

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)

Promotion of Competitive Networks)
in Local Telecommunications Markets)

Wireless Communications Association)
International, Inc. Petition for)
Rulemaking to Amend Section 1.4000 of)
the Commission's Rules to Preempt)
Restrictions on Subscriber Premises)
Reception or Transmission Antennas)
Designed to Provide Fixed Wireless)
Services)

Implementation of the Local Competition)
Provisions in the Telecommunications)
Act of 1996)

Review of Sections 68.104, and 68.213)
of the Commission's Rules Concerning)
Connection of Simple Inside Wiring to)
the Telephone Network)

To The Commission)

WT Docket No. 99-217

CC Docket No. 96-98

COMMENTS OF FLORIDA POWER & LIGHT COMPANY

FLORIDA POWER & LIGHT COMPANY

By: Jean G. Howard
9250 West Flagler Street
Miami, Florida 33174
Telephone: (305)552-3929

Its Attorney

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SUMMARY

Installation of utility facilities within a multi-tenant environment ("MTE") does not create a right-of-way over the entire MTE. Nor does it permit a cable television or telecommunications beneficiary of Section 224 to install its facilities anywhere within the MTE.

The term "right-of-way" as used in 47 U.S.C. § 224 is a defined area. It, like a "pole, duct or conduit," is a tangible physical property with defined dimensions.

The Commission correctly determined that whether a utility owns or controls a right-of-way for purposes of Section 224 is to be determined by the state. In making such a determination, the state court would also necessarily determine the location and dimensions of the right-of-way, if they are not clear on the face of the grant.

Actual use of an undefined right-of-way determines the dimensions. No interest in land is created by a license, permit or oral consent. An easement creates an interest in land. That interest, however, is one of use. It is not a possessory interest. It does not create an estate in the land.

There is no record evidence that a utility, especially an electric utility, has a right-of-way inside an MTE or has a "blanket" or "floating" easement in an MTE. Winstar's reliance on *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993) is misplaced.

Even if a utility had a "blanket" or "floating" easement, the installation of the utility facility typically creates the dimensions of the right-of-way and limits them to the extent of use.

Attachment rates pursuant to Section 224 can be determined only if the right-of-way has defined boundaries.

The record shows that the incumbent LECs and the building owners are the cause of difficulties which the competing LECs may have in accessing an MTE. The electric utility is not the problem. Nor is it the solution. The incumbent LECs have an independent duty to afford access to their poles, ducts, conduits and rights-of-way pursuant to 47 U.S.C. § 251(b)(4).

Congress directed the Commission to adopt regulations implementing Section 251. Congress did not direct the Commission to adopt rules or regulations to implement Section 224(f). "Forced" or "mandated" access must be narrowly implemented as it raises constitutional issues. Regulation of the physical plant of the non-telecommunications utilities is not within the Commission's express or ancillary jurisdiction to regulate cable television or telecommunications carriers.

If the Commission adopts any regulations with respect to access of the competitive telecommunications carriers to MTEs, it should do so solely under Section 251(b)(4). The rates and other terms or conditions of the accessed facility (e.g., indemnity, insurance requirements, etc.) may be determined not necessarily under, but consistent with Section 224.

COMMENTS OF FLORIDA POWER & LIGHT COMPANY

Florida Power & Light Company ("FPL") pursuant to the rules and regulations of the Federal Communications Commission ("Commission"), 47 C.F.R. §§ 1.415 and 1.419, respectfully submits the following comments in response to the *Further Notice of Proposed Rulemaking* in WT Docket No. 99-217, Released October 25, 2000, FCC 00-366 (hereinafter referred to as "*MTE Order*").¹

STATEMENT OF INTEREST

FPL is a corporation organized and existing under the laws of the State of Florida and is a principal subsidiary of FPL Group, Inc. FPL's service territory covers 27,600 square miles in all or part of 35 Florida counties along most of the east coast of Florida and the west coast south of the Tampa Bay area, including the municipalities of Miami, Ft. Lauderdale, West Palm Beach, Daytona Beach and Sarasota. FPL is the holder of numerous easements in which it has installed its wireline facilities. FPL is regulated by the Florida Public Service Commission ("FPSC"). The FPSC regulation includes that of electric utility capacity, safety, and reliability.² The Florida legislature has adopted

¹ *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57; FCC 00-366, released October 25, 2000; 66 Fed. Reg. 2322 (2001).*

² Chapter 366, Florida Statutes (2000), §§ 366.04(2), (5) and (6). See also FPL's Reply Brief filed in *Southern Company v. Federal*

the National Electrical Safety Code ("NESC") as the initial standard of the Florida electric utilities and has determined that the FPSC is the administrative authority referred to in the NESC.³ The FPSC does not regulate pole attachment rates, terms or conditions. FPL, therefore, is subject to pole attachment rate regulation by the Commission under the Pole Attachments Act, 47 U.S.C. § 224, as amended (hereinafter referred to as "Section 224"). FPL has a vital interest in, and is directly affected by, those portions of the Commission's *MTE Order* which address the meaning of "right-of-way" as used in Section 224(f).

I. PRELIMINARY STATEMENT.

As part of the *MTE Order* released October 25, 2000, the Commission issued a *Further Notice of Proposed Rulemaking*. These Comments are filed in response to that *MTE Order*. FPL disagrees with much in the *Competitive Networks Order*. FPL does not agree with the Commission's conclusion that there are electric utility rights-of-way within MTE buildings within the meaning of Section 224. FPL disagrees with the Commission's assumption that the FCC has jurisdiction pursuant to Section 224, to regulate access to rooftops and interior or exterior building components for

Communications Commission, Case No. 99-15160-GG (Consolidated Cases) (pending before the United States Court of Appeals for the Eleventh Circuit), a copy of which is attached hereto as Appendix A.

³Section 366.04(6), Florida Statutes (2000).

attachments to MTEs which the Commission considers to be "ducts," "conduits" or "rights-of-way" for attachment by "cable television systems" and "telecommunications companies." FPL disagrees with the Commission that wireless facilities are subject to Commission regulation under Section 224. FPL, however, agrees with the Dissenting Statement of Commissioner Harold W. Furchtgott-Roth that until the United States Supreme Court has finally ruled on *Gulf Power Company v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rehearing en banc denied*, 226 F.3d 1220 (11th Cir. 2000), *pet. for cert. filed* (Nov. 21, 2000), "[m]oving ahead with these rules . . . is extremely imprudent."⁴

FPL specifically reserves and shall not be deemed to have waived its right to file a petition for rehearing or court appeal of the *MTE Order* by virtue of filing these Comments. Comments made herein shall not preclude FPL from making any argument with respect to a petition for reconsideration or appeal of the *MTE Order*.

II. INTRODUCTION.

The Commission concludes that a "right-of-way" for purposes of Section 224: (a) exists in multi-tenant commercial buildings whenever a utility which is subject to the burdens of Section 224 has installed equipment in such a building and (b) is, at a minimum, a defined pathway that utility either is actually using

⁴ *MTE Order* at pg. 142.

or has specifically identified and obtained the right to use in connection with its transmission and distribution network.⁵

Having declared that such a right-of-way exists, the Commission seeks further comment as to "the extent to which utility rights-of-way within MTEs are subject to access by telecommunications carriers (except incumbent LECs) and cable companies pursuant to Section 224."⁶ The Commission asks whether the beneficiaries of Section 224 have a mandatory right of access not just to the "minimum right-of-way," but to the entire building.

Specifically the Commission seeks comment as to: (a) whether the term "right-of-way" as used in Section 224 denotes only a defined space; (b) whether in the absence of a "defined space" the Commission could comply with the statutory directive to determine just and reasonable rates by means of an allocation of space; (c) whether in the absence of a mechanism for compensating underlying property owners a broad definition of rights-of-way would effect an uncompensated taking in violation of the Fifth Amendment; (d) whether for purposes of Section 224 a utility could ever "own or control" a right-of-way in the absence of a defined space; and (e) whether an expansive definition of "right-of-way" would compromise the operation of Commission rules governing the wishes of cable inside wire by broadly permitting

⁵ *MTE Order* at ¶ 82.

⁶ *MTE Order* at Appendix D at pg. 139.

cable incumbents to remain in an MDU against the wishes of the property owner.⁷

FPL respectfully submits that the Commission's conclusion that the state must make a determination of "ownership or control" prior to Commission review of attachment issues under Section 224 effectively answers and moots the need for such further comment. The determination of the "ownership or control" of a right-of-way necessarily involves determination of the dimensions and location of such right-of-way. A right-of-way as used in Section 224 must be a defined space. A utility can never "own or control" a right-of-way for purposes of Section 224 which has no defined space. If there is no defined space, the Commission cannot determine attachment rates pursuant to the plain statutory mandates of Sections 224(d) and (e) which requires that the rate formula be based on "usable" space. Under Section 224 and the Commission's interpretation, the rights of the attaching entity are purely derivative from those of the utility. Once the utility's rights have ended (whether by long disuse, removal or termination of such rights by any cause), the attaching entity must obtain its own rights from the landowner. One exception, however, is if by the terms of a written easement, the holder of the right-of-way may assign its rights to the attaching entity.

⁷ *Id.* at ¶ 170.

III. AS USED IN SECTION 224 THE TERM "RIGHT-OF-WAY" MEANS THE SPECIFIC LAND WHICH CONSTITUTES THE RIGHT-OF-WAY.

A "pole attachment" is defined in Section 224(4) as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." Section 224(f)(1) places a duty on the utility to provide a cable television system or any telecommunications carrier nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by the utility. A "pole," "duct" or "conduit" is each a form of tangible personal property or equipment with defined dimensions. Similarly, a "right-of-way" as that term is used in Section 224 is tangible real property with defined dimensions.⁸ It is an existing physical thing which is owned or controlled by the utility. The wires and cables of a cable television company or a telecommunications company cannot attach to an abstract right; they must attach to the physical object. When a right-of-way exists under Section 224, it is the land itself that constitutes the right-of-way. The rights which determine what use [and by whom] may be made of that land are abstract concepts recognized in law. They are without material substance and cannot be

⁸ The principle of *noscitur a sociis* applies (the meaning of a word may be known from the accompanying words). The principle of *eiusdem generis* may also be applicable (that words following an enumeration of particular or specific items should be construed to fall into the same class as those items specifically named).

attached to.⁹ Moreover, as used in Section 224, the term "right-of-way" refers to the longtime understanding and practice within the industry as to what constitutes a right-of-way.¹⁰ In grants where the dimensions of the land are ambiguous or not clear on the face of the document, they will be determined by actual use.¹¹

IV. STATE LAW DETERMINES OWNERSHIP OR CONTROL OF A RIGHT-OF-WAY INCLUDING THE DIMENSIONS.

In the *Local Competition First Report and Order*, the Commission correctly determined that whether a utility owns or controls a right-of-way under Section 224 is a matter a state law.¹² After reviewing the extensive comments filed in its

⁹ See Bruce and Ely, *The Law of Easements and Licenses in Land*, *infra*, at ¶ 1.01, n. 5: "[T]he distinction [between easements and estates in land] is nonpossessory/possessory, not nonphysical/physical. All estates, interests, and rights in property are without material substance; each is an abstract concept recognized in the law. It is only the property itself that physically exists."

¹⁰ See, e.g., *Arcadia, Ohio v. Ohio Power Company*, 498 U.S. 73, 80 (1990), *pet. for rehearing denied*, 498 U.S. 1075 (1991).

¹¹ See Bruce and Ely, *The Law of Easements and Licenses in Land*, cited *infra* at pages 15 and 18 herein. See generally 25 Am. Jur. 2d *Easements and Licenses in Real Property*, §§ 74-80 (1996); § 74 ("A way must have a particular definite line; the grantee does not have the right to go at random over any and all parts of the servient estate").

¹² *MTE Order* at ¶ 85, citing, 11 FCC Rcd at 16082, ¶ 1179.

Second Rulemaking on the access issue of Section 224,¹³ the Commission again concluded that "state law determines whether, and the extent to which, utility ownership or control of a right-of-way exists in any factual situation within the meaning of Section 224." (Emphasis added.)¹⁴ The Commission further concluded that the duty of a utility to provide nondiscriminatory access under Section 224 exists only where state law determines that a "utility could voluntarily provide access to a third party and would be entitled to compensation for doing so."¹⁵

¹³In ¶ 13 of its *MTE Order*, the Commission noted the "extensive interest among incumbent and competitive LECs, building owners and managers, electric and gas utilities, cable service providers, local governments, and others. We received 438 formal comments and 252 reply comments . . . [and] numerous *ex parte* filings from parties representing a variety of interests, including several members of Congress."

¹⁴*MTE Order* at ¶ 87.

¹⁵*MTE Order* at ¶ 87. In such circumstances, the underlying property owner may not be entitled to compensation. See, e.g., cases finding apportionability of easement, *Orange County, Inc. v. Citgo Pipeline Company*, 934 S.W.2d 472 (Tex. App. 1996); *Salvaty v. Falcon Cable Television*, 212 Cal. Rptr. 31 (Cal. App. 1985); *Henley v. Continental Cablevision of St. Louis County, Inc.*, 692 S.W.2d 825 (Mo. App. 1985); *Witteman v. Jack Barry Cable TV*, 228 Cal. Rptr. 584 (Cal. App. 1986); *Jolliff v. Hardin Cable Television Co.*, 269 N.E.2d 588 (Ohio 1971); *Hise v. BARC Electric Cooperative*, 492 S.E.2d 154 (Vir. 1997). See also discussion of "easements in gross" and apportionability in Bruce and Ely, *The Law of Easements and Licenses in Land*, *supra*, at ¶¶ 9.03[1] through 9.05[1]. Even where apportionability of easement rights exists, however, it is questionable whether the Commission has jurisdiction to or can enforce mandatory access under Section 224(f)(1) by making rulings and determinations as to sufficient capacity, safety, reliability and sound engineering principles with respect to utility facilities which it does not regulate. See Appendix A, FPL Reply Brief filed in *Southern Company v.*

Federal Communications Commission, Case No. 99-15160-GG
(Consolidated Cases) (11th Cir.) (questioning the jurisdiction of the Commission to adopt rules and regulations and to make determinations as to the capacity, safety, reliability and sound engineering principles involving the electric utility plant). There is no uniform "cookie cutter" electric utility construction. The National Electrical Safety Code provides for end results. It does not dictate uniform construction practices to achieve these results. Utility construction, therefore, varies from company to company, from region to region. What constitutes "discriminatory" denial of access based on insufficient capacity, safety, reliability and sound engineering requirements can be determined only on a case-by-case basis. Even if the Commission had the ability to make such determinations, which it does not, such case-by-case determination creates unreasonable and unnecessary time burdens and resource demands on the Commission. It is diametrically opposed to the Congressional intent and the Commission's own often repeated requirement that Commission pole attachment authority under Section 224 requires that the Commission act in an expeditious manner which would necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation. See, e.g., *In the Matter of Amendment of Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking*, FCC 97-94, Case Docket No. 97-98, Released March 14, 1997, ¶ 4, citing 1977 Senate Report at 21. Nor does the Commission's ancillary jurisdiction to regulate telecommunications companies help it here. The five/three holding of the U.S. Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) that the Commission has broad ancillary jurisdiction pursuant to 47 U.S.C. § 201(b) in the regulation of telecommunications companies to adopt rules and regulation not inconsistent with and necessary in the execution of its functions is not determinative of the Commission's jurisdiction to regulate the poles, ducts, conduits and rights-of-way of other utilities, including those of the more critical electric utility or to make determinations as to the capacity, safety, reliability and sound engineering requirements of the electric utility -- even in the context of pole attachments. Moreover, where the utility does not have the right to allow third party use, such use cannot be compelled under Section 224. See, e.g., *ex parte* filing of Professor Laurence H. Tribe, Memorandum, "Takings Issues Raised by NPRM in FCC No. 99-141" and filed in WT Docket No. 99-217 & CC Docket No. 96-98, August 11, 2000, identifying the constitutional problems of applying a mandatory access provision to private building owners and stating "Similarly, the provision at issue in *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), could have been described as a "nondiscriminatory access rule . . . [n]onetheless, the

To state that one way of creating right-of-way is by grant of easement is not the same thing as stating that a right-of-way is an easement equivalent.¹⁶ The Commission's insistence that this is so, however, leads to inconsistencies in the *MTE Order* and makes it difficult to respond to the Commission's requests for further comment. "[T]he extent of a utility's ownership or control of a duct, conduit, or right-of-way under state law must be resolved prior to a complaint being filed with the Commission regarding whether the rates, terms or conditions of access are reasonable."¹⁷ Determination by the state of the "ownership or control" of the land which constitutes the right-of-way also requires defining the dimensions of the land owned or controlled as a right-of-way. Because, however, a utility would have no ownership or control over a right-of-way for purposes of Section 224 or interest in the land if it has merely a license, permit, or tariff right alone to install facilities on a customer's premises, the law of easements will be cited in these comments.¹⁸

Eleventh Circuit held that the provision effected a taking and that the "nondiscriminatory access rule" argument was 'foreclosed by *Loretto*.'

¹⁶ *MTE Order* at ¶ 82.

¹⁷ *MTE Order* at ¶ 89.

¹⁸ A court may conclude that a document which is entitled "easement" is really a "license" or vice versa. Regardless of the title, however, the court would still apply the law of easements or the law of license, as appropriate, in construing the rights and scope of that of the grant. See, e.g., Real Access Alliance Comments, Part II, "Survey of Use and Access Rights to Real Property" describing those various laws.

V. WHERE DIMENSIONS ARE NOT CLEAR ON THE FACE OF THE GRANT THEY ARE DETERMINED BY USE.

The general rule is that if the easement dimensions have not been specifically defined, they will be determined by use. If the easement is obtained by prescriptive right, the dimensions also will be determined by the actual use. A detailed discussion of the location and dimensions of easements where the location and dimensions are not clear in the creating instrument, including differences among state law, is found in Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land*, revised edition (1995) (supplemented), Chapter 7.¹⁹ See also W.W. Allen, Annotation, *Width of Way Created by Express Grant, Reservation, or Exception Not Specifying Width*, 28 A.L.R.2nd 253 (1953) and William B. Johnson, J.D., Annotation, *Location of Easement of Way Created by Grant Which Does Not Specify Location*, 24 A.L.R.4th 1053 (1980).

VI. THIRD PARTY ACCESS TO THE ENTIRE BUILDING DOES NOT EXIST UNDER SECTION 224.

The suggestion that "where a utility has a right to install facilities anywhere in an MTE, it has a right-of-way over the entire property, which can then be accessed by any party included

¹⁹ This chapter addresses locations and dimensions in express easements, easements created by implication, prescriptive easements, relocation rights and change in dimensions.

as a beneficiary under Section 224,"²⁰ is wrong. FPL respectfully suggests that of the three comments cited by the Commission in support of this statement, only the comments of Winstar can be fairly said to in anyway make or support such an assertion.²¹

Nothing in the record supports the further request for comments as to any right that the cable or telecommunications carrier may have under Section 224 to attach their facilities anywhere within the entire building. Winstar relies on the case of *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169, 1170 (4th Cir. 1993) holding that the right of cable television access to public rights-of-way and easements dedicated for compatible use does not extend to the private easements which are not created by dedication.²² Winstar's arguments as to why it should have a right of access anywhere in an entire building, including installation of

²⁰ MTE Order at ¶ 169.

²¹ AT&T asks the Commission to declare that the mere existence of "a private agreement" of the utility to install facilities within an MTE is sufficient to establish "ownership or control" of a right-of-way under Section 224. AT&T then asks that the extent of "right-of-way" be determined by whatever is needed for use by the beneficiary--that the utility should exercise its power of eminent domain on behalf of the third party--a determination already withdrawn by the Commission. Teligent argues the undisputed fact that Section 224 applies to right-of-way property which is owned or controlled by the utility. Teligent also argues without any factual (or legal) basis whatsoever that a utility could exercise its power of eminent domain for antennas on rooftops so it should do the same at the request of a telecommunications company for a "reasonably sized CLE antenna."

antennas on rooftops, include: (a) that because in the *Media General* case, the cable company and utilities providing service to the condominium were granted a blanket easement to install wires, circuits and conduits on, above, and under the roofs and exterior wall of the residences for its utility wires, this proves that some utility easements provide for rooftop access, and, therefore, competitors may access rooftops for antenna equipment pursuant to Section 224; and (b) that even if rooftops were not mentioned in the grant of right, Winstar could still install antennas on rooftops under Section 224 because (again citing the *Media General* case), "[u]tilities historically were granted broad rights...to go where needed to install...their... [facilities] in MTEs, including...rooftops."²³

Winstar states that the master deed of the condominium community in *Media General* contains a grant of right of a blanket easement across the property for cable television and utilities serving the development including the express right to "affix and maintain utility wires, circuits and conduits on, above, across

²²Winstar Comments at pgs. 56-57.

²³*Id.* Winstar also improperly cites *Gulf Power Co. v. United States*, 998 F. Supp. 1386, 1389 (N.D. Fla. 1998) for the "truth" of this statement. The District Court did not mention utility presence in MTEs or on rooftops in its opinion. What the court said was " . . .each [utility] owns or controls poles, ducts, conduits, and private right-of-ways in the United States. . . [t]he Utilities further acknowledge that they have access to and facilities located on public rights-of-way for which they have been given condemnation rights and have in the past frequently

and under the roofs and exterior walls of the residences."

Winstar, however, fails to inform the Commission that the master deed also required additional consent of the Condominium Council before creation of the actual right-of-way and its use:

"Notwithstanding anything to the contrary contained in this paragraph, no sewers, electrical lines, water lines, or other utilities may be installed or relocated on said property except as . . . approved by the...Council." The deed also provided that any utility covered under the master deed could request and receive a specific recordable easement.²⁴ Such easements were in fact granted. The terms and conditions of those easements--not the blanket right of access--were determinative of the rights of Media General.²⁵ Even if a true "blanket" or "floating" easement were to exist, the dimensions and scope of that easement are also determined by state law.²⁶ Actual use determines the physical

negotiated and entered into private pole attachment agreements with cable companies." *Id.* at 1389

²⁴ *Media General, supra*, at pgs. 1170-1171.

²⁵ The court looked at the specific easements which had been granted to three utility companies, Virginia Power, C & P Telephone and Amstat an unfranchised provider of satellite master antenna television services. Both the easement of the electric company and the telephone company specifically limited the installations to underground cable or conduit. Amstat's easement allowed Amstat to install its system anywhere within the common area. However another agreement that Amstat had with the condominium specified where certain large pieces of equipment would go, but not the underground cable.

²⁶ See generally, Bruce and Ely, *The Law of Easements and Licenses in Land, supra*, at ¶¶ 7.02[3] and [4] "Practical Impact of Floating Easements and Grants of Multiple Floating Easements."

dimensions of that easement if those dimensions are not otherwise described. See, e.g., Bruce and Ely, *supra*, at ¶ 7.02[3], n. 39, citing, *City of Los Angeles v. Howard*, 53 Cal. Rptr. 274, 276 n. 1 (1966) ("A 'floating easement' [power line] . . . becomes 'fixed' by the first usage thereof and, unless the right to change or expand the usage is expressly granted or reserved, the usage may not thereafter be modified, either in location or in degree beyond that originally established"). See also *Mielke v. Yellowstone Pipeline Company*, 870 P.2d 1005 (Wash. App. 1994), *pet. for renew denied*, 883 P.2d 326 (Wash. 1994).

The record before the Commission does not support the contention that there are "blanket" or "floating" easements owned or controlled by the utilities in MTEs which could be expanded after initial installation of the utility facility to accommodate the facilities of the third party cable television companies or telecommunications companies. Even if such "easements" did exist, the Commission would have no further rulemaking in that the dimensions of those easements and to what extent a utility "owned or controlled" the physical property constituting that "right-of-way" so as to allow attachment of a cable television system or telecommunications company is a matter of state law.

VII. EXPANDING THE MEANING OF "RIGHT-OF-WAY" IN SECTION 224 DOES NOT ASSIST IN MEETING COMMISSION GOALS.

Even if the Commission could expand the meaning of the term "right-of-way" as it is used in Section 224 to inside MTE building premises and rooftops and "[grant] carriers an unbounded right to place facilities anywhere within buildings,"²⁷ such expanded assumption of jurisdiction and application of Section 224 is neither necessary nor helpful in meeting Commission goals. The record before the Commission is that the MTE problem which the Commission addresses is not caused by electric utilities, that the electric utility typically does not own inside wiring, and even if it might, in limited degree, to reach inside electric vaults in high rise buildings, any attachment to that electric utility, duct, conduit or in close proximity by a telecommunications carrier would violate safety requirements.²⁸ Strikingly absent from the Commission's *MTE Order* is any factual support that the electric utility or any utility other than the incumbent LEC has in anyway contributed to the MTE issue which the Commission addresses. Nor is there any basis in the record showing the electric utility could be part of the MTE solution. The Commission repeatedly refers to "facilities and areas"

²⁷ *MTE Order* at ¶ 170.

²⁸ FPL Reply Comments, at pgs. 10-13 (a copy is attached hereto as Appendix B). See also American Electric Power Service Corporation, Reply Comments at pgs. 13-14; Joint Comments of UTC and EEI at pg. 4, n. 4.

"controlled by the building owner, the incumbent LEC, or both."²⁹

The Commission states: "Based on the record compiled . . . we are concerned that, at least in certain cases, both building owners and incumbent LECs retain the ability and incentive to discriminate among and impose unreasonable terms on new entrants."³⁰ The Commission identifies as one barrier for the competing LECs, the exclusive contracts which are sometimes entered into between building owners and the telecommunication carrier.³¹ The Commission also identifies as a barrier the LECs' demarcation point.³² The Commission's discussion of MTE conduits is also concerned with LECs.³³ The Commission states that the Petition of Winstar which started this MTE rulemaking requested a "ruling that a LEC must allow telecommunications carriers access pursuant to Section 224 to rooftop facilities and related riser conduits that the LEC owns or controls."³⁴ (Emphasis added.) The Commission states that the "competitive LECs often need access to in-building ducts, conduits, and rights-of-way used by incumbent

²⁹MTE Order at ¶ 11. See also, ¶ 12, concerned over competitions with incumbent LECs. See also, ¶¶ 14, 15, 16, 17, 18, 19 and 24.

³⁰ *Id.* at ¶ 14.

³¹ *Id.* at ¶¶ 30-40.

³² *Id.* at ¶¶ 41-69.

³³ *Id.* at ¶ 72.

³⁴ *Id.* at ¶ 74.

LECs and other utilities."³⁵ The record, however, simply does not support the inclusion of "other utilities" in this statement.³⁶ Nor is it necessary or desirable to do so.

Congress created an independent and express duty under Section 251(b)(4) on the incumbent LEC to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services. In Section 251(d)(1), Congress expressly required the Commission to implement the provisions of Section 251--something Congress did not do with respect to the nondiscriminatory access provisions of Section 224(f).³⁷ Statutes authorizing access of a private person to the property of another private person must be narrowly construed. To avoid overreaching and unnecessary and ineffective rulemaking, the Commission's MTE access rules should be implemented, if at all, under Section 251(b)(4) so as to apply only to the incumbent LECs.

CONCLUSION

Suggestions that the mere right of a utility to install facilities anywhere in an MTE creates a right-of-way over the

³⁵ *Id.* at ¶ 77.

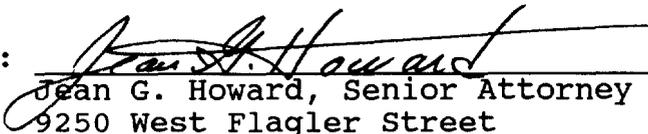
³⁶ *Id.* at Appendix C, C, b, pg. 110 (Commission anticipates that the non-LEC utilities which would be affected would be electric utilities).

³⁷ Congress, here as in Section 224, maintains the distinction between the Commission's jurisdiction over the right of access itself and the jurisdiction to regulate the rates, terms and conditions of such accessed or attached entity under Section 224. See FPL Reply Brief, at pgs. 17-23, Appendix A.

entire property which can then be accessed by any party included as a beneficiary under Section 224 should be rejected as without factual or legal merit. If a right-of-way exists for purposes of Section 224, such right-of-way has definable physical limits. Those limits appear on the face of the grant or are determined by state law as part of the state's determinations as to ownership or control. The requirement of a physically definable right-of-way moots the requests of the Commission as to how it could determine a rate in the absence of definable right-of-way boundaries (which it cannot consist with the statutory rate formula requirements). A beneficiary under Section 224 who has accessed the right-of-way solely by piggy-backing on the rights of the utility has no independent right to continue such once the underlying right of the utility has ceased to exist. If the Commission adopts regulations as to access to ducts, conduits and rights-of-way in MTE buildings, such regulations should be limited to the incumbent LECs under Section 251(b)(4).

Respectfully submitted,

FLORIDA POWER & LIGHT COMPANY

By: 
Jean G. Howard, Senior Attorney
9250 West Flagler Street
Miami, Florida 33174
(305) 552-3929

January 22, 2001

CERTIFICATE OF SERVICE

I, Jean G. Howard, hereby certify that on this 19th day of January, 2001, copies of the foregoing comments of Florida Power & Light Company were delivered by overnight mail to:

Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

(Original plus four copies)

The Honorable Chairman
Federal Communications
Commission
The Portals
445 12th Street, S.W.
Suite 8B-201
Washington, D.C. 20554

The Honorable Michael Powell
Federal Communications
Commission
The Portals
445 12th Street, S.W.
Suite 8A-204
Washington, D.C. 20554

The Honorable Harold Furchtgott-
Roth
Federal Communications
Commission
The Portals
445 12th Street, S.W.
Suite 8A-302
Washington, D.C. 20554

The Honorable Gloria Tristani
Federal Communications
Commission
The Portals
445 12th Street, S.W.
Suite 8C-302
Washington, D.C. 20554

The Honorable Susan Ness
Federal Communications
Commission
The Portals
445 12th Street, S.W.
Suite 8B115
Washington, D.C. 20554

Thomas J. Sugrue, Chief
Wireless Telecommunications
Bureau
Federal Communications
Commission
The Portals
445 12th Street, S.W. 3C-207
Washington, D.C. 20554

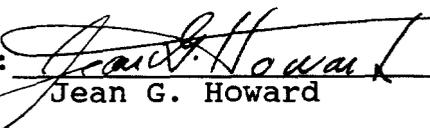
Jeffrey Steinberg
Wireless Telecommunications
Bureau
Federal Communications
Commission
445 12th Street, S.W.
Washington, D.C. 20554

Joel Taubenblatt
Wireless Telecommunications
Bureau
Federal Communications
Commission
445 12th Street, S.W., 4A-260
Washington, D.C. 20554

Lauren Van Wazer
Wireless Telecommunications
Bureau
Federal Communications
Commission
445 12th Street, S.W., 4A-223
Washington, D.C. 20554

Leon Jackler
Wireless Telecommunications
Bureau
Federal Communications
Commission
445 12th Street, S.W., 4B-145
Washington, D.C. 20554

International Transcription Services, Inc.
445 12th Street, S.W., CY-B402
Washington, D.C. 20554

By: 
Jean G. Howard