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Subject: Electronic Filing for Docket No. 060355-EI - FPL's Motion for Stay of Proceedings
Attachments: Motion to Stay Proceedings.doc



Motion to Proceedings.c

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 060355-EI - Petition for Emergency Rule, or Alternatively, for Declaratory Statement of Prohibiting Wireless Attachments in Electric Supply Space, by Florida Power & Light Company

c. Document being filed on behalf of Florida Power & Light Company.

d. There are a total of 8 pages.

e. The document attached for electronic filing is FPL's Motion for Stay of Proceedings.

(See attached file: Motion to Stay Proceedings.doc)

Thank you for your attention and cooperation to this request.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for Emergency Rule, or)	
Alternatively, for Declaratory Statement Prohibiting))	Docket No. 060355-EI
Wireless Attachments in Electric Supply Space,)	
By Florida Power & Light Company)	Filed: May 22, 2006
_____)		

**FLORIDA POWER & LIGHT COMPANY'S
MOTION FOR STAY OF PROCEEDINGS**

NOW, BEFORE THIS COMMISSION, through undersigned counsel, comes Florida Power & Light Company ("FPL" or the "Company"), and pursuant to Rule 28-106.204(1), Florida Administrative Code, files this Motion for Stay of Proceedings and in support states:

1. On April 24, 2006, FPL filed its Petition for Emergency Rule or, Alternatively, Declaratory Statement ("Petition"). In it, FPL requested that the Commission issue an emergency rule prohibiting wireless telecommunications attachments in electric supply space to remain effective 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. Alternatively, FPL requested that the Commission issue a declaratory statement, pursuant to Rule 28-105.001, *et. seq.*, of the Florida Administrative Code ("F.A.C."), that prohibits T-Mobile from attaching wireless telecommunications devices at the top of FPL's electric distribution poles until the Commission concludes its review of its pole strengthening standards in the proceedings currently before it, including in Docket No. 060173-EU. As FPL stated in its Petition, FPL was motivated to seek emergency relief from this Commission, in part, because T-Mobile asserted, in a letter to FPL that was also sent to the FCC, that it believed that the law mandated that FPL provide access to the electric supply space on its distribution poles. T-Mobile threatened to file a formal complaint against FPL at the Federal Communications Commission ("FCC") if FPL did

not accede to T-Mobile's demands. FPL found itself in a quandary. On one hand, FPL is taking, of its initiative and at the behest of this Commission, steps to improve and strengthen its electric utility infrastructure in Florida as a result increased hurricane frequency and severity. This includes the hardening of its distribution poles by, among other things, implementing the strictest National Electric Safety Code ("NESC") standards to reduce the risk of pole failure in severe weather. Related to this heightened standard is the necessary prohibition on certain types of attachments, including wireless attachments, which increase considerably the wind loading at the top of distribution facilities. On the other hand, taking such measures to protect its infrastructure, the reliability of its provision of electricity and the safety of the public and of workers on the utility pole, all in accordance with Chapter 366, Florida Statutes, and applicable regulations, appeared to subject FPL to legal action by T-Mobile because T-Mobile believed it should have access to the top of FPL's utility poles.

2. On May 3, 2006, T-Mobile filed a Petition to Intervene and Notice of Opposition to FPL's Petition. T-Mobile said it would provide a substantive response to FPL's Petition on or before May 15, 2006. On May 12, 2006, T-Mobile filed a response requesting that the Commission dismiss FPL's Petition (the "Response"). In it, T-Mobile assures FPL and the Commission that it will not seek FCC action at this time and that "at the moment" any fear that it will do so "is unfounded." *See* Response, p. 11. T-Mobile also assures FPL and the Commission that it does not intend to intervene in Docket No. 060173-EU, one of the "Storm Hardening Dockets."

3. On May 15, 2006, Staff circulated draft amendments to Rule 25-6.034, Florida Administrative Code, for consideration. These draft amendments were discussed at the May 19, 2006 rule development workshop in the Commission's Storm Hardening Dockets, Docket Nos. 060172 and 060173.

4. In light of T-Mobile's assurances that it will not pursue FCC action mandating access to the electric supply space on FPL's poles at this time, as well as the Staff's draft rule amendments as they relate to attachments to distribution poles and the apparent accelerated track on which the rulemaking is proceeding, FPL believes that it would be appropriate for the Commission to stay the proceedings in Docket No. 060355-EI pending the outcome of rulemaking in the Storm Hardening Dockets. However, if FPL believes that the threat to the safety and reliability of its system and the public intensifies, FPL will file a motion to lift the stay and request that the proceedings in Docket No. 060355-EI be resumed. Alternatively, if FPL believes the threat to the safety and reliability of its system subsides as a result of the Commission's rulemaking proceedings or other activity, FPL will take appropriate action to terminate this proceeding and request that Docket No. 060355-EI be closed.

5. FPL notes that there are a number of erroneous statements in T-Mobile's May 12 pleading that cannot stand. For example, T-Mobile wrongly alleges in its Response that issues relating to pole attachments are "completely preempted and governed exclusively by the Federal Pole Attachment Act, and thus, in Florida, are subject to the exclusive jurisdiction of the FCC." Response at 23. This is false. With the Pole Attachments Act, Congress did not preempt the entire field of pole attachments issues. Rather, the Act clearly makes room for state regulation by distinguishing between two types of pole attachment issues: (1) contract issues, including the rates, terms and conditions applicable to the attachment, which are within the province of the

FCC, unless a state reverse preempts the federal agency; and (2) safety, reliability, capacity and engineering issues raised by a request for attachment to a pole, which are within the province of the states, which traditionally have regulated in this area, and which are not required to reverse preempt the FCC to exercise this jurisdiction.¹ In other words, unlike jurisdiction over contract issues, which rests initially with the FCC, jurisdiction over safety and reliability issues does not rest with the FCC unless a state does not exercise such jurisdiction by, for example, having regulations related to safety and engineering of utility infrastructure. *See* 47 U.S.C. § 224(c)(1).

6. Even the FCC does not agree with T-Mobile's claim that Congress preempted the field of pole attachments and provided the FCC exclusive jurisdiction unless a state certified to the contrary. In fact, as to state and local regulations regarding safety and reliability issues, the Commission has consistently stated that "state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c)." In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and

¹ Specifically, 47 U.S.C. § 224(c)(1) provides, "Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State." (emphasis added). The dichotomy, set forth in the disjunctive "or" in 47 U.S.C. § 224(c)(1), is continued into the certification requirements where jurisdiction over each type of issue is handled differently under the federal law. Jurisdiction over "rates, terms and conditions" is vested in the FCC unless a state elects to preempt FCC jurisdiction by filing a certification to that effect. Thus, 47 U.S.C. § 224(c)(2) provides that "Each State which regulates the *rates, terms, and conditions* for pole attachments shall certify to the Commission that— (A) it regulates such *rates, terms, and conditions*; and (B) in so regulating such *rates, terms, and conditions*, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services." The Act provides no similar certification requirement for a state to certify that it regulates issues of safety and reliability. Rather, jurisdiction over safety, reliability, capacity and engineering issues rests entirely with the states to the extent they in fact regulate such issues. *See* 47 U.S.C. § 224(c)(1).

Commercial Mobile Radio Service Providers, *First Report & Order*, 11 FCC Rcd 15499, ¶¶ 1154, 1158 (1996). The state therefore need not certify that it regulates such issues in order to have jurisdiction over them. 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, *Order on Reconsideration*, 14 FCC Rcd 18049, ¶¶ 114, 116 (1999).

7. Florida thoroughly regulates issues of safety and reliability. For example, Section 366.04(6), Florida Statutes, delegates to the Commission “exclusive jurisdiction to prescribe and enforce safety standards for transmission and distribution facilities of all public electric utilities.” In addition, Section 366.04(6) directs the Commission to adopt the 1984 edition and any new editions of the National Electrical Safety Code (“NESC”). With respect to reliability and engineering, Section 366.04(2)(c) grants the Commission authority over electric utilities for the purpose of requiring electric power conservation and reliability within a coordinated grid. In addition, Section 366.04(5) provides that the FPSC has jurisdiction over the “planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy.” Pursuant to these statutory provisions, the Commission has promulgated numerous regulations addressing system safety and reliability, and the Commission actively inspects utility poles and audits work orders in connection with construction of transmission and distribution facilities to determine whether there are variances to the National Electric Safety Code (“NESC”).² *See, e.g.*, Rules 25-6.019, 25-6.034, 25-6.0345, 25-6.037, 25-6.039, 25-6.044, 25-6.0455, Florida Administrative Code (2006). The

² The electric utilities are notified by the FPSC when a variance is observed on the pole, and the FPSC asks the utility to ensure the attaching entity remedies any variances.

Commission's draft rules addressing pole safety and reliability, including attachments to poles, are supplemental to existing regulations and inspection practices of the FPSC.

8. In sum, the Pole Attachments Act does not preempt the entire field of pole attachments. The Pole Attachments Act creates a divide over jurisdictional issues and makes clear that the jurisdiction over safety and reliability issues is clearly reserved to states, such as Florida, that regulate in this area. Nothing in Florida's laws thwarts the purposes of the federal law. Rather, Florida's laws work in conjunction with federal law to ensure that parties seeking attachment are permitted to attach in a safe manner.

9. While FPL has been successful in entering into wireless attachment agreements with numerous other entities that permit attachments in the *communications* space of the poles, T-Mobile insists on access to the *electric* supply space of the distribution poles. This is a marked deviation from anything FPL has done before. Attachments in the electric supply space of distribution poles have not been allowed because of the threat to system safety and reliability. Only recently, beginning on or about the time of the March 6 Letter copied to the FCC and attached as Exhibit D to the Petition, has T-Mobile began to pursue an agreement with urgency, and FPL responded to T-Mobile's Letter with details on the interactions between FPL and T-Mobile to date in the March 17 Letter, which is Attachment 2 to T-Mobile's response. Contrary to T-Mobile's allegations, FPL has worked in good faith with T-Mobile to develop a pole attachment agreement that would permit T-Mobile to attach to FPL's facilities in a safe manner.

10. FPL has conferred with counsel for T-Mobile and Sprint Spectrum Limited Partnership d/b/a Sprint PCS and Nextel South Corporation and is authorized to represent that they are opposed to the granting of this Motion.

WHEREFORE, for the above and foregoing reasons, Florida Power & Light Company respectfully requests that the Commission grant FPL's Motion for Stay of the proceedings on FPL's Petition for Emergency Rulemaking and Alternative Request for Declaratory Statement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by electronic mail and by United States mail to the following this 22nd day of May, 2006:

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