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May 30, 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 Motion to Stay Proceeding 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

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 30, 2006

T-MOBILE'S RESPONSE IN OPPOSITION TO FPL'S MOTION TO STAY PROCEEDING

T-MOBILE SOUTH LLC ("T-Mobile"), pursuant to Rules 28-103.006, 28-105.001-105.003, and 28-106.204, Florida Administrative Code, hereby responds in opposition to the Florida Power and Light Company ("FPL") Motion for Stay of Proceedings (hereinafter, "Motion"). T-Mobile respectfully requests that the Florida Public Service Commission ("Commission") deny the Motion and dismiss the original Petition for Emergency Rule or, Alternatively, Declaratory Statement (hereinafter, "Petition"), as it would be improper to stay these proceedings since by filing the Motion FPL has admitted that the ultimate relief being sought, the issuance of an emergency rule, is no longer necessary or appropriate. Given the absence of any emergency, the only appropriate course is to deny the Motion, dismiss the Petition, and close the docket. As grounds for denying the Motion, T-Mobile states:

A. Introduction

1. By asking the Commission to now stay its Petition, FPL has admitted that there is no emergency or other circumstance compelling any action by this Commission at this time. This fact alone is a more than sufficient legal basis for denying the Motion and the Petition. This is not a safety issue, but rather an issue of FPL's continuing refusal to comply with federal law that requires it to provide access to its poles upon just and reasonable rates, terms, and conditions. This is FPL in the wrong forum with the wrong

issue further dragging out two years of its failure to negotiate a pole attachment agreement with a generously patient T-Mobile. The admission in the Motion that public safety peril is not imminent is tantamount to a withdrawal of its Petition, and the Commission should dismiss both the Motion and Petition.

B. There is No Legal or Factual Basis for Leaving this Docket Open

2. These proceedings were initiated when FPL petitioned this Commission to issue an emergency rule regarding wireless pole attachments in the "electric supply space" of its electric utility distribution poles or to the top of such poles. As T-Mobile demonstrated in its Response to the Petition filed on May 12, 2006, the issuance of an emergency rule requires compliance with a very high statutory standard: "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." Section 120.54(4), Florida Statutes. With FPL's admission, there is no immediate danger, no emergency, no need for an emergency rule, and thus no basis for continuing these proceedings.

3. The Commission's authority with respect to an emergency rule or declaratory statement request is quite basic – the Commission is to grant or deny the petition. Section 120.54(7)(a), Florida Statutes; Rule 28-108.003, Florida Administrative Code. While section 120.54(4) does not itself have any time requirements with respect to how quickly an agency must process a request for an emergency rule, agencies are granted the procedural flexibility to act quickly to address the emergency subject to basic due process considerations. This authority, combined with the fact that an emergency rule may be effective for only 90 days, conveys the Legislature's intent that there must be sufficient

immediacy to the situation as to require immediate action so as to bridge the gap until a regular rulemaking proceeding can be concluded.

4. As FPL acknowledges in its Motion, the Commission is proceeding with its rulemaking in Docket No. 060173-EU. But regardless of the progress of that other docket, the fact that FPL is now asking this Commission to take no further action until the conclusion of that other docket certainly demonstrates the absence of any emergency or any other reason for keeping this docket open.

5. Likewise, the contingent possibility FPL advances for keeping this docket on hold is equally unsatisfying legally and lacking in any common sense. Basically, FPL wants this docket held open in the event T-Mobile files or threatens to file a complaint at the FCC. In essence, FPL is asking this Commission to keep this docket open for the possibility that *if* FPL refuses to negotiate in good faith for a pole attachment under federal law within the exclusive jurisdiction of the FCC, and *if* T-Mobile files or threatens to file an FCC complaint, *then* FPL wants to be able to complain about such a FCC petition to this Commission through this docket. This is an absurd request, and one made without any legal authority or factual basis.

6. The other contingent possibility that FPL holds out is that "if FPL believes that the threat to the safety and reliability of its system and the public intensifies" then it will seek to have the stay lifted. Motion, at ¶ 4. Read in context, it seems that this request is that if things do not go the way that FPL wants in Docket 060173-EU, then it will seek to accomplish in one docket what it cannot accomplish in the other docket. The proper legal challenge to a rule proceeding is a draw out or rule challenge under section 120.56, Florida Statutes, not a petition for emergency rule.

7. Finally, this wait and see approach begs the question – what exactly is FPL seeking? As T-Mobile stated in its May 12, 2006, Response to the Petition, FPL did not provide any proposed rule language as to the emergency rule it was seeking. If the Commission thinks it might be appropriate to keep this docket open, as the parties move forward in time, the facts a month or six months from now will be different from those present today and certainly from the time of FPL's Petition. Thus, any reinstatement of this docket is going to have to involve some kind of new filing by FPL to explain the new circumstances and the specific nature of its request it would be seeking, which would effectively render its initial Petition moot. The Commission simply should not waste any further time or energy with this docket and do the right thing – dismiss the Motion and Petition and close the docket.

8. It must be noted that in making its request to stay, FPL makes a number of self-serving and incorrect statements regarding T-Mobile's position and the facts leading up to the filing of the FPL Petition. For the most part, T-Mobile shall rely upon its Response of May 12, 2006, to the Petition. However, there are two matters that do need to be addressed regarding FPL's Motion. First, FPL's description of Section 224 of the Pole Attachment Act and this Commission's jurisdiction *vis a vis* the FCC's is wrong. Second, FPL has improperly utilized its Motion to make an unauthorized reply to the T-Mobile Response. While the Commission does not need to address these two matters in order to dismiss the Motion and the Petition, it is necessary to set the record straight so that the Commission is properly informed regarding the law on these issues.

C. The FCC Under Section 224 of the Federal Pole Attachment Act May Address Safety

9. At the outset it must be stated that the FCC can, and does, exercise jurisdiction over safety issues when they become pole attachment issues, including situations when "safety issues" are raised as a pretext for denial of access to wireless carriers or other prospective attaching entities. The Pole Attachment Act provides that utilities must provide nondiscriminatory access to telecommunications carriers (including wireless carriers, as the Supreme Court has already found, *National Cable Telecommunications Ass'n v. Gulf Power Co.,* 534 U.S. 327, 339 (2002)),[1] with the exception that utilities may deny access "for reasons of safety, reliability and generally accepted engineering principles." 47 U.S.C. § 224(f)(1), (2). While, as FPL points out in its filing at paragraph 6, the FCC stated that "it would not invalidate summarily all local requirements," in the exact same paragraph the FCC made equally clear that state and local safety requirements apply *only* if there is no "direct conflict with federal policy. . . . Where a local requirement directly conflicts with a rule or guideline we adopt herein, our rules will prevail." *In the Matter of* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order,* CC Dkt. Nos. 96-98, 95-185, 11 FCC Rcd. 16073 ¶ 1154 (1996) ("*Local Competition Order*"). In this case, the FCC clearly articulated its policy:

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[1] *See also In the Matter of* Omnipoint Corporation v. PECO Energy Company, *Memorandum Opinion and Order*, 18 FCC Rcd 5484, ¶¶ 2, 6 (2003) (explaining that the Commission's general authority to regulate the rates, terms and conditions for attachments by a cable television system of provider of telecommunications service, includes wireless telecommunications service attachments); 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* (December 23, 2004) (reiterating the utility pole owner's obligation to provide wireless telecommunications providers with access to poles at reasonable rates).

> Providing wireless carriers with access to existing utility poles facilitates the deployment of cell sites to improve the coverage and reliability of their wireless networks in a cost-efficient and environmentally friendly manner. Such deployment will promote public safety, enable wireless carriers to better provide telecommunications and broadband services, and increase competition and consumer welfare in these markets. . . . [W]e take this opportunity to reiterate that the Commission declined, in [the Order on Reconsideration of the Local Competition Order], 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. Thus, the only recognized limits to access for antenna placement by wireless telecommunications carriers are those contained in the statute: "where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes."[2]

The FCC went on to say that it would consider the merits of "any individual case" alleging safety, reliability or engineering as a basis for denial.[3] Thus, any state or local blanket regulation purporting to prohibit pole top or electric supply space attachments would conflict directly with federal policy and could not stand.

10. Moreover, in the same Order cited by FPL, the FCC also specifically rejected "the contention of some utilities that *they* are the primary arbiters of such concerns, or that their determinations should be presumed reasonable," while noting that § 224(f)(1) "reflects Congress' intention that utilities must be prepared to accommodate requests for attachments by telecommunications carriers and cable operators."[4] And again, on reconsideration of that Order, the FCC refused to categorically restrict the type of pole attachments that must be allowed, reiterating that "when evaluating any attachment request, including a wireless attachment, access determinations are to be based on the

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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* (December 23, 2004) (citing *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, 19074 ¶72 (1999)).

[3] *Id.*

[4] *Id.* at 16074 ¶ 1158; *see also In the Matter of* Kansas City Cable Partners v. Kansas City Power & Light Company, 14 FCC Rcd 11599, ¶ 11 (1999) (stating that "the utility is not the final arbiter of [standards for safety, reliability, and generally applicable engineering standards] and its conclusions are *not* presumed reasonable") (emphasis added).

statutory factors of safety, reliability, and engineering principles."[5] Those statutory factors are subject to a reasonableness determination by the FCC (or a *certified* state, which Florida is not) on a case by case basis, where, as here, a prospective attaching entity protests the denial of access on one of those, or other, grounds.

11. Indeed, as stated by the FCC only two months ago in response to similar claims by another utility pole owner, Entergy Arkansas, Inc., that the FCC lacked jurisdiction and "specific expertise with respect to electric utilities and their unique safety and operational issues," the FCC ruled:

> Pursuant to the provisions of section 224, the Commission, through its Bureaus, has exercised its jurisdiction in prior pole attachment complaint proceedings to determine whether a pole owner's adoption or application of specific engineering standards was unjust and unreasonable. Making such a determination does not require the Commission to establish a set of engineering standards that utilities must use across-the-board. Indeed, in adopting rules governing pole attachments, the Commission expressly declined to establish a comprehensive set of engineering standards that would govern when a utility could deny access to its poles based on capacity, safety, reliability, or engineering concerns. The Commission concluded, instead, that "the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis."[6]

12. Despite FPL's claim that the FCC has extremely truncated jurisdiction over safety issues, the FCC routinely considers allegations that attachments will pose safety problems. *See, e.g., In the Matter of the Cable Television Assoc. of Georgia v. Georgia Power Company*, 2003 FCC Lexis 4463, *14 (2003) (dismissing a pole owners' alleged safety issues as they were not supported by the record because the pole owner could not point to a single instance of property damage or personal injury caused by the pole attachments); *In the*

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[5] *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, 19074 ¶72 (1999).

[6] *Arkansas Cable Telecommunications Association v. Entergy Arkansas, Inc.*, 21 FCC Rcd 2158, ¶¶ 8-10 (rel. March 2, 2006)(internal citations omitted).

Matter of Cavalier Telephone, LLC v. Virginia Electric and Power Company, Order and Request for Information, File No. PA 99-005, DA 00-1250 at ¶ 19 (June 7, 2000) (requiring a utility pole owner to "cease and desist from selectively enforcing safety standards or unreasonably changing the safety standards" that the party seeking to attach to its poles must adhere); *In the Matter of Newport News Cablevision, Ltd. Communications, Inc. v. Virginia Electric and Power Company, Order,* 7 FCC Rcd. 2610 ¶ 15 (April 27, 1992) (considering the reasonableness of VEPCO's guying requirements). The Commission has also affirmatively considered specific safety requirements in rulemaking proceedings, such as the impact of overlashing by attaching entities and third parties, including the impact on wind and weight load burdens. *In the Matter of Amendment of Rules and Policies Governing Pole Attachments, In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996,* Consolidated Partial Order on Reconsideration, CS Dkt. Nos, 97-98, 97-151, 16 FCC Rcd. 12103 ¶¶ 73-78 (2001). Accordingly, the FCC has, and does exercise, jurisdiction over pole safety issues when they are really pole attachment issues outside the statutory exemption.

13. That said, FPL has not raised legitimate safety concerns in its pleadings with this Commission – indeed, its Petition and the Motion are completely devoid of any evidentiary support for its vacuous allegations. FPL's real dispute concerns its responsibility to provide access upon federally regulated rates, terms, and conditions. As the statute and FCC rules make clear, access disputes arising in states that have not certified to regulate poles pursuant to the requirements laid out in 47 U.S.C. §224, are

governed by the FCC.[7] The only proper course at this point is for this Commission to deny the Motion and proceed to dismiss the Petition.

D. Part of FPL's Motion Constitutes an Unauthorized Reply to T-Mobile's Response

14. For the record, it must also be noted that FPL has used its Motion to make an unauthorized reply to T-Mobile's Response to the Petition. This Commission has not and cannot tolerate such improper pleadings. Order No. PSC-00-177-PCO-TP, at 5 (Sept. 28, 2000) ("neither the Uniform Rules nor our rules contemplate a reply to a response to a Motion"). *See also*, Order No. PSC-00-2233-FOF-TP, at 3 (Nov. 22, 2000); Order No. PSC-04-0333-PCO-SU (Mar. 30, 2004); Order No. PSC-03-0525-FOF-TP (Apr. 21, 2003); Order No. PSC-04-0636-FOF-TL, at 2 (July 1, 2004).

15. T-Mobile especially takes offense with the gratuitous Motion commentary as in some cases it completely misrepresents the facts. FPL's assertion that it has "worked in good faith with T-Mobile to develop a pole attachment agreement" (Motion, at ¶ 9) is belied by the facts. For example, notwithstanding T-Mobile's diligent efforts to engage in meaningful pole attachment negotiations, FPL failed to communicate with T-Mobile for nearly two years while it allegedly drafted a "permit application process manual" to address the particular technical parameters of wireless pole attachments. However, the manual that FPL took so long to "develop" was in fact the same manual used for wireline attachments with a few minimal additions pertaining to wireless carriers.[8]

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[7] *See In the Matter of Cavalier Telephone, LLC v. Virginia Electric and Power Company, Order and Request for Information*, File No. PA 99-005, DA 00-1250 at ¶ 15 (June 7, 2000) (noting that a pole owner's grant or denial of a permit request to access a pole are governed by the Commission's rules).

[8] For example, the section of the manual pertaining to wind loading – the crux of the alleged safety problems relating to hurricanes – was developed for applicants for attachments of *cables* to FPL poles – only two sentences at the bottom of that section were actually developed to address wind loading for wireless attachments – and those sentences actually apply to all "other equipment" not just antennas. Petition, Exhibit C, Manual at 25.

16. Earlier this year, when FPL finally began to provide some response to T-Mobile and FPL otherwise asserted that it would diligently pursue negotiations,[9] at FPL's request T-Mobile provided specifications about its proposed attachments to FPL. The information T-Mobile provided to FPL contained the necessary data for evaluating compliance with the wind loading criteria set forth in the manual. But it appears that FPL did not evaluate T-Mobile's equipment pursuant to the criteria set forth in its manual, as the dire and sweeping allegations set forth in its Petition and the Motion ignore everything T-Mobile provided. The instant Motion and its request to keep this docket open only reinforces the conclusion that FPL filed its Petition in an attempt to further waylay the pole negotiation process – heightened by the hurricane season – to further delay its obligation to provide T-Mobile with timely access to its poles as required by federal law. To the extent FPL's Motion provides a reply to the T-Mobile Response, the Commission should ignore this information as an unauthorized reply, as it has done in the past, and otherwise deny the Motion and Petition.

E. Conclusion

17. FPL has admitted that there is no emergency meriting the issuance of an emergency rule or a declaratory statement. Indeed, in filing its Petition and now the instant Motion FPL has sought to turn its failure to provide timely access to its poles under federal law into a Florida PSC dispute about pole safety. In the absence of any immediate danger, the proper course is to dismiss the Petition and not allow this docket to continue to linger. If proper legal circumstances of an immediate danger to the public arise, then the Commission can take such action as is within its legislative mandate. Likewise, the

[9] *See* March 17, 2006 Letter from Charles Zdebski to Maria Browne ("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" and "FPL is prepared to work with T-Mobile expeditiously to resolve T-Mobile's access request").

Commission can and should continue to address safety rules for the strengthening of electric utility infrastructure in Docket No. 060173-EU so long as any such rules are not pole attachment rules within the purview of the Pole Attachment Act. But no matter what happens in Docket No. 060173-EU or at the FCC, this Commission should recognize that under Florida law there is no emergency meriting a stay of these proceedings and the Commission should proceed to issue an order dismissing FPL's Petition.

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

Respectfully submitted this 30th day of May, 2006.

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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 30th day of May, 2006.

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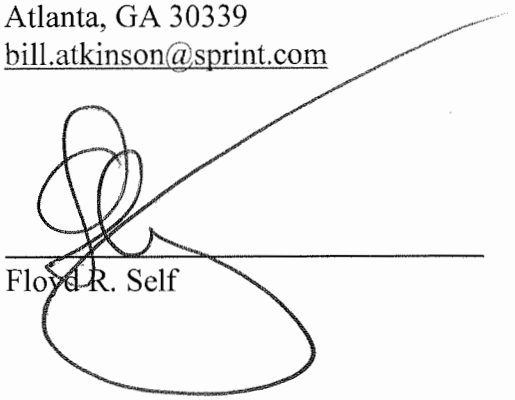

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