PETITIONS FOR RECONSIDERATION

FLORIDA IOU [LINK]

ONCOR ELECTRIC DELIVERY [LINK]

COALITION OF CONCERNED UTILITIES [LINK]

STATE CABLE OPERATORS [LINK]

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

In the Matter of	)	WC Docket No. 07-245
	)	
Implementation of Section 224 of the Act;	)	GN Docket No. 09-51
A National Broadband Plan for Our Future	)	
	)	
	)	
	)	
	)	

PETITION FOR RECONSIDERATION AND REQUEST FOR CLARIFICATION OF THE FLORIDA INVESTOR-OWNED ELECTRIC UTILITIES:

Florida Power & Light Co.
Tampa Electric Co.
Progress Energy Florida, Inc.
Gulf Power Co.
Florida Public Utilities Co.

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Pursuant to 47 C.F.R. § 1.429, Florida Power & Light Company ("FPL"), Tampa Electric Company ("TECO"), Progress Energy Florida, Inc. ("PEF"), Gulf Power Company ("GPC"), and Florida Public Utilities Company ("FPU") (collectively, the "Florida IOUs") respectfully submit this petition for reconsideration and request for clarification of certain portions of Order No. FCC 10-84 in the above-referenced docket ("Order").[1]

I. INTRODUCTION AND SUMMARY

A. The Parties

The Florida IOUs are the five investor-owned electric utilities in Florida. On August 16, 2010, the Florida IOUs submitted comments on the Further Notice of Proposed Rulemaking ("FNPRM") in this docket.[2] Each of the Florida IOUs (with the exception of FPU) has been participating in this docket since the original Notice of Proposed Rulemaking ("NPRM") (released November 20, 2007 and published February 6, 2008).[3] The Florida IOUs, which operate electric distribution systems in the country's second largest state (by population) under the Commission's pole attachment jurisdiction, are disproportionately impacted by the Commission's rules as compared to other electric utilities.

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[1] Order and Further Notice of Proposed Rulemaking, FCC 10-84 (Released May 20, 2010) ("Order & FNPRM"). The FNPRM and Order were published separately. *See* 75 Fed. Reg. 41,338 (July 15, 2010), as corrected 75 Fed. Reg. 45,590 (Aug. 3, 2010); 75 Fed. Reg. 45,494 (Aug. 3, 2010). For ease of reference, these comments will provide citations to the paragraph numbers as they appear in the May 20, 2010 Order & FNPRM.

[2] Comments of the Florida Investor-Owned Electric Utilities, WC Docket No. 07-245 & GN Docket No. 09-51 (Aug. 16, 2010).

[3] Notice of Proposed Rulemaking, 22 FCC Rcd. 20195, ¶ 36 (Nov. 20, 2007) ("NPRM"). *See, e.g.*, Initial Comments of Florida Power & Light, Tampa Electric, and Progress Energy Florida Regarding Safety and Reliability, WC Docket No. 07-245 (Mar. 7, 2008); Reply Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, WC Docket No. 07-245 (Apr. 22, 2008); Letter from Eric. B Langley and J. Russell Campbell to Marlene H. Dortch, WC Docket No. 07-245 (Nov. 20, 2008). The Florida IOUs have participated in numerous *ex parte* meetings with Commissioners and staff. *See generally ex parte* notices filed in WC Docket 07-245.

B. The Rules at Issue

Based on recommendations from the National Broadband Plan, the Commission adopted three new rules: (1) attachers may use space and cost saving attachment techniques, such as boxing and bracketing, where practical and consistent with a pole owner's use of those techniques;[4] (2) where a pole can accommodate new attachments through boxing, bracketing, or similar attachment techniques, there is not "insufficient capacity" within the meaning of section 224(f)(2);[5] and (3) access to poles, including the make-ready process, must "be timely in order to constitute just and reasonable access."[6] The Florida IOUs request clarification and/or reconsideration of the first and second new rules.[7]

C. Requested Relief

With respect to the first rule (attachment techniques), the Florida IOUs request clarification that the Commission does not intend for common electric distribution construction configurations in the electric supply space to trigger an attacher's right to use techniques such as boxing and bracketing. To the extent the Commission *does* intend for these electric supply construction configurations to trigger such rights, the Florida IOUs request reconsideration of this rule on grounds that it misapplies the non-discriminatory access provision of section 224(f) of the Pole Attachments Act.

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[4] Order, ¶ 8.

[5] *Id.*, ¶ 14.

[6] *Id.*, ¶ 17.

[7] Though the Florida IOUs are not specifically seeking reconsideration or clarification of the third rule, the third rule improperly suggests that access is evaluated according to the "just and reasonable" standard. The actual standard, as set forth in section 224(f), is the "nondiscriminatory" standard. *See* Comments of the Florida Investor-Owned Electric Utilities, WC Docket No. 07-245 & GN Docket No. 09-51 (August 16, 2010), at 12-13.

With respect to the second rule (definition of "insufficient capacity"), the Florida IOUs request clarification that this new interpretation of "insufficient capacity" only requires accommodation of a new attachment via rearrangement or space-saving techniques *within the communications space,* and does not require rearrangement or use of space-saving techniques for electric facilities in the supply space.[8] If the Commission's new definition of "insufficient capacity" is intended to require rearrangement of electric facilities or the use of space-saving techniques in the supply space, the Florida IOUs request reconsideration of this rule on grounds that the definition conflicts with the plain language of section 224(f)(2), binding judicial interpretations of section 224(f)(2), and the Commission's own previous interpretation.

II. NONDISCRIMINATORY USE OF ATTACHMENT TECHNIQUES

The Commission should clarify that this rule does not mean that an electric utility must allow boxing, bracketing and similar techniques simply because of (a) electric supply construction configurations within the supply space, or (b) the use of boxing, bracketing and similar techniques for purposes *other* than "space and cost saving."

A. Various Iterations of the Rule

The Order articulates the "Nondiscriminatory Use of Attachment Techniques" rule in at least five different ways:

- [T]he statutory nondiscriminatory access requirement allows communication providers to use space- and cost-saving attachment

[8] The Florida IOUs are not conceding that electric utilities must allow rearrangement of communications lines. Because rearrangement of communications lines is a means of capacity expansion, an electric utility is within its statutory rights to disallow such work (on a nondiscriminatory basis) under section 224(f)(2). That said, the focus of this petition is the Order's potential impact to electric supply space.

techniques where practical and consistent with pole owners' use of those techniques.[9]

- [T]he nondiscriminatory access obligation established by section 224(f)(1) of the Act requires a utility to allow cable operators and telecommunications carriers to use the same pole attachment techniques that the utility itself uses.[10]

- [U]tilities must allow attachers to use the same attachment techniques that the utility itself uses in similar circumstances… .[11]

- [A]ny attachment technique that a utility uses or allows to be used will henceforth be presumed appropriate for use by attachers on that utility's poles under comparable circumstances.[12]

- [T]he Act requires a utility to allow cable operators and telecommunications carriers to use the same pole attachment techniques that the utility itself uses or allows.[13]

The Order can be read as being consistent with the clarification sought by the Florida IOUs. First, some iterations of the new rule modify "utility use" of the techniques at issue to "comparable circumstances" or "similar circumstances," which would seem to limit application of the rule to a utility's practices within the communications space. Second, the definitions of "boxing" and "bracketing" appear to be self-limiting insofar as both techniques are uniquely "communications" construction practices – not electric supply construction practices.[14] Despite

[9] Order, ¶ 7.

[10] Order, ¶ 8.

[11] Order, ¶ 9.

[12] Order, ¶ 10.

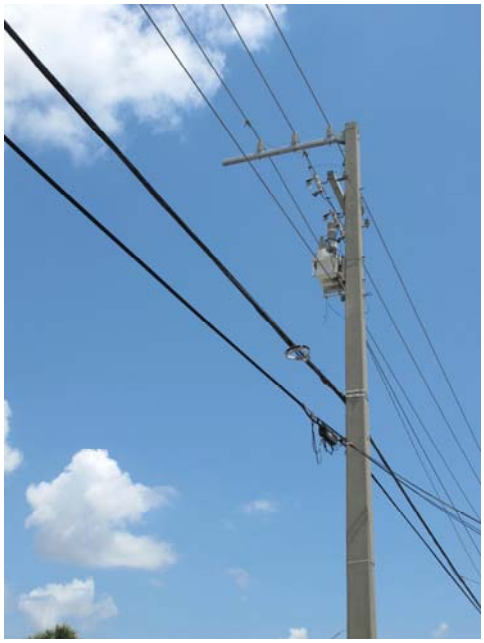
[13] FNPRM, ¶ 74.

[14] *See* Order, ¶ 8 n.35 & 36. Interpretation of the new rule is complicated by the fact that the Commission defined "boxing" and "bracketing" in the Order as released on May 20, 2010, but did not include those definitions in the version published on August 3, 2010. *Compare* Order, at ¶ 8 n.35 & 36 ("'Boxing' refers to the installation of communications on both sides of the same pole at approximately the same height. 'Bracketing' refers to the installation of 'extension arms,' which extend from the pole to support communications lines at the same level as existing lines attached to the pole.") *with* 75 Fed. Reg. 45,495 (including no footnotes with definitions for "boxing" or "bracketing").

these textual indicators, it is not entirely clear whether the "comparable" or "similar" circumstances envisioned by the Commission are limited – as they should be – to situations where either (a) the utility uses these practices for its own facilities in the communications space, or (b) where the utility has permitted other communications attachers to use the techniques on the same pole as a cost and space saving technique.

B. Electric Supply Construction Configurations

The Florida IOUs are concerned that the ambiguity in the new rule could be misinterpreted and misused by attachers to mean that common electric supply construction configurations – such as triangular framing, turkey foot, alley-arm and cross-arm – require the utility to allow techniques such as boxing and bracketing. The photographs below illustrate these configurations.

“Figure 1” 	“Figure 2” 
“Figure 3” 	“Figure 4” 

The triangular framing (shown in Figure 1) is used for three-phase primary construction, and involves using insulators on opposite sides and the top of the pole.[15] Turkey foot construction (shown in Figure 2) is similar in design and function to triangular framing.[16] Alley arms (shown in Figure 3), like other cantilevered brackets, place unbalanced stress on a pole and are used sparingly (almost exclusively where there are right-of-way restrictions, to avoid encroachment onto private property).[17] Cross-arm construction (shown in Figure 4) is used when an electric utility needs three phases of conductor to lay horizontal, such as when it installs switching equipment, crosses an intersection, or when conductors need to be tapped with a perpendicular circuit.[18]

While all of the above construction configurations might inaccurately be described as boxing, bracketing, or both, (insofar as they include electric supply lines on both sides of the pole and/or the placement of supply lines on an insulated extension from the pole), none of these construction techniques within the electric supply space pose the same problems as if similar practices were used in the communications space. As set forth in the initial and reply comments filed by FPL, TECO and PEF (and many other electric utilities) in March and April 2008, boxing and bracketing in the communications space each slow down pole change-outs, complicate

[15] Declaration of Thomas J. Kennedy, P.E. (Sept. 2, 1010) ("Kennedy Declaration") (attached hereto as Exhibit A), at ¶ 2.

[16] Declaration of Scott Freeburn (Sept. 2, 2010) ("Freeburn Declaration") (attached hereto as Exhibit B), at ¶ 2.

[17] Kennedy Declaration, at ¶ 3.

[18] Kennedy Declaration, at ¶ 4. Cross-arm construction has been used less frequently in recent years because pole-line construction has been forced (through administrative policy or local ordinance) up against the right-of-way boundary. *Id.* However, there are still instances where cross-arm construction is employed. *See id.*

transfers of attachments, make poles more difficult to climb, and can prevent proper bucket truck positioning.[19]

Further, the presence of brackets in the communications space can impact the speed and success of hurt-man rescue.[20] In hurt-man rescue, the rescuer will actually climb the pole to retrieve the injured lineman.[21] Once the rescuer reaches the appropriate height on the pole, the rescuer will block-off, rope into the injured lineman, detach the injured lineman from his harness, and lower the injured lineman to the ground on the side of the pole opposite of the attachments.[22] This prevents the injured lineman from becoming entangled in a communications line, which further complicates and delays the rescue.[23] These same problems do not exist under the electric supply construction figurations described above (or other similar configurations) simply by virtue of their positioning higher up the pole and the fact that lineman typically harness into the pole beneath the electric supply conductors.

In addition to the common electric supply construction configurations described above, the Florida IOUs have many distribution poles with transformers (see Figure 4) and/or electric service drops on more than one side of a pole. For example, in rear lot construction, there will usually be at least two service drops running from opposite sides of the pole and transformer; the

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[19] Initial Comments of Florida Power & Light, Tampa Electric, and Progress Energy Florida Regarding Safety and Reliability, WC Docket No. 07-245 (Mar. 7, 2008), at 18-19 (citing Declaration of Kristina L. Anguilli (Mar. 7, 2008), at ¶ 12; Declaration of Scott Freeburn (Mar. 7, 2008), at ¶ 11; Declaration of Thomas J. Kennedy, P.E. (Mar. 7, 2008), at ¶ 12); Reply Comments of Florida Power & Light, Tampa Electric, and Progress Energy Florida, WC Docket No. 07-245 (Apr. 22, 2008), at 10-11 (citing Second Declaration of Thomas J. Kennedy, P.E. (April 22, 2008), at ¶ 6).

[20] Freeburn Declaration, at ¶ 3.

[21] *Id.*

[22] *Id.*

[23] *Id.*

same is often true for communications service drops. Junction poles, which occur where two distribution lines intersect, necessarily contain electric supply facilities on more than one side of the pole.

C. Request for Clarification and Reconsideration

1. Request for Clarification

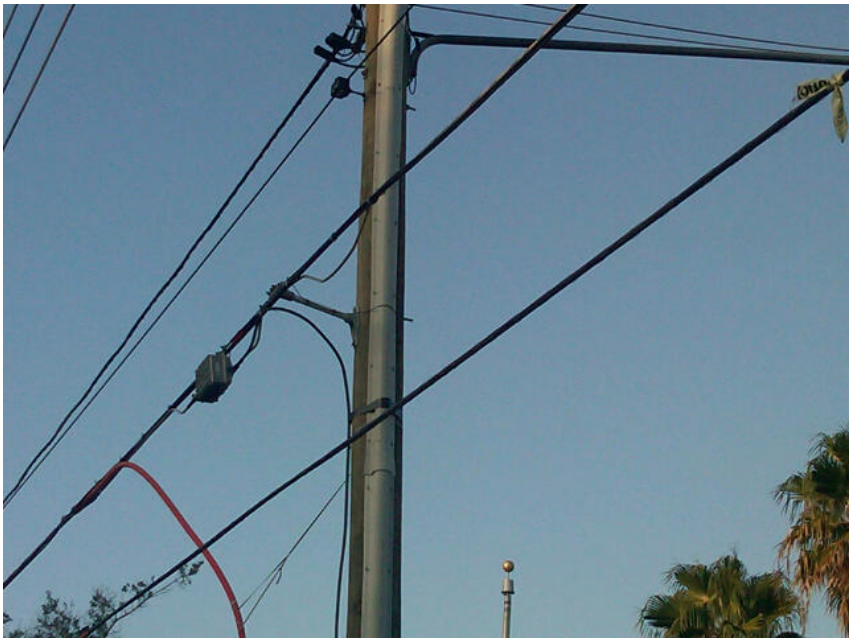
The Florida IOUs respectfully request that the Commission clarify that the situations described in part II.B. above (and other similar situations) are excluded from the reach of the new rule. The Florida IOUs propose the following clarified iteration of the Commission's new rule regarding attachment techniques:

> Where a utility itself uses attachment techniques on a particular pole such as boxing and bracketing for its own facilities in the communications space, or where the utility authorizes other communications attachers to use such techniques (as a means of cost and space saving), the utility must allow cable operators and telecommunications carriers to use the same techniques.

The language restricting application of the rule to circumstances where prior use of the techniques was for "cost and space-saving" purposes is important. On occasion, an electric utility will allow the use of an extension arm – not as a "cost and space saving technique" at the pole but to avoid the need for a communication attacher to splice its fiber and completely re-tension its messenger in situations where a tangent pole has been moved back several feet.[24] The photograph below illustrates this issue:

[24] *See* Freeburn Declaration, at ¶ 4.

"Figure 5"



These are rare situations. The purpose of the above configuration is not to avoid make-ready at the pole but instead to avoid the need for complete line reconstruction.[25] The language restricting application of the rule to circumstances where a utility has "authorized" use of boxing and bracketing also is important. On occasion, attachers will use boxing or bracketing without authorization. It is impossible to police bandit attachments and attachment techniques in real time. The fact that there may be one or more instances of an unauthorized boxing and bracketing on an electric utility's system should not require the electric utility to allow boxing and bracketing in the normal course. To allow otherwise would create a perverse incentive for an attacher to engage in unauthorized boxing and bracketing.

[25] *Id.* Though this rare situation may indeed result in "cost savings" to the attacher, it is not a "space saving" technique. Moreover, if the Commission intends for this type of practice – which some electric utilities allow on a very limited basis as a means of accommodating an attacher in extraordinary circumstances – to open-up poles to widespread use of bracketing, it will discourage electric utilities from being flexible and allowing rare exceptions (for fear the exception will become the new rule).

The proposed clarified rule would minimize further disputes, foster predictability, and help realize the Commission's intent to "rely in part on new, broadly applicable rules to ensure that terms and conditions of access to pole attachments are just, reasonable, and nondiscriminatory."[26] The proposed clarification is also (a) consistent with the Commission's stated intent not to "broaden the range of circumstances in which these techniques are used,"[27] and (b) aligned with the two bureau orders (*Salsgiver* and *Cavalier*) cited by the Commission as being consistent with the new rule.[28]

2. Request for Reconsideration

If, on the other hand, the Commission intends the very interpretation which concerns the Florida IOUs, the Florida IOUs respectfully request that the Commission reconsider its decision and instead adopt the more limited rule proposed above. The nondiscriminatory access

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[26] FNPRM ¶ 22.

[27] Order, ¶ 12.

[28] Order, ¶ 9 n.40. In *Salsgiver Commc'ns, Inc. v. N. Pittsburgh Tel. Co.,* 22 FCC Rcd. 20536 (2007), the pole-owning utility against whom the complaint was filed was an ILEC, not an electric utility. The prospective attacher alleged – and the bureau apparently found – that the ILEC "itself uses boxing, and allows other attachers to do so as well." *Id.* at ¶ 20. Thus, the pole owner's attachment technique at issue in *Salsgiver* was boxing **within the communications space** – not the electric supply space construction configurations addressed above in part II.B. The bureau also specifically noted that its holding was "limited to and by the record in this case." *Id.* at ¶ 21 n.62. Moreover, the fact that the pole-owning utility in *Salsgiver* was an ILEC means it did not enjoy the same statutory right to deny access as electric utilities. *See* 47 USC § 224(f)(2) (granting electric utilities, but not ILECs, the right to deny access for reasons of safety, reliability, insufficient capacity and generally applicable engineering purposes).

In *Cavalier Tel., LLC v. Va. Elec. & Power Co.,* 15 FCC Rcd. 9563 (2000), *supplemented by* 15 FCC Rcd. 17962 (2000), *vacated pursuant to joint motion by* 17 FCC Rcd. 24414 (2002) -- a decision with uncanny staying power despite being specifically vacated by the Commission -- the electric utility attachment techniques at issue were those of its CLEC affiliate (for all it appears). *Id* at ¶ 19 n.72 & 73 (describing the electric utility's use of boxing and extension arms as practices to support or install "communications lines"). Whatever the case, the *Cavalier* decision was premised in large part on access rules from the Local Competition Order which were subsequently reversed by *Southern Company v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002).

obligation in section 224(f)(1) does not mean an electric utility must "do" for attachers in the communications space what it "does" for itself in the supply space. This interpretation of section 224(f)(1) already has been tested and rejected in court. In the rulemaking following the 1996 Amendments, the Commission adopted a rule which stated: "[T]he principle of nondiscrimination established by section 224(f)(1) requires a utility to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs."[29] In his dissenting opinion, Commissioner Furchtgott-Roth (who has been proffered as an expert in this proceeding by cable television interests[30]) took exception with the Commission's interpretation of the non-discrimination "principle" in section 224(f)(1):

> I believe that the Commission misapprehends the group that is protected from discrimination, and as against whom. To my mind, "non-discrimination" is not about discrimination as between the utility itself and the requesters, but discrimination by the utility as among requesters. That is, non-discrimination does not mean that the utility must treat all cable televisions systems and telecommunications carriers just as it treats itself, but that the utility must treat all cable televisions systems and telecommunications carriers just as it treats other cable television systems and telecommunications carriers.[31]

[29] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Order on Reconsideration, 14 FCC Rcd. 18049, ¶ 51 (1999) ("Local Competition Order on Reconsideration"); *see also* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 1162 (1996) ("Local Competition Order").

[30] *See* Comments of Comcast Corp., WC Docket No. 07-245 (Mar. 7, 2008) (including as Exhibit 2 Declaration of Harold W. Furchtgott-Roth (Mar. 5, 2008)); see also Reply Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245 (April 22, 2008), at 10.

[31] Local Competition Order on Reconsideration, 14 FCC Rcd. 18049 (Comm'r Harold W. Furchtgott-Roth, Concurring in Part and Dissenting in Part).

The portion of the Commission's Order which drew Commissioner Furchtgott-Roth's comment was ultimately reversed on appeal in *Southern Co. v. FCC*.[32]

Simply put, boxing and bracketing are not "comparable" or "similar" to electric supply construction configurations such as triangular framing, turkey foot, alley arms or cross-arm construction. At a bare minimum, the Florida IOUs request that the Commission more clearly specify the intent of the rule, so the rule is properly framed for appellate review in the context of the existing record. In addition, the Florida IOUs request reconsideration on grounds that the Order is contrary to the requirements of reasoned decision-making and other relevant law, especially to the extent that the Order's findings and directives are inconsistent with Commission policy previously established in whole or part through rulemaking.[33]

III. THE NEW DEFINITION OF "INSUFFICIENT CAPACITY"

A. The New Definition

The Order -- apparently to support both the new rule regarding nondiscriminatory use of attachment techniques and the proposed new access rules in the FNPRM -- redefines the term "insufficient capacity" as used in section 224(f)(2). Although the new definition appears crafted in a way that allows an electric utility to deny access where a pole must be changed-out to accommodate a new attachment, it is not clear whether the new definition means a pole has "insufficient capacity" if an electric utility must rearrange its own supply facilities to accommodate a new attacher.

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[32] 293 F.3d at 1346-47.

[33] 5 U.S.C. § 706(2)(D) (stating that "[t]he reviewing court shall…hold unlawful and set aside agency action, findings, and conclusions found to be … (D) without observance of procedure required by law"). Given that the Order's finding on this issue is a statement of general applicability that defines practices bearing on pole access governed by section 224 in the same manner as the rules proposed in the FNPRM, under 5 U.S.C. § 553(b)-(d), the Commission should have developed this rule pursuant to notice and comment procedures.

The Commission expresses the definition in several different ways:

- [W]e find that a pole does not have "insufficient capacity" if it could accommodate an additional attachment using conventional methods of attachment that a utility uses in its own operations, such as boxing and bracketing.[34]

- Some utilities have argued that a pole has insufficient capacity—and thus access may be denied under section 224(f)(2)—if *any* make-ready work is needed. At the other extreme, the statute might be read to require a utility to completely replace a pole—an interpretation that some commenters oppose. We see no reason to adopt either of those extreme positions. Within those extremes is a range of practices, such as line rearrangement, overlashing, boxing, and bracketing that exploit the capacity of existing infrastructure in some way. Although commenters are divided regarding whether a pole has insufficient capacity if techniques such as boxing and bracketing are necessary to accommodate a new attachment, we find more persuasive the position that a pole does not have insufficient capacity if a new attachment can be added to the existing pole using conventional attachment techniques. Utilization of existing infrastructure, rather than replacing it, is a fundamental principal underlying the Act.[35]

- [W]e conclude that, where a pole can accommodate new attachments through boxing, bracketing, or similar attachment techniques, there is not "insufficient capacity" within the meaning of section 224(f)(2).[36]

- [W]e find that when a utility could accommodate a new attachment on a pole by using attachment techniques that the utility employs in its own operations, consistent with applicable safety codes, capacity is not "insufficient."[37]

The reference to "conventional methods of attachment that a utility uses in it own operations" is troubling in that it seeks to accomplish, through slightly different language, the same Commission objective specifically reversed by the Eleventh Circuit as *ultra vires* in *Southern Co. v. FCC*.[38] The reference to "line rearrangement" is of particular concern to the Florida IOUs insofar as it is not specifically limited to *communications* line rearrangement.

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[34] Order, ¶ 14.

[35] Order, ¶ 16 (citations omitted) (emphasis in original).

[36] Order, ¶ 16.

[37] Order, ¶ 16 n.56.

[38] 293 F.3d at 1347.

B. Request for Clarification and Reconsideration

1. Request for Clarification

The Florida IOUs request that the Commission clarify the intended scope of the new "insufficient capacity" definition because the statements (when read collectively) could be susceptible to two different interpretations: (1) a pole does not have "insufficient capacity" if rearrangement or use of similar techniques in the communications space can make room for an additional attachment; or (2) a pole does not have "insufficient capacity" if rearrangement or use of similar techniques anywhere on the pole (including but not limited to the electric supply space) can make room for an additional attachment.

Leaving the Order's language intact, without a more specific statement of intent, creates a potential for confusion and disputes. The Florida IOUs respectfully request that the Commission clarify the new definition of "insufficient capacity" by explaining the boundary of that definition with the following statement:

> Where a pole can accommodate new attachments through boxing, bracketing, or similar attachment techniques consistent with existing use of those techniques (by the pole owner or other attachers) in the communications space, there is not "insufficient capacity" within the meaning of section 224(f)(2). However, an electric utility is not obligated to change-out its pole or rearrange its electric facilities in order to accommodate an attachment request.

At a bare minimum, the Florida IOUs request that the Commission more clearly specify the intent of the rule, so the rule is properly framed for appellate review.

2. Request for Reconsideration

If the Commission intends to obligate electric utilities to rearrange their electric facilities or perform other supply space make-ready to accommodate new attachments, the Florida IOUs respectfully request that the Commission reconsider its rule. Such a rule would be erroneous in

at least three respects. First, the rule would misconstrue the scope of the "insufficient capacity" exception to the nondiscriminatory access requirement in the same fundamental manner already rejected by the Eleventh Circuit in *Southern Co. v. FCC*. Second, the rule would improperly conflate the separate exceptions to nondiscriminatory access by defining "insufficient capacity" contrary to the legislative intent of section 224. Third, the new definition of "insufficient capacity" would conflict with the Commission's earlier findings regarding the same term.

i. The Scope of the "Insufficient Capacity" Exception

The 1996 Amendments to the Act, for the first time, required utilities to grant cable television systems and telecommunications carriers non-discriminatory pole access. But the Act also gave electric utilities (and only electric utilities) a right to deny access "on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[39] In the initial rulemakings implementing the 1996 Amendments, the Commission required "a utility to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs."[40] Expanding (or increasing) capacity included "rearranging existing attachments or installing a new pole or duct"[41] and steps taken "to rearrange or change out existing facilities at the expense of the attaching parties in order to facilitate access."[42] On appeal, in *Southern Co. v. FCC*, the Eleventh Circuit reversed the Commission:

> The FCC's position is contrary to the plain language of § 224(f)(2). While the FCC is correct that the principle of non-discrimination is the primary purpose of the 1996 Telecommunications Act, we must construe statutes in such a way to give effect, if possible, to

[39] 47 USC § 224(f)(2).

[40] Local Competition Order on Reconsideration, 14 FCC Rcd. at ¶ 51.

[41] Local Competition Order, 11 FCC Rcd. at ¶ 1163.

[42] Local Competition Order on Reconsideration, 14 FCC Rcd. at ¶ 53.

> every clause and word of a statute. Section 224(f)(2) carves out a plain exception to the general rule that a utility must make its plant available to third-party attachers.[43]

The Order focuses on the Eleventh Circuit's statement about "giving effect" to the "insufficient capacity" exception,[44] but then defines "insufficient capacity" based on the rule of nondiscriminatory access, rather than as an *exception* to that rule.

"Capacity expansion" is the means by which "insufficient capacity" is rectified. The Commission has accurately noted in the past that both rearrangement and change-out are means of capacity expansion.[45] However, as Commissioner Powell explained when he dissented in part to the Commission's original requirement that utilities expand capacity:

> The language [in § 224(f)(2)] unambiguously reserves to electric utilities the right to deny access if there is not sufficient capacity on its poles, or in its ducts or conduits, or in its rights-of-way. There is nothing in the statute from which to draw the conclusion that Congress meant the words "insufficient capacity" to mean "insufficient expanded capacity," nor does this Order cite to any legislative history to support such a position. … [U]pon a request for attachment, the electric utility is not mandated to expand capacity of its poles under the non-discrimination principle drawn from section 224(f)(1). Instead, the electric utility must only ensure that any denials of such requests are done so on a non-discriminatory basis. [46]

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[43] *Southern Co. v. FCC*, 293 F.3d at 1346-47 (citation omitted).

[44] *See* Order, ¶ 15.

[45] *See supra* notes 41 and 42 and accompanying text.

[46] Local Competition Order on Reconsideration (Comm'r Michael Powell, Concurring in Part and Dissenting in Part). As quoted above, Commissioner Furchtgott-Roth made a similar point in his separate statement when he interpreted the nondiscriminatory access requirement to mean "the utility must treat all cable televisions systems and telecommunications carriers just as it treats other cable television systems and telecommunications carriers." *See supra* note 31.

The Eleventh Circuit agreed with Commissioner Powell and held that the Commission's "attempt to mandate capacity expansion is outside the purview of its authority under the plain language of the statute."[47]

The Commission cannot sidestep the Eleventh Circuit's holding through a new definition of "insufficient capacity." The Commission is repeating -- almost verbatim -- the error found by the Eleventh Circuit in *Southern Co. v. FCC*: "insufficient capacity" is an *exception to* nondiscriminatory access that does not depend on whether or how the utility "would expand capacity to meet its own needs."[48] In the current Order the Commission seems to exclude any practice from the meaning of capacity expansion if it is "conventional" or the utility uses it in its own practices.[49] This play on words has the same effect as the Commission's earlier (and since-reversed) capacity expansion rule, based on the same premise that what a utility does for itself somehow defines the boundaries of "insufficient capacity." Under *Southern Co. v. FCC*, the Order's definition of "insufficient capacity" is unlawful.

ii. Section 224(f)(2) Contains Multiple, Separate Exceptions to the Nondiscriminatory Access Rule

The Commission finds that there is not "insufficient capacity" if a pole "*could* accommodate" an attachment "using conventional methods of attachment that a utility uses in its own operations."[50] The Commission is combining the exceptions to mandatory access "for reasons of safety, reliability and generally applicable engineering purposes" with the

[47] *Southern Co. v. FCC*, 293 F.3d at 1346-47. The Eleventh Circuit also implicitly rejected the Commission's capacity expansion requirement in *Alabama Power Co. v. F*CC, 311 F.3d 1357, 1370 (11th Cir. 2002), where it equated a full capacity pole with the concepts listed in section 224(f)(2): "Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime."

[48] *Southern Co. v. FCC*, 293 F.3d at 1346.

[49] Order, ¶¶ 14, 16.

[50] Order, ¶ 14 (emphasis added).

"insufficient capacity" exception, despite the fact that the statute sets them out as separate exceptions. This distinction is especially problematic when applied to a utility's electric facilities, because it effectively requires the utility to subordinate its configuration of electric facilities for an attacher's needs until some secondary reason for denying access can be shown (like a safety or reliability problem). Section 224 contains no such dual requirement.

According to the Order, the "insufficient capacity" exception exists only when changing-out a pole is required, or when the techniques necessary to allow the attachment may be objectionable for reasons of safety, reliability, or engineering principles. The section 224(f)(2) exceptions were added as a limitation on the general right to nondiscriminatory access, and have been consistently interpreted as separate and independent bases for denying access.[51] Nothing in the list of exceptions in section 224(f)(2) allows the Commission to require the utility to show more than one of the listed bases for denying access; but this is precisely what the Commission's new definition has done. The Commission has declared that any technique the utility has found not to violate safety, reliability, and general engineering standards is not capacity expansion but instead merely "[u]tilization of existing infrastructure."[52] No matter how it is presented, this result artificially narrows the separate exception for "insufficient capacity" by ensuring it can only be found where a new pole is needed or where the adjustments required are otherwise objectionable.[53]

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[51] *Ala. Power Co. v. FCC*, 311 F.3d at 1363 ("That is, power companies could not decline offers to attach at regulated rates, save for the statutory **exceptions** of insufficient capacity **or** some safety, reliability, **or** other engineering problem." (emphasis added)); *Southern Co. v. FCC*, 293 F.3d at 1349-50 ("This language plainly mandates that utilities make all of their 'poles, ducts, conduits, or rights-of-way' available to third-party attachers (unless **one of the exceptions listed in § 224(f)(2)** applies)...") (emphasis added).

[52] Order, ¶ 16.

[53] *See, e.g.* Order, ¶ 16 n.56 ("The issue is whether a pole has 'insufficient capacity,' and we find that when a utility could accommodate a new attachment on a pole by using attachment

iii. The New Interpretation of "Insufficient Capacity" Contradicts Prior Interpretations of the Act

The Commission goes to great lengths to distance itself from settled interpretations of "capacity expansion" and "insufficient capacity." The Commission previously defined insufficient capacity as "the absence of usable physical space on a pole."[54] The Order now explains that employing boxing, bracketing and other "conventional" techniques (unlike pole replacement) "take[s] advantage of usable physical space."[55] The Commission also previously characterized both rearrangement and change-out as "capacity expansion" or means of "increasing capacity." The Commission now attempts to side-step those characterizations by describing rearrangement as "exploit[ing] the capacity of existing infrastructure in some way."[56]

The Commission bends over backwards to disavow its past statements. First, the Commission claims it "did not say that rearranging existing attachments constitutes 'capacity expansion.'"[57] Second, the Commission claims that, regardless, its previous statements about "capacity expansion" are insignificant.[58] A utility's statutory right to deny access where there is "insufficient capacity" and the fact that the Commission may not mandate "capacity expansion"

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techniques that the utility employs in its own operations, consistent with applicable safety codes, capacity is not 'insufficient.'").

[54] Order, ¶ 14; s*ee also Southern Co. v. FCC*, 293 F.3d at 1349.

[55] Order, ¶ 14.

[56] Order, ¶ 16.

[57] Order, ¶ 16 n.56; *but see* NPRM, ¶ 10 ("requiring capacity expansion, including installation of a larger pole where necessary, was a fair reading of the statute…"); Local Competition Order, ¶ 1163 (The Commission further determined that "[i]n some cases … increasing capacity involves more than rearranging existing attachments…").

[58] *Compare* Order, ¶ 16 n.56 ("[T]he term **'capacity expansion'** does not appear in the relevant provisions of the Act or our rules, so the Commission's discussion of that term has little regulatory significance for our interpretation of section 224(f)(2) here.") *with Southern Co. v. FCC*, 293 F.3d at 1347 ("The FCC's attempt to mandate **capacity expansion** is outside of the purview of its authority under the plain language of the statute.") (emphasis added throughout).

are but two sides of the same coin. The Commission's past discussions about expanding capacity and "insufficient capacity" were inextricably linked, and clearly equated "accommodating" and "modification" techniques with expanding capacity.[59]

The Eleventh Circuit found that "mandat[ing] capacity expansion is outside of the purview of [the Commission's] authority under the plain language of the statute."[60] In fact, the Eleventh Circuit explicitly stated that its inquiry into the Commission's requirement for expanding capacity "need not extend beyond the first step of the *Chevron* test."[61] The Commission's new refusal to acknowledge the settled meaning of "capacity expansion" is a thinly veiled attempt to circumvent the limitations of the Act. Any portion of the Order that

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[59] *See, e.g.*, Local Competition Order, ¶ 1163 ("We find it inadvisable to attempt to craft a specific rule that prescribes the circumstances in which, on the one hand, a utility must **replace or expand an existing facility** in response to a request for access and, on the other hand, it is reasonable for the utility to deny the request due to the difficulties involved in honoring the request. We interpret sections 224(f)(1) and (f)(2) to require utilities to take all reasonable steps **to accommodate** requests for access in these situations. Before denying access **based on a lack of capacity**, a utility must explore **potential accommodations** in good faith with the party seeking access."); *see also, e.g.*, Local Competition Order on Reconsideration, ¶ 51 ("We reiterate that the principle of nondiscrimination established by section 224(f)(1) requires a utility to take all reasonable steps **to expand capacity** to accommodate requests for attachment just as it would **expand capacity** to meet its own needs. Furthermore, before denying access **based on a lack of capacity**, a utility must explore **potential accommodations** in good faith with the party seeking access. Again, because **modification** costs will be borne only by the parties directly benefitting from the **modification**, neither the utility nor its ratepayers will be harmed by the requirement that **capacity expansions** be undertaken on a nondiscriminatory basis.") (emphasis added throughout).

[60] *Southern Co. v. FCC*, 293 F.3d at 1347.

[61] *Southern Co. v FCC*, 293 F.3d at 1347 (citing *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984)). The Eleventh Circuit explained the *Chevron* two-step process, "*Chevron's* first step requires us to ascertain whether Congress has spoken unambiguously 'to the precise question at issue.' *Id.* at 842. If the language of the statute is unambiguous, we go no further, for we must give effect to clear congressional intent. *Id.* at 842-43. If, however, we determine that Congress's intent is ambiguous as to the question at issue, we must move on to the second step of the *Chevron* test and ask whether the agency's interpretation of congressional intent is reasonable. *Id.* at 844. We must defer to an agency's reasonable interpretation of congressional intent. *Id.* at 844-45." *Southern Co. v. FCC*, 293 F.3d at 1343.

requires rearrangement and modification of facilities -- particularly of the utility's electric supply facilities -- contradicts the plain language of the Act, and would not be entitled to deference under the first prong of the *Chevron* standard.[62]

This is true not only because of *Southern Co. v. FCC*, but also because a Commission rule that prescribed use of certain construction techniques for electric supply facilities would require, in effect, that the Commission exert jurisdiction over the standards applicable to electric distribution construction. The Act regulates *pole attachments*, which are specifically defined to include only those attachments made by cable television systems and telecommunications carriers. There is no evidence in the statutory text or in the legislative history to indicate that Congress intended the Commission to be responsible for setting or adjudicating engineering standards for electric supply facilities. Any interpretation of "capacity expansion" or "insufficient capacity" that leads to such result goes beyond the plain language of the Act, and would be equally undeserving of *Chevron* deference.

In order to circumvent its past statements and the plain language of the Act (and the Eleventh Circuit's reaction thereto), the Commission relies on the Eleventh Circuit's finding that the term "insufficient capacity" is ambiguous such that the Commission has discretion to fill in a "gap in the statutory scheme."[63] This exalts semantics over substance. The Commission cannot insert a definition for an ambiguous term that is contrary to the clear legislative intent of the Act.

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[62] To find otherwise is to presume that the Eleventh Circuit meant something different by "capacity expansion" than the very Commission Orders it was overturning on the subject. *See, e.g., id.* at 1346-47 (citing Local Competition Order on Reconsideration; Local Competition Order).

[63] Order, ¶ 14 (citing *Southern Co. v. FCC*, 293 F.3d at 1348). The "gap" the Eleventh Circuit referred to that opened the door to Commission discretion was "[t]he absence of statutory language outlining this relationship [between insufficient capacity "and the utilities' ability to reserve available space for future needs]." *Southern Co. v. FCC*, 293 F.3d at 1348.

The concept of "capacity expansion" and "insufficient capacity" are inextricably linked. Whether viewed together, or taking the concepts separately, the Commission's attempt to require an electric utility to modify or rearrange its electric facilities in order to make additional capacity available for attachers would be contrary to the Act and not based on a reasoned justification. In addition to being contrary to the requirements of reasoned agency decision-making and section 224, to the extent that the Order's findings and directives are inconsistent with Commission policy previously established in whole or part through rulemaking, the Order's new "insufficient capacity" rule was not the product of the requisite procedure.[64]

IV. CONCLUSION

The Commission's new rules set forth in the Order, which will in turn become the basis for future action on the FNPRM, are susceptible to different interpretations. It is the nature of administrative regulation generally (and past activity on pole attachment issues in particular) that the possibility of different interpretations will lead to disputes – a result expensive for the Commission and the interested parties alike. As explained above, if the Commission's ultimate goal is to "rely … on new, broadly applicable rules,"[65] then the most logical step at this time is to clarify the boundaries of the new rules. The Florida IOUs request that the Commission adopt the clarifying statements set forth in the body of this petition. In the alternative, if the Commission does not intend the above-described scope for the newly stated rules, the Florida IOUs respectfully petition the Commission for reconsideration. Interpreted in light of previous

[64] *See* 5 U.S.C. § 706(2)(D). The "insufficient capacity" definition is a statement of general applicability that defines practices bearing on pole access governed by section 224, and is largely indistinguishable from the rules proposed in the FNPRM, because it likewise prescribes the limitations on future actions taken by the utilities to deny access. As such, under 5 U.S.C. § 553(b)-(d), the Commission should have developed this rule pursuant to notice and comment procedures.

[65] FNPRM, ¶ 22.

disputes regarding the purpose and extent of the nondiscrimination principle, the Florida IOUs believe that the new rules overreach the Commission's authority under the Act, and subject utilities to requirements neither contained in nor intended by the Act.

Respectfully submitted,

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Exhibit A

Declaration of Thomas J. Kennedy, P.E.

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

In the Matter of	**)**	
	)	
Implementation of Section 224 of the Act;	**)**	**WC Docket No. 07-245**
A National Broadband Plan for Our	**)**	**GN Docket No. 09-51**
Future	**)**	
	)	

DECLARATION OF THOMAS J. KENNEDY, P.E.

1. My name is Thomas J. Kennedy. I am a Professional Engineer licensed in the State of Florida. I am currently employed by Florida Power & Light Company ("FPL") as Principal Regulatory Affairs Analyst in the Distribution Business Unit. I am FPL's Professional Engineer responsible for managing Joint Use. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity at FPL. I am the same Thomas J. Kennedy who submitted declarations in support of FPL's comments in this docket in March 2008, April 2008, and August 2010. This declaration is submitted in support of the Petition for Reconsideration and Request for Clarification of the Florida Investor-Owned Electric Utilities.

2. "Figure 1" in the Petition for Reconsideration is a true and correct photograph of triangular framing construction used in the past, and can be currently found on some of FPL's distribution poles. Triangular framing is used for three-phase primary construction and involves using insulators on two opposite sides and the top of the pole.

3. "Figure 3" in the Petition for Reconsideration is a true and correct photograph of an alley arm, as used from time to time on FPL's distribution poles. Alley arms, like other cantilevered brackets, place an unbalanced amount of stress on a pole and, therefore, are used sparingly and almost exclusively where there are right-of-way restrictions. This construction method avoids

encroachment onto private property and is used when there is a need to have the primary conductor lay horizontal. However, as a result of the stress these brackets place on the pole, FPL's construction policy requires poles made of steel reinforced concrete to be used for this type of framing.

4. "Figure 4" in the Petition for Reconsideration is a true and correct photograph of cross-arm construction as used on FPL's distribution poles. Cross-arm construction is used when FPL needs three phases of conductor to lay horizontally, such as when FPL installs switching equipment, crosses an intersection, or when conductors need to be tapped with a perpendicular circuit. Cross-arm construction has been used less frequently in recent years because pole-line construction has been forced (through administrative policy or local ordinance) up against the right-of-way boundary.

5. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 2nd day of September, 2010.

Thomas J. Kennedy
Principal Regulatory Affairs Analyst
Florida Power & Light Company

Exhibit B

Declaration of Scott Freeburn

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

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	**WC Docket No. 07-245**
A National Broadband Plan for Our Future	)	**GN Docket No. 09-51**
	)	
	)	

DECLARATION OF SCOTT FREEBURN

1. My name is Scott Freeburn. I am currently employed at Progress Energy Florida, Inc. ("PEF") as Manager of Joint Use and Locates. I have held this position for 6 years. I am the same Scott Freeburn that submitted declarations in support of PEF's comments in this docket in March 2008, April 2008, and August 2010. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as Manager of Joint Use and Locates for PEF. This declaration is submitted in support of the Petition for Reconsideration and Request for Clarification of the Florida Investor-Owned Electric Utilities.

2. "Figure 2" in the Petition for Reconsideration is a true and correct photograph of "turkey foot" construction as used from time to time on PEF's distribution poles. Turkey foot construction is a three-phase electric conductor design which involves three insulator arms at the top of the pole. Turkey foot construction is similar in design, function and purpose to triangle/delta construction, but uses slightly less of the electric supply space.

3. Boxing and bracketing in the communications space can impact the speed and success of hurt-man rescue. When a lineman on the pole is rendered unconscious or otherwise unable to descend a pole under his own power, another lineman will climb the pole to retrieve him. Once the rescue lineman reaches the appropriate height (usually above the communications space), he

will block-off, rope into the injured lineman, detach the injured lineman from his harness, and lower the injured lineman to the ground on the "clean" side of the pole (the side opposite of the attachments) to avoid entanglement or delay. If the injured lineman becomes caught on hardware or lines, the overall time of rescue increases, which minimizes the chances of a successful rescue.

4. On rare occasions, PEF will allow a communications attacher to use an extension arm to avoid the need for retensioning a messenger in situations where a pole has been moved back due to road widening or some other reason. This is allowed only on a case-by-case basis and depends on a variety of circumstances. This practice is not allowed to avoid vertical clearance issues (to avoid make-ready at the pole) but instead to avoid, where possible, more costly alternatives for the communications attacher. "Figure 5" in the Petition for Reconsideration is a true and correct photograph depicting such a situation.

5. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 2nd day of Sept, 2010.

Scott Freeburn
Joint Use Manager and Locates
Progress Energy Florida

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

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	**WC Docket No. 07-245**
A National Broadband Plan for Our Future	)	**GN Docket No. 09-51**
	)	
	)	

PETITION FOR RECONSIDERATION AND REQUEST FOR CLARIFICATION OF ONCOR ELECTRIC DELIVERY COMPANY LLC

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September 2, 2010

Oncor Electric Delivery Company LLC ("Oncor"), pursuant to 47 C.F.R. § 1.429, respectfully submits this Petition for Reconsideration and Request for Clarification ("Petition") of certain portions of Order No. FCC 10-84 in the above-referenced docket ("Order").[1] As grounds for this Petition, Oncor states as follows:

1. Oncor adopts and joins in the arguments set forth in the Petition for Reconsideration and Request for Clarification of the Florida Investor-Owned Utilities as if set forth fully herein. Oncor also adopts and joins in the arguments set forth in the Petition for Reconsideration of the Coalition of Concerned Utilities as if set forth fully herein.

2. Respectfully, the newly stated rules set forth in the Order overreach the Commission's statutory authority as set forth in the Pole Attachment Act. To that end, Oncor requests that such rules be vacated in their entirety. In the event the Commission does not vacate such rules in their entirety, Oncor requests that the Commission adopt the clarifying statements set forth in the petitions filed by the Florida Investor-Owned Utilities and the Coalition of Concerned Utilities. In the alternative, if the Commission does not adopt the proposed clarifying statements, Oncor respectfully petitions the Commission for reconsideration.

Respectfully submitted,

/s/ J. Russell Campbell

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[1] 75 Fed. Reg. 45,494 (Aug. 3, 2010).

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

In the Matter of	)	
	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	

To: The Commission

PETITION FOR RECONSIDERATION OF THE COALITION OF CONCERNED UTILITIES

Allegheny Power
Baltimore Gas and Electric Co.
Dayton Power and Light Co.
FirstEnergy Corp.
National Grid
NSTAR
PPL Electric Utilities
South Dakota Electric Utilities
Wisconsin Public Service Company

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Filed: September 2, 2010

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

In the Matter of	)	
	)	
Implementation of Section 224 of the Act	)	**WC Docket No. 07-245**
	)	
A National Broadband Plan for Our Future	)	**GN Docket No. 09-51**
	)	

To: The Commission

PETITION FOR RECONSIDERATION OF THE COALITION OF CONCERNED UTILITIES

Allegheny Power, Baltimore Gas and Electric Co., Dayton Power and Light Co., FirstEnergy Corp., National Grid, NSTAR, PPL Electric Utilities, South Dakota Electric Utilities, and Wisconsin Public Service Company (collectively, "the *Coalition of Concerned Utilities*" or "*Coalition*"), by their attorneys and pursuant to Section 1.429 of the Rules of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.429, respectfully petition the Commission for reconsideration of its Order released in this proceeding on May 20, 2010 ("May 20 Order").[1]

The May 20 Order established a rule requiring the "nondiscriminatory" use of attachment techniques. The general rule, as articulated by the May 20 Order, is that "any attachment technique that a utility uses or allows to be used will henceforth be presumed appropriate for use

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[1] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (rel. May 20, 2010). The Order portion was published in the Federal Register on August 3, 2010, 75 Fed. Reg. 45494.

by attachers on the utility's poles under comparable circumstances."[2] The Order adds that electric utilities may rebut the presumption for reasons of "safety, reliability and generally applicable engineering purposes."[3] The May 20 Order also states that "[i]f a utility believes that boxing and bracketing are fundamentally unsafe or otherwise incompatible with proper attachment practice, it can choose not to use or allow them at all."[4] Finally, the Order provides that "[i]f a utility chooses to allow boxing and bracketing in some circumstances but not others, the limiting circumstances must be clear, objective, and applied equally to the utility and attaching entity."[5]

The *Coalition* requests that the Commission reconsider its decision and clarify its final rules as follows:

(1) This nondiscrimination requirement applies only to the extent the pole owner has allowed itself or others to use boxing, bracketing and other attachment techniques for *communications* wires in the communications space;

(2) Going forward, a pole owner should be free to impose new boxing and extension arm requirements regardless of what it may have allowed in the past; and

(3) For poles that are jointly-owned by an ILEC and electric utility, each joint owner should be permitted to limit the extent to which boxing, bracketing and other attachment techniques are permitted on jointly-owned poles.

A. The Nondiscrimination Requirement Should Apply Only To Communications Attachments

Section 224(f)(1) of the Pole Attachment Act specifies that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any

[2] May 20 Order at ¶10.

[3] *Id.* at ¶11.

[4] *Id.*.

[5] *Id.* at ¶13.

pole, duct, conduit, or right-of-way owned or controlled by it."[6]

The *Local Competition Order*, which established five general rules of access to utility poles, makes clear that the Section 224(f)(1) nondiscrimination requirement applies only to communications attachments. The fourth rule adopted in the *Local Competition Order* provides that "where access is mandated, the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access."[7] The fifth rule specifies that "a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services."[8] As summed up by the Commission, "the statute does not require nondiscriminatory treatment of all utilities; rather, it requires nondiscriminatory treatment of all telecommunications and video providers."[9]

For good reason, the *Local Competition Order* did not in any way create "parity" between an electric utility's electric operations and a communications company's communications operations. Instead, it held that electric utilities must treat telecommunications carriers and cable operators in a nondiscriminatory manner.

Consistent with the *Local Competition Order*, therefore, the Commission should clarify that an electric utility's use of boxing, brackets or any other attachment technique for facilities in the electric space on the poles does not obligate the utility pole owner to allow the same attachment technique to be used for communications attachments.

Boxing, bracketing and other attachment techniques in the electric space are not "comparable" to communications attachments in the communications space in any event. The

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[6] 47 U.S.C. § 224(f)(1).1

[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, at ¶1156 (1996) ("*Local Competition Order*").

[8] *Id.* at ¶1157.

[9] *Id.* at ¶1170.

electric industry uses cross arms and fiberglass brackets to support the electric conductors located near the top of the poles. While boxing and brackets in the communications space can impede access to the electric space at the top of the pole, electric workers have no need to bypass or get above the cross arms and fiberglass brackets supporting electric conductors. In addition, while boxing in the communications space greatly impedes pole replacement, no such concern exists with cross arms used in the electric space (which one could argue is similar to boxing) since any facilities at the top of the pole can readily be moved to either side of the pole and not impede pole change outs. Wires that box the pole in the communication space, however, have insufficient slack to be moved over the top of the pole to the other side. Thus, when a pole is boxed in the communications space, the new pole must be inserted between the wires on both sides of the existing pole. Such a procedure is more costly and time consuming, creates additional safety hazards, and risks damaging the communications facilities that are currently attached.

Comparing boxing, bracketing and other attachment techniques in the electric space to the same techniques in the communications space is akin to comparing apples to oranges. It makes no sense. The circumstances are entirely different.

B. Pole Owners Should Be Able To Modify Their Policies Regarding The Use Of Attachment Techniques

The May 20 Order specifies that "[i]f a utility believes that boxing and bracketing are fundamentally unsafe or otherwise incompatible with proper attachment practice, it can choose not to use or allow them at all."[10] On its face, this statement allows a pole owner to change its policies with respect to boxing, bracketing and other attachment techniques for the purpose of disallowing their use altogether. While it is logical to infer that a pole owner similarly may

[10] May 20 Order at ¶11.

change its attachment technique policies to limit but not disallow such techniques altogether, the May 20 Order does not explicitly authorize it. For example, as this new rule becomes effective and is implemented, utilities may find that their policies must be refined rather than eliminated altogether.

The *Coalition* therefore respectfully requests that the Commission clarify that a utility pole owner retains a right to modify its standards and policy with respect to attachment techniques provided the policy is applied in a nondiscriminatory manner going forward. Further, as mentioned above, it should be permissible for a utility to have differing attachment requirements for attachments made within the communications space as opposed to attachments in the electric space.

C. Joint Pole Owners Must Retain The Ability To Control Attachment Practices On Their Poles

Jointly-owned poles (where each pole is owned jointly by the ILEC and electric utility) are used extensively by several *Coalition* members. Recognizing ownership liabilities, Joint Ownership Agreements typically require each owner to consent to third party use of the poles, and each pole owner has the separate and independent right to (and in fact does) establish its own standards and practices regarding use of the pole, consistent with safety, reliability and generally accepted engineering practices.

The May 20 Order does not explain how the nondiscrimination rule would apply with respect to poles that are jointly-owned. The *Coalition* therefore requests the Commission to clarify its ruling in a way that retains the authority of each pole owner to approve attachment techniques that are used on jointly-owned poles. Each pole owner should be permitted to establish requirements or limitations on boxing, bracketing and other attachment techniques on jointly-owned poles, provided the requirements are applied in a nondiscriminatory manner.

WHEREFORE, THE PREMISES CONSIDERED, the *Coalition of Concerned Utilities* urges the Commission to act in a manner consistent with the views expressed herein.

Respectfully submitted,

COALITION OF CONCERNED UTILITIES

Allegheny Power
Baltimore Gas and Electric Co.
Dayton Power and Light Co.
FirstEnergy Corp.
National Grid
NSTAR
PPL Electric Utilities
South Dakota Electric Utilities
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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PETITION FOR RECONSIDERATION OR CLARIFICATION OF THE ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION, BRESNAN COMMUNICATIONS, BROADBAND CABLE ASSOCIATION OF PENNSYLVANIA, CABLE AMERICA CORPORATION, CABLE TELEVISION ASSOCIATION OF GEORGIA, FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., MEDIACOM COMMUNICATIONS CORPORATION, NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, OHIO CABLE TELECOMMUNICATIONS ASSOCIATION, OREGON CABLE TELECOMMUNICATIONS ASSOCIATION, AND SOUTH CAROLINA CABLE TELEVISION ASSOCIATION

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September 2, 2010

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A *National Broadband Plan* for Our Future	)	GN Docket No. 09-51

PETITION FOR RECONSIDERATION OR CLARIFICATION OF THE ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION, BRESNAN COMMUNICATIONS, BROADBAND CABLE ASSOCIATION OF PENNSYLVANIA, CABLE AMERICA CORPORATION, CABLE TELEVISION ASSOCIATION OF GEORGIA, FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., MEDIACOM COMMUNICATIONS CORPORATION, NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, OHIO CABLE TELECOMMUNICATIONS ASSOCIATION, OREGON CABLE TELECOMMUNICATIONS ASSOCIATION, AND SOUTH CAROLINA CABLE TELEVISION ASSOCIATION

The Alabama Cable Telecommunications Association, Bresnan Communications, Broadband Cable Association of Pennsylvania, Cable America Corporation, Cable Television Association of Georgia Florida Cable Telecommunications Association, Inc., Mediacom Communications Corporation, New England Cable and Telecommunications Association Ohio Cable Telecommunications Association, Oregon Cable Telecommunications Association, and South Carolina Cable Television Association, providers of cable, broadband, and other services, and state trade associations representing these entities ("Petitioners"), pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby seek reconsideration of the Commission's recent *Pole Order* in the above-captioned docket, or alternatively, for clarification of the *Pole Order*.[1]

[1] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-245; GN Docket No. 09-51, FCC 10-84 (rel. May 20, 2010), 75 Fed. Reg. 45494 (Aug. 3, 2010) ("*Pole Order*").

INTRODUCTION AND SUMMARY

Petitioners are concerned that pole owners will rely on parts of the *Pole Order* to refuse to replace (or changeout) an existing pole with a taller replacement pole where a taller pole is needed to accommodate communications plant for existing or prospective attachers because the *Pole Order* states that replacement will not be required.[2] Pole replacement is a routine procedure for all pole owning utilities, and has without question been commonly used by all pole owners to accommodate existing, new and modified attachments for themselves and third-party attachers before and after the Pole Attachment Act, the 1996 amendments, and currently. Petitioners are also concerned that pole owners will also deny replacements in a discriminatory manner that is prohibited by the Act but ostensibly sanctioned by the *Pole Order* even if the cost of such replacement is tendered by the attacher and a pole owning utility has made and continues to make such changeouts to satisfy its own needs, those of joint owners, and/or those of other pole users.

First, normal and customary make-ready without a doubt includes rearrangements as well as pole change-outs where necessary, and "transfers" described in Sections 224(h) – (i) and pole agreements likewise indisputably relate to replacement poles. Moreover, a changeout requirement is fully consistent with the intent underlying the *Pole Order* and long-standing, well-established industry practice, as well as with the judicial and administrative decisions interpreting Section 224.

[2] The Commission erroneously characterized pole replacement as an "extreme position[]" that it would not adopt, finding that "[u]tilization of existing infrastructure, rather than replacing it, is a fundamental principal underlying the Act." *Id.* ¶ 16. As will be shown below, pole replacement is not "extreme" but is and has been an integral part of the Act and history of pole line maintenance and accommodation of third-party attachers.

Second, the same nondiscrimination standard in 47 U.S.C. § 224(f) that the Commission relies on to require pole owners to allow the use of "techniques" such as "line rearrangement, overlashing, boxing, and bracketing," would also require pole owners to install a taller replacement pole, if pole replacement is one of the "techniques" the utility uses for itself or other attachers.[3] Alternatively, if the *Pole Order* was instead intended to reinforce that *any* nondiscriminatory technique – including a changeout – is no less a requirement and only that new pole placement would not be required where no pole line exists, the Commission should clarify the *Pole Order* by stating that expressly.

Third, a changeout requirement would also advance the country's broadband policies. In seeking to "revis[e] … pole attachment rules to lower the costs of telecommunications, cable, and broadband deployment and to promote competition, as recommended in the National Broadband Plan,"[4] the *Pole Order* underscored that "communications providers have a statutory right to use space- and cost-saving techniques … consistent with pole owners' use of those techniques." *Id.* ¶¶ 1, 8. Thus, "utilities must allow attachers to use the same attachment techniques that the utility itself uses in similar circumstances," *id.* ¶ 9, and "any attachment technique that a utility uses or allows to be used will [ ] be presumed appropriate for use by attachers … under comparable circumstances." *Id.* ¶ 10.

Reconsideration is necessary if the Commission truly seeks to "prevent utilities from denying attachers the benefits of [ ] techniques in situations where the utility itself would, or has, used them," *id.* ¶ 12, to require them to adhere to "limiting circumstances [that are] clear,

[3] Pole owning utilities will still retain the right to decline pole changeouts if they do not already do such for themselves and/or other pole users.

[4] *Pole Order* ¶ 1 (invoking *Omnibus Broadband Initiative*, Federal Communications Commission, "Connecting America: The National Broadband Plan," at 109 (2010) ("*National Broadband Plan*")).

objective, and applied equally," *id*. ¶ 13, and to avoid hindering deployment of infrastructure needed to maximize broadband access and other upgraded or evolving services. As with other steps taken in the *Pole Order*, "[c]larifying this application of a utility's nondiscriminatory access obligation [will] provide[ ] certainty that will spur competition and promote the deployment of a variety of technologies." *Id*. ¶ 10.

BACKGROUND

When implementing the 1996 Act's amendments to Section 224's regulation of pole attachments to create an affirmative right of access,[5] the Commission determined that, where a utility can take steps necessary to expand capacity if its own needs so require, including changing out poles for taller replacements, the nondiscrimination principle in Section 224(f)(1) required also doing so to accommodate prospective attachers and/or additional facilities of existing attachers.[6] The Commission quoted legislative history from Section 224's original enactment, that Congress expected "it may be necessary for the utility to replace an existing pole with a larger facility … to accommodate [ ] CATV user[s]" under the statute. *Local Competition Recon. Order* ¶ 53 (quoting S. Rep. No. 580 (1977)). In addition, Congress made clear that pole replacements were part of the known and accepted techniques for accommodating attachers by

[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151 *et seq*.)) ("1996 Act") adding, *inter alia*, Section 224(f).

[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 ¶¶ 1162-1163 (1996) ("*Local Competition Order*"), *on recon.*, 14 FCC Rcd. 18049 ¶¶ 51-52 (1999) ("*Local Competition Recon. Order*") (construing 47 U.S.C. § 224(f)(1) ("A utility shall provide a cable [ ] system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.")).

requiring that the costs of rearranging or replacing attachments be borne by the entity necessitating such rearrangements or replacements. 47 U.S.C. §§ 224(h) – (i).[7]

The contours of this obligation were reviewed in *Southern Company v. FCC*, 293 F.3d 1339 (11th Cir. 2002). In that case, the Eleventh Circuit reversed the Commission's requirement for capacity expansions, but only "where *it is agreed* that capacity on a given pole or other facility is insufficient to accommodate a proposed attachment." *Id*. at 1346 (emphasis added). Because that reversal was limited to instances "where it is agreed" by the relevant parties – *i.e.*, the utility and would-be attacher – that a facility is "insufficient" to allow further attachments, a pole owner could not refuse to replace a pole in its sole discretion but only where the attacher agreed.[8] The court went on to hold that "the scope and parameters of the term 'insufficient' capacity'" are ambiguous, and thus to be set by the Commission acting in its sound discretion. *Id*. at 1348 ("[T]he Act does not speak precisely to … how the term 'insufficient capacity' is to be defined" and is "[i]n fact … silent on the scope and parameters of the term."). *See also Pole Order* ¶ 16. And, critically, under *Southern Co.*, pole owners are not able to unilaterally determine that capacity is insufficient, 293 F.3d at 1347-48, yet that would be the result of

[7] In addition, pole accounting allows for depreciation and net salvage values, none of which would make any sense unless poles were routinely removed and replaced. S*ee* FCC Report 43-01, Table III - Pole and Conduit Rental Calculation Information, Row 201 (titled "Accumulated Depreciation – Poles") and Row 301 (titled "Depreciation Rate – Poles"); FERC Form 1, Annual Report of Major Electric Utilities, page 200, line 22 (indicating depreciation for total plant in service, which includes depreciation for pole plant); pages 206-207, line 64 (indicating Account 364 beginning of year account balance, additions, retirements, adjustments, transfers and end of year account balance); and page 337.1 (indicating estimated average service life and applied depreciation rates for various electric plant asset accounts, including Account 364).

[8] Such instances could include situations where pole change-outs cannot practically occur due to terrain, obstructions, or zoning restrictions. *See infra* at 10.

allowing the pole owners to refuse changeouts to taller poles, as the *Pole Order* appears to contemplate.[9]

Any possible question about the custom and practice with respect to changeouts was laid to rest in a subsequent Eleventh Circuit decision issued just a few months after *Southern Co*. In *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002), the court considered, *inter alia*, what it means for poles to be "full" and the effect thereof on whether utilities receive just compensation for mandatory third-party attachments that "take" space on the pole at rates set by FCC formula. *Alabama Power* held that a takings analysis requires compensation to the pole owner above marginal cost *only* if the pole was "full" *and* the pole owner's own needs or those of another would-be attacher/buyer "waiting in the wings" could not be accommodated.[10]

Thus, a "full" pole, in the Eleventh Circuit's view, is one that has reached a point where *no* measures can be taken to allow attachment of further equipment without displacing any pole user. Plainly, the ability to changeout poles to allow all existing users to remain, while also accommodating new users/attachments, means a pole is not "full" or, put differently, does not have "insufficient capacity." And in subsequent administrative litigation, the FCC's Chief Administrative Law Judge held that "full capacity" occurs only in cases where replacement with taller poles is not feasible; where it is feasible, changeout is required, and existing attachments

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[9] In this same regard, the FNPRM accompanying the *Pole Order* also erroneously (and perhaps mistakenly) proposes to delegate to pole owning utilities the unilateral right to determine when capacity is sufficient. FNPRM ¶ 67 (referring to "pole owners' ... final authority ... relat[ing] directly to insufficient capacity" and other circumstances that may factor into capacity-limit considerations). The Eleventh Circuit has already rejected this notion when it held that such a delegation "is clearly not what Congress intended when it passed the Act." *Southern Co.*, 293 F.3d at 1347-48 (rejecting "argu[ment] that the language [in § 224(f)(2)] permitting utilities to deny access on the basis of 'insufficient capacity' specifically entrusts [ ] utilities with the power to determine when capacity is insufficient").

[10] *Id*. at 1370-71. The Eleventh Circuit also noted the FCC formula already provides pole owners "much more" than marginal costs. *See id*. at 1369.

must be "transfer[ed] to a substituted pole." *Florida Cable Telecomms. Ass'n v. Gulf Power Co.*, ALJ Initial Decision, 22 FCC Rcd. 1997 ¶ 11 (2007) ("*Gulf Power ALJ Decision*").

Moreover, the present *Pole Order* properly notes that, even after *Southern Co.*, the statute gives attachers a right to space- and cost-saving techniques consistent with those pole owners already use, and the availability of those techniques means there is "sufficient capacity" under Section 224(f)(2) so as to preclude a denial of access. *Pole Order* ¶¶ 8-16. Significantly for present purposes, the *Pole Order* also indicates that even changeouts can be a permitted technique consistent with *Southern Co.* if the parties have not "agreed" that capacity is insufficient, insofar as "the statute might be read to require a utility to completely replace a pole." *Id*. ¶¶ 1, 16. In this regard, it is significant that *Southern Co.* also recognized, apart from overturning the Commission's expansive approach, that "the scope and parameters of the term 'insufficient' capacity'" are ambiguous,[11] leaving a "gap in the statutory scheme '[f]rom [which] springs executive discretion" for the FCC to exercise on when "insufficient capacity" exists. *Southern Co.*, 293 F.3d at 1348 (quoting *Gonzalez v. Reno*, 212 F.3d 1338, 1348 (11th Cir. (2000)). The *Pole Order* is on the right track insofar as it indicates the Commission properly views *Southern Co.* as applying only where "it is agreed that the pole's capacity is insufficient," and as recognizing "that the term 'insufficient capacity' … is ambiguous" giving the Commission "discretion in filling that 'gap in the statutory scheme.'" *Pole Order* ¶ 14 (quoting *Southern Co.*, 293 F.3d at 1346-48); *accord id*. ¶ 15 (citing *Gulf Power ALJ Decision* ¶ 24). Reconsideration here will fill that "gap" with well-accepted custom and practice.

[11] 293 F.3d at 1348 ("[T]he Act does not speak precisely to … how the term 'insufficient capacity' is to be defined" and is "[i]n fact … silent on the scope and parameters of the term.").

DISCUSSION

I. CHANGING OUT EXISTING POLES FOR TALLER POLES IS A ROUTINE TECHNIQUE THAT UTILITIES HAVE DEPLOYED AND CONTINUE TO DEPLOY FOR THEIR OWN NEEDS AND TO ACCOMMODATE THIRD-PARTY ATTACHERS

Distribution poles generally average 35 or 40 feet in height, but are widely available and routinely deployed in sizes starting at 30 feet, on up to 60 feet, usually in 5 foot increments. Even poles as tall as 100 feet are sometimes used in distribution plant. Accordingly, utility pole inventories usually have taller poles available that can be and have been routinely deployed, whether to replace a pole damaged by weather or in an accident, or to accommodate new or modified facilities. Indeed, the ability to install taller poles is part of the Pole Attachment Act's legislative history, noting that the law would require utilities "to replace an existing pole with a larger facility … to accommodate [ ] CATV." *See supra* at 4 (citing *Local Competition Recon. Order* (quoting S. Rep. No. 580)). The expectation that utilities routinely change out poles for their own benefit or that of others is also embodied in Sections 224(h) and (i), which require notice to allow all pole users to take advantage of modifications, and specify how the costs of modifications, facilities updates and transfers should be allocated.[12]

The *Gulf Power ALJ Decision*, ¶ 20, confirms that utilities generally accommodate changeouts, and that "the industry's established remedy" as part of "normal and customary make-ready" is to require "rearrangements, including pole change-outs" where necessary. *Id*. ¶ 22 & n.11. These conclusions reflect testimony of a "former key employee" of the utility, who

[12] *See* 47 U.S.C. § 224(h) – (i). It is significant that Section 224(i), among other things, establishes that an attacher is "not [ ] required to bear any of the costs of rearranging or *replacing* its attachment, if such rearrangement or *replacement* is required [by] an additional attachment or [ ] modification of an [ ] attachment [ ] by [another] entity." *Id*. § 224(i) (emphasis added). Such "replacement," as an alternative to "rearrangement," would only be necessary where the attacher moves facilities from an existing pole to a replacement pole as a result of a changeout.

acknowledged "Gulf Power will change-out … a pole if necessary." *Id*. ¶¶ 7, 23. In fact, other, expert testimony in *Gulf Power* – which was litigated in the wake of *Alabama Power* to allow the utility the opportunity to show (among other things) that its poles might be "full" so as to support its request for higher pole rates – confirms the ALJ's conclusions and corroborates the testimony by Gulf Power's employee.[13] Michael T. Harrelson, P.E., a registered professional electrical engineer and engineering consultant who has worked on or around electrical systems and the electricity business most of his life, including several decades with Georgia Power Company, explained that, "if a new attachment or existing attachments necessitate a change-out to an incrementally taller pole that [the utility] routinely uses and that is available from [its] inventory, [it] … is routine work" to undertake the changeout.[14] Mr. Harrelson testified in his expert opinion that pole replacement is "[s]tandard industry practice for electric utilit[ies]." *Id*. at 6-7.

Taking just one example, Gulf Power's permitting procedure provides for pole change-outs, and testimony by its personnel indicated that only in "limited cases" is there a situation where, because of engineering practices, the height of a pole line or pole itself cannot be increased.[15] Another of Plaintiffs' experts similarly noted that, "[i]n the overwhelming majority of cases, by Gulf Power's own admission, additional attachments can (and are) accommodated in the course of normal and customary operating practices of pole owners, including … change-

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[13] Gulf Power ultimately was unsuccessful in showing its poles were full and/or that a higher pole rental rate was supportable. *See generally id*.

[14] *See* Pre-Filed Direct Testimony of Michael T. Harrelson, P.E., in *Florida Cable Telecommunications Association, Inc., et al. v. Gulf Power Co.*, EB Docket No. 04-381 ("*FCTA v. Gulf Power*"), Mar. 31, 2006, at 10 ("Harrelson Expert Test.") (Exhibit 1 hereto). Excerpts of testimony and other record materials referenced herein are provided in the Appendices to this Petition. The record in this proceeding, while initially designated as confidential and subject to a protective order, was deemed unsealed by Order FCC 06M-32 (rel. Oct. 13, 2006).

[15] Deposition of Rex Brooks, Senior Engineering Representative (Retired), in *FCTA v. Gulf Power*, at 45-46 (Exhibit 2 hereto).

outs."[16] Mr. Harrelson underscored this point, opining that: "Not to do … pole change-out if the space is needed would be … inconsistent with industry custom and … practices. Expanding pole capacity is exactly what … all [ ] power companies do when they need more pole space or … line capacity." Ex. 1, Harrelson Expert Test. at 10-11.

The expert testimony thus confirmed the "actual, dynamic nature of poles in a joint use utility system," *id*. at 9, that along with the routine nature of pole changeouts, supports an FCC determination that, even after *Southern Co.*, changeouts may be required to meet the needs of third-party attachers and the *National Broadband Plan*. Again, this would not require utilities to erect new pole lines for third-parties where they do not already exist, or to make pole changeouts in the unlikely event that (for whatever reason) it is physically impossible, cost-ineffective, or not already the utility's practice to do such replacements. Rather, consistent with the *Pole Order*'s holdings regarding other attachment techniques, changeouts (or intersetting new poles in existing lines) would only be required if it is something the utility already does, and there is no external restraint on its doing so in favor of an attacher. Indeed, one of Gulf Power's key employees testified that it was impractical to distinguish between rearrangements of attachments and pole changeouts,[17] and the Commission should not treat these routine construction practices differently under Section 224(f)(1).

Adopting on reconsideration the rule proposed here would be an "eminently reasonably mechanism to ensure that when utilities … deny attachers access on the basis of insufficient capacity, capacity is actually insufficient." *Southern Co.*, 293 F.3d at 1348-49. There is no

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[16] Pre-filed Direct Testimony of Patricia D. Kravtin, in *FCTA v. Gulf Power*, Mar. 31, 2006, at 28 ("Kravtin Expert Test.") (citing Gulf Power discovery responses and pleadings) (Exhibit 3 hereto).

[17] Testimony of Michael Dunn in *FCTA v. Gulf Power*, Apr. 24, 2006, at 725 (Exhibit 4 hereto).

concern adopting the narrower "capacity expansion" requirement advocated here will face the same problem under Section 224(f)(2) as the rule *Southern Co.* overturned, because changeout leaves ample room for access to be denied for actual "insufficient capacity," where a utility does not change out or some physical limitation precludes a changeout.

As confirmed in the *Gulf Power ALJ Decision* (cited in the *Pole Order*), where "there was never an agreement between [attachers] and [the utility] regarding pole capacity, the *Southern Co.* decision is not relevant."[18] The "*Alabama Power* regimen" means that a pole "is at full capacity" *only* when replacement with a taller pole and transferring existing attachments to it is not feasible.[19] And this is entirely consistent with the holding in *Southern Co.* that expressly prohibits pole owners from making the final determination that a pole's capacity is insufficient. "This is clearly not what Congress intended when it passed the Act." 293 F.3d at 134 (rejecting "argu[ment] that the language [in § 224(f)(2)] permitting utilities to deny access on the basis of 'insufficient capacity' specifically entrusts [ ] utilities with the power to determine when capacity is insufficient"). Accordingly, changeouts are and should be confirmed to be part of a pole owning utility's obligations to allow access for third-party attachers.

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[18] *Gulf Power ALJ Decision* ¶ 24 (emphasis added); *see also id*. (*Southern Co.* was a "narrow" holding applicable "when it is agreed [by pole owner and attacher] that capacity is insufficient") (internal revision by ALJ).

[19] *See supra* at 6. Indeed, precisely these kinds of transfers are contemplated by existing pole agreements, including those in evidence in the *Gulf Power* case (as part of Exhibit 46) before the Commission. *See*, *e.g.*, Gulf Power-Emerald Coast Cable Pole Attachment Agreement, Jan. 1, 1997, § 12; Gulf Power-Comcast Cablevision of Panama City Cable Television Attachment Agreement, Mar. 17, 1995, § 12 Gulf Power-Cox Communications Pensacola Pole Attachment Agreement, Jan. 1, 1997, § 12; Gulf Power-U.S. Cable Television Group Cable Television Attachment Agreement, May 1, 1995, § 12, assigned to Mediacom Southeast per Assignment Agreement, Jan. 23, 1998 (relevant excerpts of each attached as Exhibit 5 hereto).

II. ENABLING UTILITIES TO REFUSE CHANGEOUTS WOULD BE DISCRIMINATORY AND PLACES AT RISK INFRASTRUCTURE NEEDED TO MAXIMIZE BROADBAND AND DEPLOYMENT OF OTHER ADVANCED COMMUNICATIONS SERVICES

The *Pole Order* concludes that "the nondiscriminatory access obligation [in] section 224(f)(1) … requires a utility to allow cable operators … to use the same [ ] attachment techniques [ ] the utility itself uses," *Pole Order* ¶ 8, and there is no reason this should not include changeouts for taller poles "whenever appropriate," *id.* ¶ 12, *i.e.*, if parties seeking to attach necessitate it and physical, regulatory, and other barriers are absent. *Cf. Cavalier Tel., LLC v. VEPCO*, 15 FCC Rcd. 9563 ¶ 19 (CSB 2000). Significantly, the *Pole Order* held that "a pole does not have 'insufficient capacity' if it could accommodate an additional attachment using conventional methods … that a utility uses in its own operations." *Id.* ¶ 14. While this holding pertains to boxing and bracketing, it is no less apropos for pole changeouts. As shown, such replacements have long been a "conventional method" of accommodating attachers, and as with other measures the *Pole Order* requires, the "form of nondiscriminatory access" sought here "is limited by the utility's existing practices." *Id.* ¶ 11.[20] Indeed, given the limitations on the relief Petitioners seek, it is consistent with clarifying matters in a manner "not designed to broaden the range of circumstances in which these techniques are used," but "[r]ather …to prevent utilities from denying attachers the[ir] benefits … where the utility itself would, or has, used them." *Id.* ¶ 12.

Nondiscriminatory changeout is not only consistent with *Southern Co.* but required under Section 224(f)(1), and is necessary to protect the efficacy of the *National Broadband Plan* and

[20] If, for whatever *legitimate* reason, a utility believes pole changeouts are incompatible with safety, physical or geographical constraints, or other factors, "it can choose not to" make changeouts. *Id.* Indeed, even if a presumption arises that changeouts are feasible generally in a utility's system, "a utility may rebut it with respect to any single pole or class of poles" for similar reasons. *Id.*

other advanced communications services from being thwarted by arbitrary utility refusal to accommodate new, existing or modified attachments. The Commission and Congress, through Section 224, have long recognized the importance of access to utility plant to burgeoning communications services.

Not requiring changeouts would be incompatible with the *National Broadband Plan*, Section 224(f)'s nondiscrimination principle, and sound regulatory policy. If utilities can refuse to install new poles to accommodate attachers, even where the utility undertakes pole changeouts for its own needs where required, cable operators and others seeking to deploy facilities for broadband and other new services will face even greater barriers than exist today.[21] The Supreme Court also has recognized that leaving pole attachment matters to the exclusive control of utilities – which will be the case if relief is denied here and they can refuse changeouts to attachers even as a utility makes them for itself – would "defeat Congress' general instruction to the FCC to 'encourage the deployment' of broadband Internet capability and, if necessary, 'to accelerate deployment of such capability by removing barriers to infrastructure investment.'" *NCTA v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (quoting 1996 Act).

The uncertainty of construction and delayed or abandoned facilities deployment will be the result of the FCC's ruling in the *Pole Order*. An attacher's inability to require changeouts can, with respect to even a single pole, scuttle an entire route or buildout. The extent to which communications providers expecting to build out systems using existing infrastructure instead may face a utility empowered to refuse to replace poles will surely affect investment decisions about whether to undertake a project in the first instance.

[21] In *Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd. 6777 (1998), the Commission explained how increased pole costs "might deter an operator from providing non-traditional services." *Id*. ¶ 32.

III. A POLE CHANGEOUT REQUIREMENT IS WELL-SUPPORTED AS A MATTER OF LAW AND POLICY

A decision on reconsideration or clarification in favor of changeout is legally supported by the *Pole Order*, *Southern Co.*, *Alabama Power*, and Section 224(f)(1)'s nondiscrimination standard. As shown above, changeouts do not as a practical matter differ from rearrangement and other cost- and space-saving techniques utilities must allow on a nondiscriminatory basis under the *Pole Order*. Meanwhile, *Southern Co.* is limited to cases where the parties already agree such changeouts are not feasible and nondiscriminatory changeout best gives meaning to both parts of Section 224(f).

As recognized in the *National Broadband Plan* out of which the *Pole Order* arises, *see Pole Order* ¶ 6, "improve[d] utilization of existing infrastructure to ensure that network providers have easier access to poles" is critical to "deploying and upgrading broadband and network infrastructure and facilitat[ing] competitive entry." *National Broadband Plan* at 109. This is particularly the case insofar as "cost of deploy[ment] depends significantly on the costs that service providers incur to access poles," among other facilities. *Id.* Leveraging "existing infrastructure" becomes impossible if attachers cannot add facilities to existing attachments and/or newly attach to poles that, though unable to be further burdened in their current state, do not truly have "insufficient capacity" because they can exchanged for taller or stronger poles.

Requiring pole replacement as part of makeready "still ensures that 'insufficient capacity' is given *some meaning*," *Pole Order* ¶ 16 (emphasis added), while stopping well short of requiring that any new pole lines be installed; only replacement or interset poles would be covered. It also, unlike the *Pole Order*'s express statements as they currently stand, adheres to Section 224's legislative history. *See supra* at 4 (quoting *Local Competition Recon. Order* ¶ 53 (quoting S. Rep. No. 580)). Finally, it avoids creating an incentive for a utility to use the ability

to refuse changeouts to claim "full" poles in order to seek compensation above marginal costs under *Alabama Power*, *see* 311 F.3d at 1369-71, which would be an outcome at odds with the cost-causation principles on which Section 224 rests. *See, e.g.*, Ex. 3, Kravtin Expert Test. at 29, 31. *See also id*. at 33 ("[I]t would be decidedly perverse from an economics and public policy standpoint to reward [utilities] for refusing to permit make-ready work performed in the normal course of business operations (and for which the lessee is willing to pay) for the express purpose of justifying a higher 'just compensation' rate.").

CONCLUSION

Pole changeouts to accommodate the addition of equipment for utilities and/or attaching entities is a long-standing, well-established practice that should be preserved through a requirement that any utility that engages in pole-changeouts on its own behalf or for any joint or other pole user must perform such changeouts on a nondiscriminatory cost-justified basis for any existing or prospective attachers, unless external factors physically preclude installation of taller poles. Reconsideration to reassert this requirement, or clarification that such a changeout requirement has always been what the *Pole Order* intended, is critical to ensuring that deployment of communications facilities for broadband and other services is not thwarted by empowering pole owners to arbitrarily refuse to install taller poles when need for attachments so requires.

Respectfully submitted,

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