly violate the Pole Attachment Act as the FCC has already rejected the electric utility industry's request for such a blanket prohibition. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Order on Reconsideration,* 14 FCC Rcd 18049, 18074 ¶ 72 (1999).

Commission to adopt an emergency rule and the requested alternative declaratory statement against T-Mobile is simply not legally permissible.

## II. FPL's Emergency Rulemaking Request Is Legally Insufficient

15. The statutory provisions governing emergency rulemaking are set forth in section 120.54(4), Florida Statutes. The situations under which an agency may adopt an emergency rule are very restricted. The critical statutory limitation is in the very first sentence of the statute: "If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger." The Florida courts have clearly and consistently found that the basis for the emergency rule "must be factually explicit and persuasive concerning the existence of a genuine emergency." *Golden Rule Ins. Co. v. Department of Insurance*, 586 So.2d 429, 430 (Fla. 1st DCA 1991, citing *Florida Home Builders Ass'n v. Division of Labor*, 355 So.2d 1245, 1246 (Fla. 1st DCA 1978). There is nothing in the FPL petition that demonstrates an immediate danger to the public health, safety, and welfare that would compel this Commission to promulgate an emergency rule. There is simply no emergency.

16. First, FPL has not provided any rule draft or other specific language setting forth exactly what it is requesting this Commission to promulgate as an emergency rule. If there was an immediate danger compelling the issuance of an emergency rule, then the proposed remedy to the problem must be reduced to writing. As it is, the Commission and T-Mobile are left to try to deal with a phantom request. This is not proper for any kind of rulemaking under Florida law.

17. FPL makes several circular attempts at establishing the need for immediate action by the Commission through an emergency rule, but none of these approaches satisfy the statutory directive.

**A. The "Threat" Is No Threat, and No Basis for an Emergency Rule**

18. In Section II of its Petition, FPL first argues that an emergency rule is necessary to maintain the status quo as there is the "threat" of a T-Mobile suit "which seeks the very type of precarious attachment that FPL and the State are seeking to prohibit." Similar allegations are made in the introductory paragraphs of the Petition at pages 2 and 4. Putting aside the fact that there is no such State of Florida proposal presently pending that would seek to prohibit antenna attachments, this alleged threat is no threat.

19. While reasonable minds may differ as to what constitutes a "threat," this question involves correspondence between the parties in March 2006, some of which FPL attached to its Petition and some of which it failed to attach.

20. It seems that the genesis of the "threat" argument originated in a March 6, 2006, letter from T-Mobile to FPL in which T-Mobile set forth some of its dissatisfaction with FPL's failure to deliver a pole attachment agreement to T-Mobile after nearly two years of attempted negotiations. After setting forth some of T-Mobile's frustrations with FPL's continuing delays, T-Mobile said that it was copying the FCC staff "to alert the FCC to FPL's continued failure to comply with the Pole Attachment Act and FCC rules." Petition, Attachment D, at page 3. T-Mobile's letter then went on to request from FPL "the proposed pole attachment rental rate and the exhibits to the draft agreement," none of which had yet been provided. *Id.* It seems the "threat" was that T-Mobile would

"escalate this matter to a formal FCC pole attachment complaint," if FPL continued to be unresponsive. *Id.*

21. Subsequent to this letter, on March 9, 2006, new outside counsel for FPL notified T-Mobile that it was now going to be handling the negotiations with T-Mobile, and FPL's counsel promised a substantive response by March 17, 2006. *See* Attachment 1 to this Response; this was not a part of FPL's Petition attachments. On March 17, 2006, FPL counsel provided some substantive response to T-Mobile's March 6th letter and further promised production of the still missing documentation by month's end. *See* Attachment 2 to this Response; this was not a part of FPL's Petition attachments. On March 30, 2006, T-Mobile responded to FPL's March 17th letter. By this letter T-Mobile's negotiation counsel advised FPL in the first paragraph of the letter that "T-Mobile has authorized me to negotiate the terms of attachment directly with you under the timeframe set forth in my initial letter of March 6, 2006, and will not seek FCC intervention at this time." *See* Attachment 3 to this Response; this was not a part of FPL's Petition attachments. While T-Mobile's letter indicated that T-Mobile would reconsider its request if the parties were unable to reach resolution by the end of May, such reconsideration did not "threaten" or promise any specific action.

22. Thus, to the extent FPL's Petition is motivated by any fear of being dragged into litigation at the FCC, at the moment that fear is unfounded. Assuming the threat of litigation between two parties to a negotiation was a basis for an emergency rule, and it is not as is more fully discussed below, there is no such alleged threat and there will be no such litigation if FPL negotiates in good faith. While some progress has been made since March 6th, much of the real work remains to be done. FPL has not discussed with T-

Mobile the particulars of its proposed attachments or the specific poles that T-Mobile wants to use. Without such a discussion, FPL simply cannot know whether there will be a real problem with respect to any particular pole. Once the overall agreement is in place, then the parties can engage in a joint pre-construction survey, and at the appropriate time T-Mobile will submit the actual attachment application that would be required by the terms of FPL's agreement. But the bottom line is that the issue is not about getting dragged into an FCC complaint case – the issue is that T-Mobile wants to conduct and conclude its negotiations with FPL so both companies can get on with the work that needs to be done. FPL will end up before the FCC, the correct and only legal form to resolve any pole attachment complaint, *if and only if* FPL fails to negotiate in good faith.

23. This attempted end run on the negotiation process is especially counterproductive in that it appears that FPL is now trying to game the system by going outside the process, and outside the agency charged with resolving pole attachment disputes, and using the Florida PSC to gain negotiating leverage. FPL's negotiation counsel pledged to work *with* T-Mobile: "FPL is prepared to work with T-Mobile to expeditiously resolve T-Mobile's access request." See Attachment 1 to this Response (page 4, 2nd paragraph). FPL's Petition is inconsistent with conducting good faith negotiations, and such actions call into question all of FPL's actions, promises, and negotiation positions. If anyone is threatening to upset the negotiation process, it is only FPL by filing this rogue Petition.

24. Alternatively, while the present factual situation is not as represented by FPL, to the extent FPL believes there is some "threat" outstanding, this Commission needs to recognize exactly what is going on here: by its Petition, FPL is really asking this Commission to directly intervene in a private negotiation by promulgating an emergency

rule in order to circumvent some of T-Mobile's lawful requests. While the requested emergency rule would presumably apply to all wireless carriers, FPL's unhappiness over T-Mobile's request for a pole attachment agreement hardly constitutes an immediate danger to the public health, safety, and welfare. The only thing that has happened is negotiations, or an attempt to negotiate. The correspondence and document exchanges pose no public danger of any kind as T-Mobile has not threatened or otherwise taken any action to actually install such equipment outside a pole attachment agreement.

25. While the whole foundation for FPL's Petition is gone, to the extent that the Commission believes that the negotiations between FPL and T-Mobile constitute some kind of threat, the case law demonstrates that such concerns do not rise to the level of immediate danger to the public health, safety, and welfare as to justify the issuance of an emergency rule.

26. Florida courts have found that an emergency rule based on an adverse administrative ruling, among other reasons, was an insufficient basis for issuing an emergency rule. *Golden Rule Ins. Co. v. Department of Insurance*, 586 So.2d 429, 430 (Fla. 1st DCA 1991). If an actual adverse administrative ruling is an insufficient basis, then surely a potential adverse ruling in a proceeding that does not yet exist, and that may never exist, can't be a sufficient basis for an emergency rule.

27. Similarly, to the extent that the "threat" of an FCC action might somehow thwart the rulemaking process now ongoing in Docket No. 060173-EU, an emergency rule may be appropriate "when the delay creates an emergency; but the unusual conditions giving rise to the emergency must be clearly documented. Delay alone cannot suffice." *Florida Home Builders Ass'n v. Division of Labor*, 355 So.2d 1245, 1246 (Fla. 1st DCA 1978). But there is no allegation in the FPL Petition that the process in Docket No. 060173-EU

has been stymied or in any other way delayed by T-Mobile or any other party.[4] In fact, Docket No. 060173-EU is proceeding exactly on schedule. If and when a rule may be noticed in Docket No. 060173-EU for eventual adoption has yet to be determined.

28. If there was some allegation in FPL's Petition that T-Mobile had done something wrong, the courts have held that "[p]ast acts may be sufficient to allege a danger of future misconduct if the conduct alleged is sufficiently serious and is likely to be repeated." *Witmer v. Department of Bus. & Prof. Reg.*, 631 So.2d 338, 343 (Fla. 4th DCA 1994). But at worse, all that is present here is an alleged "threat" of potential litigation, and nothing else. If there is any wrongdoing in this case, it has been FPL constantly delaying the negotiation process, or the fact that until March 31, 2006, FPL had yet to provide a complete draft agreement to T-Mobile, or that FPL refuses to provide the types of access required by federal law, or that FPL has failed to provide access to its poles within 45 days of T-Mobile's original request two years ago. *See* 47 C.F.R. 1.403(b), and which is referenced in the March 6, 2006 letter to FPL at Petition, Attachment D. If there is any misconduct in this case, it is by FPL and not T-Mobile. Under all the facts, T-Mobile's "threat" does not rise to the level of grave public concern that substantiates the need for an emergency rule.

**B. Prejudice or No Prejudice to Attaching Entities Does Not Substantiate the Need for An Immediate Emergency Rule**

29. The second prong of FPL's argument for immediate Commission action is that an emergency rule will not prejudice attaching entities. Petition, Section II.B, page 11. T-Mobile certainly disputes FPL's unsubstantiated statements contained in this section

4 T-Mobile notes that it is not a party to Docket No. 060173-EU and does not intend to intervene in that case.

about how an emergency rule would or would not impact T-Mobile, but the arguments FPL advances do not demonstrate any need for immediate action.

30. For example, FPL cites the need to avoid "the costly and time-consuming construction and later removal of such attachments." Petition, at 11. That's a nice thought, but FPL provides no evidence that there are attachments for which this would be true. Indeed, FPL states that its request is specifically not directed to existing attachments. Petition, at 2. But assuming FPL's statements are true, they still don't constitute an immediate public danger.

31. Secondly, FPL restates it desire to prevent costly litigation. Petition, at 11. This argument has already been addressed, but it must be said that FPL's desire to avoid litigation does not pose an immediate danger to the public's health, safety, or welfare.

32. Next, FPL asserts that T-Mobile would not be harmed by an emergency rule. On its face, these self-serving and inaccurate statements do not address the public's immediate need for an emergency rule. Rather, these are more in the nature of argument as to how an emergency rule impacts T-Mobile. As it is, these arguments do not address the immediacy requirements for an emergency rule.

33. Finally, FPL simply states that telecommunications customers would not be impacted by an emergency rule. Again, this statement does not demonstrate an immediate danger to the public, only FPL's opinion as to the effect of an emergency rule on its customers. What is especially interesting about this argument is that FPL asserts that since T-Mobile and other carriers will have access to the pole in the "telecommunications" portion of the pole that the need is met. T-Mobile is aware of that position, but since T-Mobile is

requesting other space on the pole, the telecommunications portion of the pole obviously does not meet the need.

**C. FPL's "Immediate Dangers" are Neither Immediate or Dangerous**

34. In Section III of its Petition, FPL attempts to identify three immediate dangers presented by the wireless attachments at the top of electric distribution poles. At the outset, it must be stated that none of the three points supply any immediacy for an emergency rule since each are predicated on the assumption that such attachments are in place or will be in place.

35. First, FPL claims that the presence of such attachments "hinders the ability of the distribution pole to handle its primary load." Petition, at 12. T-Mobile does not dispute that the collapse of a pole could be dangerous and that pole failure could cause the loss of electric service. But FPL has not offered any evidence that the attachments proposed by T-Mobile are "heavy or otherwise unwieldy" let alone that such pole attachments are imminent. Moreover, T-Mobile routinely performs a structural analysis with the electric utility to determine the pole's ability to safely handle the proposed attachment. This review is done based upon the standards of the National Electric Safety Code ("NESC"), which define the spacing and loading requirements for utility poles. In addition, FPL's pole attachment agreement and Permit Application Process Manual, which it attached as an exhibit to its Petition, clearly establish the loading limitations for each pole, and contains a formula for determining whether a proposed attachment would create excess loading. The manual also lists the approximate load of various facilities including FPL's primary and secondary cables and transformers, which together comprise a much more significant loading factor than T-Mobile's attachments. T-Mobile could not, and would

not seek to, attach anything to the pole that would exceed safe and acceptable pole loading, as established by the NESC. Moreover, the fact that FPL has failed to engage in meaningful negotiations and thus has not obtained an understanding T-Mobile's experiences in attaching this equipment demonstrates that FPL's concerns are at best speculative conclusions. FPL's unfounded conclusions, made without any evidentiary or real world experience, let alone evidence of an immediate danger to the public, cannot and will not support the adoption of an emergency rule.

36. Second, FPL asserts that wireless attachments would unnecessarily place communications workers in proximity to high voltage lines. Petition, at 12. There is certainly no disputing that if a wireless carrier is attaching telecommunications equipment to electric utility poles, and especially attaching equipment at the top or in the electric supply area of the pole, that the workers will be in proximity to high voltage lines. But mere proximity to high voltage lines does not necessarily mean that installation workers will be at risk, and in fact FPL doesn't say that anyone is at risk, or subject to a higher risk of death or injury than when they work directly on FPL facilities. Since FPL has so far failed to negotiate the requested pole attachment agreement we do not know whether it will be FPL representatives, T-Mobile employees, or a combination thereof who would do the actual installation work. Moreover, because there is no agreement in place, we don't know what reasonable training, certification, and safety requirements may be negotiated to ensure that whoever it is that is installing this equipment will do so safely and without risk to the installer or the network.

37. FPL's third immediate danger prong is that the proposed wireless attachments "needlessly complicates the work of electric utility crews" who may be called upon to

make repairs and other services in less than ideal weather conditions. Again, without a contract, this Commission has no way of knowing whether such attachments will or will not complicate electric utility crews or wireless communications employees working on the poles. These are issues that can and should be addressed in a negotiation to ensure proper safety for employees and contractors of both parties. But at this time, such a threat to electric utility pole crews is entirely speculative and tenuous and does not demonstrate an immediate danger compelling an emergency rule.

**D. FPL is Seeking the Promulgation of an Illegal Emergency Rule**

38. Outside of FPL's arguments, it must be recognized that the specific request FPL is making is not permissible. Section 120.54(c) provides: "An emergency rule adopted under this subsection shall not be effective for a period longer than 90 days and shall not be renewable, except during the pendency of a challenge to proposed rules addressing the subject of the emergency rule." However, FPL is seeking the adoption of an emergency rule "until such time as the Commission completes its rulemaking in Docket No. 060173-EU and determines whether such a practice is a safe and advisable one in the state." On its face, this request violates the 90 day effective period for emergency rules. But more importantly, the courts have found that "[a]n agency's delay in proceeding to standard rulemaking does not justify the use of an emergency rule." *Florida Health Care Ass'n v. Agency for Health Care Admin.*, 734 So.2d 1052, 1054 (Fla. 1st DCA 1998); *Postal Colony Co. v. Askew*, 348 So.2d 338 (Fla. 1st DCA 1977).

39. FPL's Petition demonstrates that any proceedings before this Commission regarding T-Mobile's attempt to enter into a pole attachment agreement with FPL for the attachment of antennas or any other telecommunications equipment are unfounded. The T-Mobile

letter that FPL alleges is the catalyst for this emergency rule request petition was dated March 6, 2006. *See* Petition, Attachment D. There was subsequent correspondence between the parties in March 2006, including T-Mobile's transmittal of a redlined mark up of the draft Wireless Antenna Attachment Agreement. A review of this correspondence reveals a fairly normal business exchange of drafts and other information. T-Mobile did not, quite simply, run off and make good on its "threatened" complaint and file an FCC action, even though it could have done so during most of the prior two years. Indeed, T-Mobile withdrew its statement about potentially seeking an FCC complaint and T-Mobile has continued to negotiate in good faith. Contrary to FPL's own statement of cooperation in the correspondence (*See* Attachment 2), FPL is attempting to create its own exigent circumstances, seven weeks after T-Mobile's alleged threat and three weeks after it was withdrawn. A dispute regarding the pole attachment agreement does not exist, and to the extent there is one, it is not appropriate for this Commission to hear such a dispute as such matters are reserved to the FCC. The petition for an emergency rule should be dismissed and the negotiation should be allowed to run its course, as T-Mobile has tried to do.

## III. FPL's Alternative Declaratory Statement Request is Improper

40. A petition seeking a declaratory statement is appropriate when there is a need for "resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority." Section 120.565(1), Florida Statutes. Pursuant to Rule 28-105.001, Florida Administrative Code, a declaratory statement may only address the application of statutes, rules, or orders to the petitioner and under Rule 28-105.002, the petitioner must provide the "statutory

provision(s), agency rule(s), or agency order(s) on which the declaratory statement is sought." Order No. PSC-06-0306-DS-TL, Docket No. 060049-TL, at 2 (April 19, 2006). FPL's alternative request for the issuance of a declaratory statement fails all of these requirements.

41. At the outset, FPL's petition seeks a declaratory statement "that prohibits T-Mobile from attaching its wireless telecommunications devices at the top of FPL's electric distribution poles." Petition, at 2. The same or substantially the same language is used in the opening paragraph of the Petition, at the top of page 6 of the Petition, in the first paragraph of Section IV of the Petition beginning at page 13, and in the concluding paragraph at page 15. As is well established, this attempt to prescribe T-Mobile's conduct through a declaratory statement is not proper under any application of the declaratory statement law. Order No. PSC-06-0306-DS-TL, Docket No. 060049-TL (April 19, 2006) ("Broward County's request . . . does not conform to Rule 28-106.001, Florida Administrative Code, in that it is asking us to state that BellSouth is not entitled to take certain actions.")

42. Moreover, there is no way to rescue FPL's alternative request for declaratory statement by claiming that it is really seeking an interpretation of statutes, rules, or orders as to its own applicable circumstances because it does not identify any statutes, rules, or orders that it claims are ambiguous or for which it is otherwise in doubt of as to their application to FPL.

43. In its first stated basis for requesting a declaratory statement, FPL asserts that because it is "permitted to adopt safety standards for its facilities" that T-Mobile should therefore be prohibited from attaching its wireless facilities to the electric supply space or at the top of

its distribution poles. Petition, at 12. FPL identifies a rule and statute which provides the basis for it to adopt such safety standards, but it does not raise any question as to the meaning or interpretation of either.

44. FPL goes on to say in this paragraph of its request that it is seeking "a declaration that the prohibition of the attachment of wireless facilities in its electric supply space and at the top of its distribution poles, which is in conformance with the higher load bearing standards of the NESC, *see* Exhibits B and F, is allowed under the Florida Administrative Code, and state law." Petition, at 14. But the problem with this request is that it fails to state with particularity, in violation of section 120.565(1) and (2), the specific provisions of the Florida Administrative Code and state law that it believes may apply "to the petitioner's particular set of circumstances." Likewise, the request is directed to prohibiting wireless carriers' facilities from being attached, which would be a rule of general applicability which is not a proper basis for a declaratory statement. Rule 28-105.001, Florida Administrative Code.

45. For its second basis, FPL asserts that the attachment of wireless equipment to the electric space of a FPL distribution pole, including the pole top, "is an improper practice" within the meaning of section 364.14, Florida Statutes, and is an unsafe practice prohibited by Rule 25-4.038, Florida Administrative Code. Petition, at 12. Section 364.14 does not apply to T-Mobile in that T-Mobile is not a telecommunications company subject to section 364.14, so there is no controversy here with respect to this statutory citation. As for Rule 25-4.038, this rule applies only to local exchange companies providing local residential service. *See* Rule 25-4.002(1), Florida Administrative Code. To be a local exchange company providing local residential service requires a regulated

telecommunications company under section 364.02(14), and T-Mobile is neither. Thus, again, there is no statutory, rule, or order ambiguity with respect to FPL under the statute or rule FPL has identified in this paragraph of its Petition.

46. Furthermore, any attempt to issue a declaratory statement prohibiting the attachment of wireless telecommunications equipment to the electric supply space or to the top of electric utility distribution poles would have the effect of being a rule of general applicability. FPL makes clear in its Petition that it is seeking to preclude not just T-Mobile from making such attachments but any and every wireless carrier from attaching such telecommunications equipment. This is not a permissible use of the declaratory statement process: "A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency." Rule 28-105.001, Florida Administrative Code.

47. Finally, as has been initially identified in the Background section of this Response and which is more fully discussed in the next section of this Response, pole attachment issues are not within the jurisdiction of this Commission. 47 U.S.C. § 224. As such, this Commission does not have the authority to issue any declaratory statement on this subject as "[a] declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders *over which the agency has authority.*" Rule 28-105.001, Florida Administrative Code (emphasis added). As this Commission found in the recent Broward County declaratory statement, it was not proper for this Commission to issue a declaratory statement as to the lease agreement between Broward County and BellSouth as that private contract addressed the use of property, not telecommunications service or rates. Order No. PSC-

06-0306-DS-TL, Docket No. 060049-TL, at 6 (April 19, 2006). In the present situation, the issue is a request for a pole attachment agreement that has not yet even risen to the level of a formal dispute, and even if it was a formal dispute, the FCC is the agency with the exclusive jurisdiction to resolve such issues. Thus, the declaratory statement should be denied.

## IV. Federal Preemption

### A. FPL's Petition Concerns Wireless Service Providers Pole Attachment Rights – An Issue Exclusively Under The Jurisdiction Of The FCC

48. FPL's Petition seeks a State rule or declaratory ruling that would prevent wireless telecommunications providers from attaching antennas to the tops of utility poles. In support of its Petition, FPL asserts unsupported and general allegations that such attachments will impair the structural integrity of the poles, and thus jeopardize public and worker safety. However, notwithstanding the vacuous nature of these assertions, the safety, reliability and general engineering of pole attachments by wireless telecommunications providers are issues completely preempted and governed exclusively by the Federal Pole Attachment Act, and thus, in Florida, are subject to the exclusive jurisdiction of the FCC.

49. Federal law completely preempts the field of pole attachments, and clearly enunciates the limited circumstances in which States may regulate the area. Under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, "[w]hen the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes."[5] Preemption occurs when Congress, in enacting a federal statute, expresses a

5 *City of New York v. FCC*, 486 U.S. 57, 63 (1988).

clear intent to preempt state law.[6] Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977). *See also H. Papas v. The Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) (finding that federal law clearly articulated that states could not adopt more stringent labeling and packaging practices for pesticides and citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)); *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983 (7th Cir. 2000)(finding that the Communications Act completely preempted state regulation of mobile telecommunications rates and market entry, and upholding the removal of claims that purported to invoke state law in this area, notwithstanding the presence of a savings clause which permitted consistent state regulation. The court found the requested relief "tread on the very areas reserved to the FCC," *id.* at 989, and the plaintiff could not disguise the federal nature of the claims.).

50. The federal Pole Attachment Act expressly governs the pole attachment rights of wireless telecommunications providers. Specifically, the Pole Attachment Act provides that "[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."[7] The FCC, the federal agency charged with administering the Communications Act, determined in a rulemaking proceeding that the term "telecommunications carriers" as used in Section 224 includes wireless telecommunications carriers, a determination that was upheld by the United States Supreme Court.[8]

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6 *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).
7 47 U.S.C. § 224(f)(1) (emphasis added).
8 *See* Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rule and Policies Governing Pole Attachments, Report and Order, 13 FCC Rcd 6777, 6798-99 ¶¶ 39-41 (1998)

51. The FCC and its staff are very familiar with the esoteric rules, procedures, and practices that communications and utility companies must follow in the world of pole attachment matters. The U.S. District Court for the Northern District of Florida acknowledged this principle in describing the FCC's role over the terms and conditions of pole attachments as "the decisive spotlight," and stated that "the FCC is far more capable than the courts to make such determinations [regarding pole rates and conditions] in an efficient and knowledgeable manner." *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff'd*, 187 F.3d 1324 (11th Cir. 1999). Moreover, questions regarding pole attachment rates and conditions involve a "subject matter [that] is technical, complex and dynamic." *See National Cable Telecommunications Ass'n v. Gulf Power Co.,* 534 U.S. 327, 339 (2002).

52. The Pole Attachment Act also sets forth the only circumstances in which wireless attaching entities may be denied access – including the very issues raised in FPL's petition – safety, reliability and general engineering purposes, and provides the exclusive process for resolving disputes governing such denials of access. Specifically, to the extent a dispute arises concerning the safety, reliability or engineering of a particular pole top attachment, that dispute would necessarily be presented to the FCC or to a state regulatory agency ***if*** that agency has certified with the FCC to regulate the rates, terms and conditions of pole attachments in accordance with the procedures set forth in Section 224(c)(3).

53. The Pole Attachment Act clearly preempts state jurisdiction over pole attachment matters except to the extent expressly provided in the Act. 47 U.S.C. § 224(c). Under the express

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(recognizing that wireless providers are "telecommunication carriers" under 47 U.S.C. § 224 and therefore entitled to access to the poles); National Cable Telecommunications Ass'n v. Gulf Power Co., 534 U.S. 327 (2002) (upholding wireless providers' attachment rights).

terms of the statute, the FCC has jurisdiction over pole attachment matters unless a state affirmatively certifies to the FCC that it not only regulates these matters but that it has issued and made effective rules and regulations to this effect.[9] Absent such certification, "the FCC shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). The Pole Attachment Act's certification requirements apply equally to access issues. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and CMRS Providers,* Order on Reconsideration, 14 F.C.C.R. 18049, 18074 ¶ 72 (1999) ("We require any party seeking to demonstrate that a state regulates access issues to cite the state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum."). Florida has not so certified,[10] and therefore, does not have authority to entertain FPL's Petition. The FCC previously has asserted its jurisdiction over disputes involving terms and conditions of pole access where pole owners have sought to avoid the FCC's jurisdiction by filing state court proceedings. *See In re Mile Hi Cable Partners, et al. v. Public Service Company of Colorado*, 17 FCC Rcd 6268, 6271 (March

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9 Section 224(c) provides that "in any case where [pole attachment] matters are regulated by a State" then the FCC will not have jurisdiction over such matters. The FCC's regulations identify the method by which States are to certify that they regulate pole attachments. These regulations provide:
(a) If the Commission does not receive certification from a state that:
(1) It regulates, rates, terms and conditions for pole attachments;
(2) In so regulating such rates, terms and condition the state has the authority to consider and does consider the interests of the subscribers of cable television services as well as the interests of the consumers of the utility services; and,
(3) It has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available within the state), it will be rebuttably presumed that the state is not regulating pole attachments.

10 See States That Have Certified That They Regulate Pole Attachments, 7 FCC Rcd 1498 (1992). Notably, the Florida Public Service Commission attempted to assert jurisdiction over poles by certifying to the FCC that it regulated pole attachment matters in 1979. However, the Florida Supreme Court rejected its certification order finding that the Florida PSC did not have statutory jurisdiction to regulate pole matters. See Teleprompter Corporation v. Paula F. Hawkins, 384 So.2d 648 (Fla. 1980).

28, 2002). The FCC has also adjudicated numerous disputes about the rates, terms and conditions of access in Florida. *See, e.g., Time Warner Entertainment/Advance-Newhouse Partnership v. Florida Power & Light Company*, 14 FCC 9149 (rel. June 9, 1999); *See, e.g., Time Warner Entertainment/Advance-Newhouse Partnership v. Florida Power & Light Company*, 14 FCC 9149 (rel. June 9, 1999); A*merican Cablesystems of Florida, Ltd. v. Florida Power and Light Co.*, 10 FCC Rcd 10934 (June 15, 1995); *Cablevision Industries Of Middle Florida, Inc., v. Florida Power Corp.*, 4 FCC Rcd 2579 (March 27, 1989); *Comcast Cablevision Of Perry, Inc., Complainant, v. Florida Power Corporation*, 4 FCC Rcd 2577 (March 27, 1989).

### B. FPL's Petition Is An Attempt To End Run Binding FCC Precedent On The Issue Of Pole Top Attachments

54. The FCC repeatedly has rejected utility requests to prohibit attachments to the tops of poles. In 1999, the FCC declined to adopt a rule that would have reserved the space on the top of the poles, above what is sometimes referred to as the "communications space," solely for use by electric facilities.[11] FPL filed comments in that rulemaking proceeding and, while FPL challenged portions of the FCC's 1999 Order on Reconsideration in federal court, it did not seek review of the FCC's decision declining to adopt a rule prohibiting communications attachments in or above the power supply space — including pole tops. *See Southern Co. v. FCC*, 293 F.3d 1338 (11 Cir. 2003) (listing FPL as petitioner).

55. Several years later, upon learning that some utilities were refusing arbitrarily to accommodate the requests of some wireless carriers to place antennas on pole tops, the

11 See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and CMRS Providers, Order on Reconsideration, 14 F.C.C.R. 18049, 18074 ¶ 72 (1999). FPL filed comments in the proceeding that led to this decision. See id. at Appendix A.

FCC issued a Public Notice reminding utilities of the FCC's refusal to adopt a rule creating a presumption against pole top attachments and admonishing utilities for denying wireless providers access to the pole tops.[12] In that ruling, the FCC unequivocally stated that under federal law, pole owners cannot refuse to allow antenna attachments at the top of poles except for the reasons articulated in the Act – "where there is insufficient capacity, or for reasons of safety, reliability and generally applicable engineering standards."[13] As set forth above, the process for resolving disputes about the safety, reliability and engineering standards for pole attachments must be resolved pursuant to the terms of the Act – either before the FCC or pursuant to the regulations of a certified State.

56. The FCC's decision to refrain from adopting a rule prohibiting pole top attachments is binding precedent. FPL could have sought review of the FCC's decision in its 1999 Reconsideration Order or the December 2004 Public Notice – either through a petition for reconsideration or an appeal to federal court but it did not. [14] Instead, FPL chose to file with this Commission its emergency rule or alternative declaratory statement Petition eight years after the FCC first rejected its pole-top arguments, and well after the public notice reminding pole owners that the pole top prohibition had been rejected by the FCC. FPL's filing is nothing more than a much belated, thinly veiled attempt to end–run the

12 Public Notice, Wireless Telecommunications Bureau Reminds Utility Pole Owners Of Their Obligations To Provide Wireless Telecommunications Providers With Access To Utility Poles At Reasonable Rates, DA 04-4046 (released Dec. 23, 2004) ("[W]e take this opportunity to reiterate that the Commission declined . . . to establish a presumption that space above what has traditionally been referred to as "communications space" on a pole may be reserved for utility use only.").
13 See id.

14 See 47 C.F.R. §1.429; 47 U.S.C. § 402(a); In the Matter of Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses NextWave Personal Communications, Inc. and NextWave Power Partners Inc. Petition for Reconsideration, 15 FCC Rcd 17500, ¶ 10 (Sept. 6, 2001) (stating "we believe that in some instances it may be proper for a party to challenge the Commission's public notices that establish or deny rights").

FCC's binding precedent and obtain the same results the utility industry sought in 1998 and which the FCC specifically rebuked at that time and in its later December 2004 Public Notice.

57. Furthermore, if this Commission were to grant FPL's Petition, and deny wireless providers access to the top of the poles, such a decision would effectively prevent wireless attachers from providing telecommunication service to certain areas in Florida. This type of decision would not only adversely affect T-Mobile and other wireless providers, but would also violation federal law under 47 U.S.C. § 253.

58. Section 253 of the Telecommunications Act of 1996 was one of the primary measures implemented by Congress to ensure that its goal of encouraging the development of local competition would not be frustrated by state and local governments through the passage of restrictive local regulations or requirements. As such, Section 253 preempts state or local statutes, regulations, or legal requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Congress vested the jurisdiction necessary to preempt and correct violations of Section 253(a) or (b) with the F.C.C.[15] Thus, to the extent that this Commission granted the relief requested in FPL's Petition, that action would have the unlawful effect of prohibiting wireless providers from providing service.

## V. Conclusion

57. In the final analysis, the FCC is the agency with the jurisdiction to address any complaint FPL or T-Mobile may have with respect to any attachments being made to FPL's electric utility distribution poles pursuant to the Pole Attachment Act. Such a FCC proceeding, potential or actual, should not impact this Commission's authority or jurisdiction under

15 See 47 U.S.C. § 253.

Florida law to adopt those standards and other requirements regarding the strengthening of electric utility infrastructure, whether in Docket No. 060173-EU or elsewhere, provided such actions do not stray within the purview of the Pole Attachment Act. But as a matter of Florida law, FPL has failed to provide a basis for the issuance of an emergency rule or the issuance of a declaratory statement, and accordingly FPL's Petition should be dismissed.

WHEREFORE, T-Mobile respectfully requests that the Commission deny both FPL's Petition for Emergency Rulemaking and Alternative Request for Declaratory Statement and that this docket be closed.

Respectfully submitted this 12th day of May, 2006.

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and

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March 9, 2006

Maria Browne, Esq.
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, DC 20006-3458

Re: T-Mobile Request for Wireless Attachments to Florida Power & Light Poles

Dear Ms. Browne:

This firm represents Florida Power & Light Company ("FPL") in connection with the issues raised in T-Mobile's letter of March 6, 2006. I am writing to let you know that FPL is treating the issues raised in that letter with due concern and consideration.

I want to assure you that FPL is earnestly working to provide T-Mobile with a substantive response to its letter by March 17, 2006. In the meantime, please feel free to contact me, or my colleague Ray Kowalski, at (202) 274-2909, if you have any questions or concerns.

Sincerely,

Charles A. Zdebski

cc: Florida Power & Light
Alex Starr
Elizabeth Mumaw

Attachment 1

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March 17, 2006

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RE: T-Mobile Request for Wireless Attachments to Florida Power & Light Poles

Dear Ms. Browne:

As promised in our letter of March 9, 2006, this is Florida Power & Light Company's ("FPL") substantive response to your letter of March 6, 2006, on behalf of T-Mobile USA Inc.

*The Parties' Interactions to Date*

In the first part of this letter, I would like to address the chronology of the dealings between the parties with which T-Mobile's letter begins. Be assured that FPL recognizes that the FCC has declared that electric utilities have an obligation to allow access to their distribution poles by wireless telecommunications carriers. FPL also recognizes and appreciates T-Mobile's frustration with the pace of the negotiations to accomplish that access. These unavoidable delays were caused by a series of events, discussed more fully below, and not by any deliberate purpose by FPL to deprive T-Mobile, or any other wireless carrier, of lawful access to its distribution poles.

While FPL does not agree with all of the detail and implications contained in T-Mobile's chronology, FPL does not believe that it is productive to engage in a point-by-point response. Rather, FPL wishes to bring to T-Mobile's attention several factors critical to understanding the parties' interactions in this matter. The first factor is that attachment requests by wireless telecommunications carriers is a relatively new phenomenon. To accommodate these requests, FPL contracted with Alpine Communications Corp. to develop a *Permit Application Process Manual for use by Wireless Antenna Companies*. That manual will comprise an exhibit to the Wireless Antenna Attachment Agreement, which will be the master licensing agreement for wireless attachments. FPL and Alpine have been working diligently on the manual, which is now nearly complete. Without the finalized manual, FPL's efforts to address T-Mobile's access request as rapidly as T-Mobile might have preferred have been hampered.

Attachment 2

The second critical factor is that the same FPL employees who must provide input to the Manual and the Agreement must also perform other critical duties within the utility. These duties include hurricane related duties. This means that the same FPL employees working with entities such as T-Mobile on attachment issues are, following a storm event, pressed into electric service restoration duty in the field. The restoration of safe, reliable electric service to the citizens of Florida following a storm event takes priority over all FPL employees' other duties and responsibilities. You will recall that during the past two years Florida was besieged by an unusually active hurricane season. The 2004 hurricane season was one of the costliest on record in the United States as hurricanes Charley, Frances, Jeanne and Ivan pummeled Florida. In 2005, hurricanes Katrina and Wilma paid visits to Florida. Each of these storms caused unusual and prolonged demands on the time of FPL employees.

While FPL and T-Mobile can endlessly debate the timeliness of FPL's responses under the circumstances then existing, FPL believes that a more productive route would be to address T-Mobile's concerns as of today and going forward.

*Moving Forward in Good Faith*

In the belief that the parties should acknowledge where they are today and move as quickly as possible to address T-Mobile's request, in the second part of this letter FPL will address T-Mobile's specific concerns and requests. T-Mobile's first request is the timeframe within which FPL intends to provide T-Mobile with the proposed rental rate and the exhibits to the Agreement. T-Mobile asked that the further negotiations of this agreement not extend beyond May 31, 2006.

FPL has provided T-Mobile with a rate calculation formula within the agreement received by T-Mobile in May, 2005. Although FPL does not have sufficient information about the devices T-Mobile anticipates attaching to FPL's poles, once T-Mobile is able to provide the details of the equipment it intends to install on FPL poles, FPL will be able to provide T-Mobile with the requested rate calculations within fourteen (14) days thereafter. The parties can then address rate issues immediately and hopefully conclude this matter by May 31, 2006 or soon thereafter.

FPL submits that it is possible to move ahead immediately on this matter, and that the ability to do so lies with T-Mobile. T-Mobile presently has a substantially complete draft of the Agreement (only the rental rate calculation and the exhibits -- principally the Manual -- are missing). If T-Mobile prefers, this Manual can be removed as an exhibit to the agreement. In the alternative, if T-Mobile prefers that the Manual remain an exhibit to the agreement, this exhibit can be provided to T-Mobile by March 31, 2006.

In your letter, you state that T-Mobile has concerns with three provisions of the draft Agreement. First, you contend that, under FCC policy and precedent, FPL cannot deny T-Mobile the right to occupy the top of FPL's poles. This issue is likely to be the subject of careful consideration and negotiation, given the safety, engineering and reliability concerns that are created by the attachment of antennas to poles – concerns that only become greater as such antennas are placed higher and higher on the poles. These concerns are further magnified by an extremely active hurricane season and predictions of further, extreme storm activity for the next decade at least. As you know, many of these storms made landfall on Florida which has suffered the devastating effects of these highest category storms. In recognition of these severe weather conditions the Florida Public Service Commission ("PSC") is specifically addressing the need to "harden" and protect the state's electric delivery infrastructure, whether through undergrounding, more stringent construction standards or storm emergency plans, in multiple proceedings.[1] The PSC is looking to Florida electric utilities such as FPL to fulfill their responsibilities to address and implement solutions to the PSC's concerns.

Against the backdrop of and notwithstanding the foregoing, FPL is willing to consider and study the safety, engineering and reliability effects of the specific equipment that T-Mobile intends to place on particular poles, but this leads to another of T-Mobile's objections. T-Mobile believes that submission to FPL of wireless attachment design plans and sample actual working devices for evaluation of safety, engineering and reliability issues results in unreasonable delay and "unnecessary burden" and forces disclosure of proprietary information.

FPL disagrees that Federal Communications Commission ("FCC") precedent establishes FPL's request for engineering specifications and design samples as unlawful.[2] FPL is willing, of

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[1] Docket No. 060172: Proposed rules governing placement of new electric distribution facilities underground, and conversion of existing overhead distribution facilities to underground facilities, to address effects of extreme weather events.

Docket No. 060173: Proposed amendments to rules regarding overhead electric facilities to allow more stringent construction standards than required by National Electric Safety Code.

Docket No. 060198: Requirement for investor-owned electric utilities to file ongoing storm preparedness plans and implementation cost estimates.

Docket No. 060226: Requests for approval of electric utilities' long-term energy emergency plans, filed pursuant to Rule 25-6.0185, F.A.C.

[2] Paragraph 84 of the *Consolidated Partial Order on Reconsideration*, 16 FCC Rcd 12103 (2001), cited in your letter as support for your position, does not address the utility's evaluation of, and right to evaluate, equipment sought to be placed on the utility's poles. Rather, this paragraph addresses whether cable companies can be required to certify that they are not providing telecommunications service. Section 224(f)(2) of the Communications Act, 47

course, to enter into a confidentiality and non-disclosure agreement with T-Mobile to prevent the misuse of T-Mobile's commercially sensitive data. With that protection in place, T-Mobile should be willing to cooperate in facilitating the engineering evaluations that are in the best interests of both parties and the citizens of Florida. Mr. Jim West, whom you identify as T-Mobile's representative, has provided such information to Troutman Sanders in other similar situations, which resulted in the successful evaluation of wireless attachment safety, engineering and reliability concerns. We would be happy to work in the same way again with Mr. West.

Finally, you question the indemnity provision in the draft Agreement. FPL is willing to discuss a mutually satisfactory resolution to the indemnification issue.

As we hope we have shown above, FPL has not been dilatory in addressing wireless access issues. FPL is prepared to work with T-Mobile to expeditiously resolve T-Mobile's access request.

Please contact me, or my colleague Ray Kowalski at (202) 274-2909, to discuss the parties' next steps in acting to resolve this matter.

Sincerely,

Charles A. Zdebski

cc: Florida Power & Light Company
Alex Starr
Elizabeth Mumaw
Raymond A. Kowalski, Esq.

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U.S.C. § 224(f)(2) specifically reserves to the electric utility the right to deny access to the pole on engineering grounds. Implicit in this right is the authority to review the specific attachment proposed to be made.

COLE, RAYWID & BRAVERMAN, L.L.P.
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MARCH 30, 2006

**BY FIRST CLASS MAIL & E-MAIL**

Charles A. Zdebski
Troutman Sanders LLP
401 9th Street, NW
Suite 1000
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**Re: T-Mobile Request for Wireless Attachment to Florida Power & Light Poles**

Dear Mr. Zdebski:

I am writing in response to your letter dated March 17, 2006 detailing the reasons for Florida Power & Light's ("FPL") delay in providing T-Mobile USA, Inc. ("T-Mobile") with a complete pole attachment agreement and FPL's desire to continue attachment negotiations in good faith. T-Mobile appreciates FPL's willingness to work expeditiously to facilitate T-Mobile's access request. Towards that end, T-Mobile has authorized me to negotiate the terms of attachment directly with you under the timeframe set forth in my initial letter of March 6, 2006, and will not seek FCC intervention at this time. If we are unable to reach a resolution by the end of May, however, T-Mobile will need to reconsider whether to delay any further, a request for FCC intervention. Nearly two years have passed already and T-Mobile cannot afford any further delay to its access of FPL poles.

In addition, I want to clarify that T-Mobile's substantive concerns with the agreement extend beyond the three "examples" highlighted in my letter of March 6, 2006. I will be providing you today, under separate cover, a redline of the proposed agreement detailing the various terms and conditions and specific language that T-Mobile finds problematic. In addition, T-Mobile intends to provide comment on the *Permit Application for use by Wireless Antenna Companies* manual, which it expects to receive from FPL by March 31, 2006, as stipulated in your March 17, 2006 letter, as well as any other information not yet provided. And, pursuant to FPL's request, T-Mobile currently is in the process of developing mechanical specifications for various pieces of equipment that it plans to attach to FPL's poles. These specifications will include the approximate dimensions, weight, and wind load of the equipment that T-Mobile plans to attach to FPL poles.

I look forward to working with you to obtain a mutually satisfactory resolution of the terms and conditions governing T-Mobile's access to FPL's poles.

Sincerely,

Maria Browne / RT

Maria Browne

cc: Alex Star
Elizabeth Mumaw
Raymond A. Kowalski
Edwin Lee
Kathleen Ham
Allan Tantillo

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by electronic mail this 12th day of May, 2006.

Lawrence Harris
Office of General Counsel, Room 370
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