

MAR 14 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Promotion of Competitive Networks)	WT Docket No. <u>99-217</u>
)	
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)	
)	
Cellular Telecommunications Industry)	
Association Petition for Rule Making and)	
Amendment of the Commission's Rules)	
to Preempt State and Local Imposition of)	
Discriminatory And/Or Excessive Taxes)	
and Assessments)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions of 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)	CC Docket No. 88-57

**THE UNITED STATES TELECOM ASSOCIATION'S
OPPOSITION**

I. INTRODUCTION

Pursuant to the relevant Federal Communications Commission (Commission) rule¹ and notice,² The United States Telecom Association (USTA),³ on behalf of its members, respectfully

¹ 47 C.F.R. § 1.429(f) (1998).

² See 66 Fed. Reg. 12510-12511, regarding WT Dkt. No. 99-217 and CC Dkt. Nos. 96-98 and 88-57 (Feb. 27, 2001).

³ For more than 100 years, USTA has been representing the interests of the small, mid-size and large

files its opposition specifically in response to the petition for reconsideration filed by the Florida Power & Light Company;⁴ and, with qualification, files in support of Verizon's petition for clarification.⁵

II. DISCUSSION

A. **FPL's PRF Raises Stale and Unfounded Allegations, Adds Nothing New and Should Be Dismissed. However, to the Degree it Opens the Door to Allow the Commission to Revisit Application of Section 251's "Necessary and Impair" Standard to Riser Cable/Inside Wire and In-Building Facilities Owned or Controlled by an ILEC, USTA Urges Such Reconsideration.**

FPL's petition for reconsideration urging that the Commission take further action to prevent incumbent local exchange carriers (ILECs) from creating access problems in Multi-

companies of the nation's local exchange carrier industry. The Association represents more than 800 companies worldwide that provide local exchange, long distance, wireless, Internet, and cable services.

USTA filed comments (Aug. 27, 1999; (USTA Comments)) and reply comments (Sept. 27, 1999; (USTA Reply I)) *In re Promotion of Competitive Networks 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, Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments, Implementation of the local Competition Provisions of the Telecommunications Act of 1996*, WT Docket No. 99-217, CC Docket No. 96-98. *See also, in re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (USTA comments filed before the FCC on May 16, 1996; and USTA Reply Comments, May 30, 1996; USTA Comments on Dialing Parity/Number Administration Technical Changes/Access to Right of Way" (May 20, 1996); *In re Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98 (USTA Comments, June 27, 1997; and Reply Comments, Aug. 11, 1997); and [USTA Comments in the UNE Remand Proceeding]. *See also*, "Reply Comments of the United States Telecom Association", WT 99-217 (Feb. 21, 2001). USTA, respectfully, requests that its previous comments be incorporated in this proceeding, by reference.

⁴ Petition for Reconsideration of Florida Power & Light Company (FPL), WT Dkt No. 99-217, CC Dkt. No. 96-98 (Feb. 8, 2001).

⁵ Petition of Verizon for Clarification, WT Dkt. No. 99-217, CC Dkt. Nos. 96-98 and 88-57)(Feb. 12, 2001)(Verizon Clarification Petition).

tenant Environments (MTEs) is disingenuous, offers mere allegations without proof beyond anecdotal support⁶ and raises no new issues.⁷ Because FPL's petition for reconsideration raises no new issues and puts forth no proof that the Commission should take further actions concerning ILECs in the context of Section 251 in this proceeding, as FPL suggests, it should be dismissed, on such basis.

However, USTA agrees with FPL's premise that the FCC improperly expanded its jurisdiction by adopting a tortured definition of public right-of-way to include in-building access.⁸ USTA has consistently disagreed with the determination that in-building facilities constitute public rights-of-way.⁹ Moreover, USTA has consistently argued that riser cable,

⁶ FPL Comments at 3-9.

⁷ See, e.g., "XI. Obligations Imposed on LECs By Section 251(b) at http://www.fcc.gov/ccb/local_competition/sec11.html at 1-80 (Obligations Imposed on LECs By Section 251(b)) at ¶¶ 1119-1240.

⁸ See FPL at 5-15.

⁹ See MTE Order at ¶¶ 75-76. USTA had challenged the FCC's extension of Section 224 authority in private buildings. See USTA Comments at 3, 6-10. *Inter alia* USTA opines that, "Section 224 of the 1996 Act is a specific provision that requires utilities, including ILECs, to provide cable television systems and telecommunications carriers with nondiscriminatory access to any pole, duct, conduit, or right-of-way that they own or control. Section 224 does not contemplate access to conduits or premises owned by any other persons. Moreover, conduit has traditionally referred to underground conduit, but has never referred to in-building conduit or riser conduit. See FCC rule 32.2241(a) (conduit systems): "This account [under Part 32 concerning uniform system of accounts for telecommunications companies] shall include the original cost of conduit, whether underground, in tunnels or on bridges, which is reusable in place. It shall also include the cost of opening trenches and of any repaving necessary in the construction of conduit plant." 47 C.F.R., Ch. 1, § 32.2441(a) . . . Section 224 governs non-discriminatory access to public, **but not private**, rights-of-way . . .

Basically, USTA believes the FCC previously reached the appropriate result when it declared that:

Access to inside wiring through the incumbent LEC's NID does not entitle a competitor to deliver its loop facilities into a building without the permission of the building owner. Similarly, access to an incumbent LEC's NID does not entitle the competitor to the riser and lateral cables between the NID and individual units within the building, which may be owned

inside wire and conduit should not be deemed UNEs; that the Commission should not impose such additional unbundling obligations on ILECS; and also, strenuously challenged that no party has shown that riser cable, inside wire or in-building conduit owned or controlled by ILECs meet the "necessary and impair" standard set forth in Section 251(d)(2) of the Telecommunications Act of 1996.¹⁰

Despite the fact that USTA strongly agrees with FPL that the FCC improperly interpreted right-of-way to apply to in-building facilities, USTA emphatically disagrees with FPL in the belief that it would be appropriate for the Commission to justify a tortured interpretation of Section 251, as a means of simply letting electric utilities off the regulatory hook with respect to Section 224.

Moreover, to the extent that FPL's petition has opened the door to allow the Commission to revisit its determination that riser cable, inside wire or in-building conduit owned or controlled by ILECs meets the requisite standards pursuant to Section 251(d)(2), as interpreted by the U.S. Supreme Court in AT&T Corporation v. Iowa Utilities Bd.,¹¹ USTA,

or controlled, for example, by the premises owner. [*In re Implementation of Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98); Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers (CC Docket No. 95-185), Order on Reconsideration (FCC 96-394)* (adopted and released, Sept. 27, 1996) at n.853.]

See also, USTA's First Reply Comments at 3: "Private in-building facilities do not exist in or on public rights-of-way. USTA submits that areas within private buildings do not constitute, and never have been deemed, public-rights-of-way."

¹⁰ See USTA comments filed in this proceeding on Aug. 27, 1999 at 13-14; and USTA reply comments filed on Sept. 29, 1999 at 3-4.

¹¹ *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999), *Order on Reconsideration*, 11 FCC Rcd. 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd. 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 12460 (1997), *appeals docketed, Second Further Notice of Proposed Rulemaking*, FCC 99-70 (rel. Apr. 16, 1999). See also, e.g., "Separate Statement of Commissioner Michael K. Powell", concurring *in re Promotion of*

respectfully, urges that the Commission take this opportunity to re-evaluate its determination in light of the U.S. Supreme Court's interpretation of UNEs in *Iowa Utilities Bd.*

1. **FPL's Attempt to Put the Blame on ILECs for MTE Building Access Problems and Emphasize a Section 251 Approach, in Lieu of a Section 224 Approach, Suggests that FPL is Merely Trying to Deflect Regulation Away From Powerline Telecom Service Providers That Are Actively Planning to Provide Telecom Services in MTEs.**

Since the beginning of the Commission's rulemaking in this docket addressing competitive local exchange carrier (CLEC) access in MTEs, USTA has maintained that if the building owner wants a company in the building, the company will get in the building. However, if the building owner does not want the company in the building, regardless of what the Commission may direct against an ILEC, the CLEC seeking access (or it could be the ILEC seeking access in new developments) is probably going to have a difficult time getting in that building. To that extent, it is impractical, imprudent and perhaps, in the end, illegal,¹² to try to circumvent this reality by creating a regulatory structure that, in effect, puts carriers in between a competing carrier and the building owner.

Competitive Networks in Local Telecommunications Markets; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; and Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments (CC Dkt. No. 96-98) at <http://www.fcc.gov?Speeches/Powell/Statements/stmkp920.html> (Jun. 10, 1999) (Commissioner Powell's Concurring Statement": **My second area of concern is the proposal to consider requiring incumbent LECs to make available "unbundled access" to riser cable and wiring they control within multiple tenant environments pursuant to section 251(c)(3) of the 1996 Act. I feel strongly about our duty to faithfully and quickly implement the Supreme Court's remand of the Commission's unbundled network element rule (the so-called Rule 319). I am therefore concerned about adding yet another possible 'network element' to a list that the Supreme Court struck down without the thorough and thoughtful interpretation and application of the 'necessary' and 'impair' standards of section 251(d)(2).**"(Emphasis added.)

¹² See, *id.*, (Commissioner Powell's Concurring Statement in CC Dkt. No. 96-98): **"We have no specific statutory provision that directs, or 'empowers' us to assert regulatory authority over owners of private property. . . ."** (Emphasis added.)

Contrary to what FPL suggests, the record in this proceeding argues against ILECs being obstructionists and touts competition in MTEs. Recently, a number of ILECs have gone on record in this rulemaking strongly opposing exclusive access agreements in MTEs.¹³ Moreover, according to one commentator:

“The record established thus far establishes competition in the MTE marketplace. The Commission has enacted effective regulation in this and other proceedings that effectively limit an incumbent local exchange carrier's incentive or ability to impede competitive access to MTEs.”¹⁴

Specifically, pursuant to Section 251, the FCC requires ILECs to make available to CLECs, on an unbundled basis, any portion of the local loop as a subloop element, which includes facilities between the MTE property line and the demarcation point within, wherever located.¹⁵ Additionally, according to the Commission:

¹³ See, e.g., Comments of Verizon, WT Dkt. No. 99-217, CC Dkt. Nos. 96-98 and 88-57 (Jan. 22, 2001) at 4-5; “Comments of SBC Communications Inc.”, WT Dkt. No. 99-217 (Jan. 22, 2001) at 1.

¹⁴ See Bellsouth's Comments (Corrected Version), WT Dkt. No. 99-217, CC Dkt. Nos. 96-98 and 88-57 (Jan. 22, 2001) at i. See also, Further Comments of the Real Access Alliance, WT Dkt. No. 99-217, CC Dkt. Nos. 96-98 and 88-57 (Jan. 22, 2001) at 5 and n. 9, citing a *BOMA Survey*, RAA demonstrates that “of 1,097 respondents representing 2,097 buildings, 80% of respondents had more than one telecommunications service provider, and almost 60% offer their tenants three or more telecommunications service providers.”

¹⁵ See *id.* at 3 and n.4; and *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999)(UNE Remand Order). See also, *In re Promotion of Competitive Networks in Local Telecommunications Markets*, WT Dkt. No. 99-217, *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*, CC Dkt. No. 96-98, *Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, First Report and Order and Further Notice of Proposed Rulemaking in WT Dkt. No. 88-217, Fifth Report and Order and Memorandum Opinion and Order in CC Dkt. No. 96-98, and Fourth Report and Order and memorandum Opinion and Order in CC Dkt. No. 88-57 (rel. Oct. 25, 2000)(MTE Order) at ¶ 48.

Section 251(b)(4) imposes upon each LEC the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." . . . *The access provisions of section 224, as amended by the 1996 Act, differ from the requirements of section 251(b)(4) with respect to both the entities required to grant access and the entities that may demand access. Section 224(f)(1) imposes upon all utilities, including LECs, the duty to "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."*¹⁶

Indeed, FPL recognizes that Section 224 captures electric utilities;¹⁷ and that the Commission's MTE order concludes that "rights-of-way" in buildings means, at a minimum, defined pathways that are being used or have been specifically identified for use as part of a utility's transmission and distribution network."¹⁸

It appears that FPL's actions in this proceeding may merely be to deflect the Commission's efforts away from Section 224 and onto Section 251, as an attempt to stave off regulation of electric companies, in certain regards.

The Commission has interpreted Section 224(f)(1) to afford access sought by a telecommunications carrier or cable operator that seeks access to the utility's facilities or property identified in that section, with the limited exception allowing electric utilities to deny access "where there is insufficient capacity and for reasons of safety, reliability and generally

¹⁶ See, *supra* note 7, Obligations Imposed on LECs by Section 251(b) at Section B. (Access to Rights of Way) at ¶ 1119.

¹⁷ FPL at 10-11: "The record in this proceeding, as well as the Commission's own determinations, show that the electric utilities as well as the water, gas and steam utilities which are subject to Section 224(f) burdens are not the cause of access problems to MTEs" (emphasis added).

¹⁸ See FPL at 6-7 citing the FCC's MTE Order at ¶ 82 (emphasis original); also see ¶ 75 of the MTE Order.

applicable engineering purposes."¹⁹ However, the Commission believes "that section 224(f) reflects Congress' determination that utilities generally must accommodate telecommunications carriers and cable operators."²⁰ Thus, where there is sufficient capacity and in the absence of any justification for safety, reliability and generally applicable engineering purposes, electric utilities would not be precluded from denying access by telecommunications carriers or cable television systems to the electric utility's facilities or property existing on public rights-of-way it owns or controls.

It is interesting to note that according to the UTC's²¹ Web site (www.utc.org), a number of electric companies are actively "pursuing powerline telecom as part of a last-mile or in-home access strategy." The UTC Web Site also discusses a June 1999 Forum in which powerline telecom providers sought to explore questions about electric utilities offering telecom services over electrical transmission and distribution wires.

If FPL is merely engaging in a pretext to protect its interest in providing telecom service in MTEs, seeking to divert the Commission's Section 224 regulatory approach to regulating public utilities providing telecom service in MTEs, the Commission should see this for what it is and not allow this.

For the reasons stated, USTA believes the Commission should dismiss the petition

¹⁹ See *supra* note 7, Obligations Imposed on LECs by Section 251(b) at ¶ 1120.

²⁰ *Id.* at ¶ 1123.

²¹ See "Joint Comments of the United Telecom Council and Edison Electric Institute" in WT Dkt. No. 99-217, CC Dkt. No. 96-98 (Jan. 22, 2001) at 2: "UTC (formerly known as Utilities Telecommunications Council) is the national representative on communications matters for the nation's electric, gas, and water utilities and natural gas pipelines. Over 1,000 such entities are members of UTC, ranging in size from large combination electric-gas-water utilities which serve millions of customers, to smaller, rural electric cooperatives and water districts which serve only a few thousand customers each."

filed by FPL. But to the extent, the petition raises issues pertaining to whether the Commission's Section 251 approach in this matter is consistent with the *Iowa Utilities Bd.'s* UNE Remand decision, USTA urges that the Commission reconsider this aspect of its Order.

B. To the Extent that the Measure is Optional for Telephone Companies, USTA Supports Verizon's Proposal to Allow Telephone Companies to Post on its Website a Designated Contact Person or Organization to Whom the Landlord's Notice Must be Sent Regarding Demarcation Point Information.

The Verizon clarification petition asks the Commission to clarify its requirement regarding disclosure to the landlord of the location of the demarcation point in MTEs. The Commission's recent order allows the landlord to ask a telephone company the location of the demarcation point in a building. That order specified that, if the telephone company does not respond to the landlord's request within ten business days, the landlord may presume the demarcation point to be located at the minimum point of entry.²² Verizon asks the Commission to specifically clarify when the time begins to run and also to allow a telephone company to designate a single point of contact on its Web Site for all landlord requests for demarcation point information.

USTA supports the need for clarification as to the timing which triggers compliance in the context of Verizon's proposal. To the extent that this approach will be permissible for carriers and not mandatory, USTA believes that this approach serves the public interest and is reasonable. The proposal enables those companies that opt to adopt this approach to ensure that the appropriate telephone company staff respond within the 10-day deadline, will likely prevent

²² See First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order, CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order, CC Docket No. 88-57, FCC 00-366, ¶ 56 (rel. Oct. 25, 2000); *Erratum* (rel. Nov. 7, 2000); and 47 C.F.R. ¶ 68.3(1)(b)(4).

misunderstandings and ensure that property owners receive prompt responses, while assisting the company to be in compliance and thereby avoid enforcement action.

III. CONCLUSION

WHEREFORE, for these reasons as may appear just to the Commission, USTA urges that the Commission take action consistent with the positions advocated by USTA in this matter.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

By: Julie E. Rones

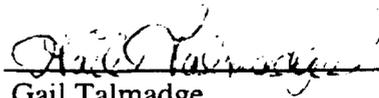
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March 14, 2001

CERTIFICATE OF SERVICE

I, Gail Talmadge, do hereby certify that on March 14, 2001, a copy of *The United States Telecom Association's Opposition*, CC Docket Nos. 99-217, 96-98, and 88-57, was either hand-delivered or deposited in the U.S. Mail, first-class, postage prepaid, to the persons on the attached service list.



Gail Talmadge