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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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

[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

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