

**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)	
)	

**ONCOR ELECTRIC DELIVERY COMPANY LLC'S
OPPOSITION TO PETITION FOR RECONSIDERATION OR CLARIFICATION
FILED BY THE STATE CABLE ASSOCIATIONS AND CABLE OPERATORS**

**COUNSEL FOR
ONCOR ELECTRIC DELIVERY
COMPANY LLC**

J. Russell Campbell
Allen M. Estes
Lindsay S. Reese
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203-4644
T: (205) 251-8100
F: (205) 488-5859

November 1, 2010

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF OPPOSITION.....1

II. ARGUMENT3

 A. There is a Practical Difference Between Pole Changeouts and Other Attachment Techniques3

 B. Mandated Pole Changeouts Would Violate the Express Language of 47 U.S.C. § 224(f)(2).....5

 C. Capacity Expansion Through Pole Changeouts is Prohibited by *Southern Co.*6

 D. There is No Evidence that Pole Changeout Requirements Would Advance Broadband Deployment10

III. CONCLUSION.....11

Oncor Electric Delivery Company LLC (“Oncor”),¹ pursuant to 47 C.F.R. § 1.429, respectfully submits this Opposition to the Petition for Reconsideration or Clarification (“Petition”) filed by the State Cable Associations and Cable Operators (collectively referred to as “Petitioners”) seeking reconsideration, or alternatively, clarification of Order No. FCC 10-84 in this docket (“Order”). As grounds for this Opposition, Oncor states as follows:

I. INTRODUCTION AND SUMMARY OF OPPOSITION

The issue currently before the Commission on reconsideration can be summed up as follows: Should the Commission require electric utilities to perform pole changeouts to accommodate third-party attachers? The Petition responds to the Commission’s recognition that pole changeouts were excluded from the Order providing that “utilities must allow attachers to use the same attachment techniques that the utility itself uses in similar circumstances.”² Petitioners claim to have filed the Petition because they “are concerned that pole owners will rely on parts of the [Order] to refuse to replace (or changeout) an existing pole with a taller replacement pole ... because the [Order] states that replacement will not be required.”³

¹ Oncor has actively participated in the comment process since the first Notice of Proposed Rulemaking, 22 FCC Rcd. 20195 (Nov. 20, 2007) (“NPRM”). See Oncor NPRM Initial Comments, WC Dkt. No. 07-245 (March 7, 2008) and Oncor NPRM Reply Comments, WC Dkt. No. 07-245 (April 22, 2008). Oncor also submitted Initial Comments on August 16, 2010, and Reply Comments on October 4, 2010, in response to *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, WC Dkt. No. 07-245; GN Dkt. No. 09-51, FCC 10-84 (May 20, 2010), 75 Fed. Reg. 45494 (Aug. 3, 2010) (“Order”). Oncor also has participated in numerous *ex parte* meetings with the Commission staff in this proceeding. Oncor incorporates its previously filed comments as if fully set forth herein. When generally referring to “Initial Comments” throughout this Opposition, Oncor is referring to the FNPRM Initial Comments filed in WC Dkt. No. 07-245, GN Dkt. No. 09-51, on August 16, 2010. When generally referring to “Reply Comments,” Oncor is referring to the FNPRM Reply Comments filed in WC Dkt. No. 07-245, GN Dkt. No. 09-51, on October 4, 2010.

² Order, ¶ 9.

³ Petition, p. 2. As a practical matter, Oncor typically offers attachers the option of a pole changeout to accommodate attachments. However, the vast majority of attachers choose

Petitioners essentially ask the Commission to treat electric utility poles as unlimited (never-ending), expandable pieces of property and ignore the plain language of the Act by adopting pole changeout requirements amounting to a Commission determination that there is never “insufficient capacity” if a pole changeout can accommodate a new attachment. Petitioners’ arguments belie 47 U.S.C. § 224(f)(2)’s express language entitling an electric utility “[to] deny a cable television system or any telecommunications carrier access to its poles ... where there is *insufficient capacity* and for reasons of safety, reliability and generally applicable engineering purposes.”⁴ Petitioners’ arguments also fly in the face of well-established precedent holding that “*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.”⁵ To adopt Petitioners’ arguments would render meaningless both § 224(f)(2) and well-established, sound legal precedent.⁶

Petitioners’ also argue that pole changeouts are a “normal and customary” technique for purposes of make-ready⁷ and that a pole changeout requirement would “advance the country’s broadband policies.”⁸ These arguments do not comport with reality and are unaccompanied by *any* supporting evidence.

The Commission should deny the Petition.

to forego the changeout stating that they do not want to pay for it. As a result, Oncor does not perform many pole changeouts to accommodate its attachers. Petitioners’ claim that a pole changeout is not “extreme” but a “routine,” “commonly used” procedure to accommodate new and modified attachments (Petition, p. 2) is contrary to reality.

⁴ 47 U.S.C. § 224(f)(2) (emphasis added).

⁵ *Southern Co. Servs. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002) (emphasis added).

⁶ In the Order, the Commission correctly recognized that Petitioners’ argument that pole changeout requirements should be adopted and enforced is an “extreme” position for which the Commission can see “*no reason to adopt.*”⁶ Order, ¶ 16 (emphasis added).

⁷ Petition, p. 2.

⁸ *Id.* at 3.

II. ARGUMENT

A. There is a Practical Difference Between Pole Changeouts and Other Attachment Techniques.

Petitioners claim that pole changeouts should be treated like line rearrangement, overlashing, boxing and bracketing, and required if the utility uses the “technique” for itself or other attachers.⁹ As stated in Oncor’s previous comments, as well as those from other electric utilities, the Commission cannot – and should not – mandate that electric utilities permit any of these “techniques” as they are beyond the Commission’s limited statutory authority and would impair the safety and reliability of the electric distribution system.¹⁰ Because only pole changeouts are addressed in the Petition, Oncor will address only pole changeouts here.¹¹

Petitioners claim that “changeouts do not as a practical matter differ from rearrangement and other cost- and space-saving techniques.”¹² This is inaccurate. Boxing and bracketing, by their very nature, are different as they are techniques in which equipment is attached to the pole – essentially to avoid a pole changeout. This has been acknowledged by attachers throughout this docket as they “have explained [that] boxing and bracketing can help avoid the cost and delay of pole replacement.”¹³ With boxing and bracketing, modifications are being made to a specific, existing pole. That is not, “as a practical matter,” the same as a pole changeout.

⁹ *Id.*

¹⁰ *See, e.g.*, Oncor Initial Comments, pp. 16-19; Oncor Reply Comments, pp. 2-3; AFPAR Initial Comments, pp. 9, 37-38, 50-54; Coalition of Concerned Utilities Initial Comments, p. 15; EEI/UTC Initial Comments, pp. i-iii, 2-5; Idaho Power Initial Comments, pp. 3-4; AFPAR Reply comments, pp. 45-46; EEI/UTC Reply Comments, pp. 7-10.

¹¹ Oncor in no way waives its arguments that the Commission lacks authority to adopt any general access rules including, without limitation, mandatory make-ready of any kind (whether through rearrangement or changeout), or rules requiring electric utilities to permit boxing and bracketing.

¹² Petition, p. 14.

¹³ Order, ¶ 8.

In stark contrast, with a pole changeout, the existing pole is removed and an entirely new pole is installed. As acknowledged by the Commission: “[u]nlike requiring a pole owner to replace a pole with a taller pole, [boxing and bracketing] take advantage of usable physical space on the *existing pole*.”¹⁴ While Petitioners argue that a pole changeout requirement “is fully consistent with the intent underlying the [Order] and long-standing, well-established industry practice,”¹⁵ the Commission has confirmed that it is the “[u]tilization of *existing* infrastructure, rather than replacing it, [that] is a fundamental principal underlying the Act.”¹⁶ The question is whether *an actual pole* can accommodate an additional attachment – not whether a hypothetical new pole can accommodate the attachment.¹⁷ If an existing pole does not have space for the additional attachment, insufficient capacity exists.

Petitioners attempt to disguise the difference between pole changeouts and other techniques and rationalize their illogical position. They argue that a pole changeout requirement, and the adoption of their definition of insufficient capacity, “would not require utilities to erect new pole lines ... 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.”¹⁸ If Petitioners’ arguments are adopted (*i.e.*, if the Commission reconsiders its Order and holds that “insufficient capacity” does not exist if a new,

¹⁴ *Id.* at ¶ 14 (emphasis added); *see also* National Broadband Plan, p. 109 (“[I]mprove[d] utilization of *existing infrastructure* to ensure that network providers have easier access to poles” is critical to deployment) (emphasis added).

¹⁵ Petition, p. 2.

¹⁶ Order, ¶ 16 (emphasis added).

¹⁷ Order, ¶ 14 (acknowledging that *Southern Co.*, 293 F.3d at 1349, “upheld the Commission’s finding that ‘insufficient capacity’ means the absence of usable physical space *on a pole*”) (emphasis added); *see also* *Southern Co.*, 293 F.3d at 1347 (“When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access *to that particular pole*, duct, conduit, or right-of-way.”) (emphasis added) (internal quotations omitted).

¹⁸ Petition, p. 10.

taller pole can accommodate the attacher), there would be no practical set of circumstances under which an electric utility could deny access due to insufficient capacity other than the few limited situations where an ordinance or regulation limits the height of poles in a given area, such as an FAA regulation. Such an outcome would not “give effect” to the plain language and intent of the Act (creating an exception to mandatory access),¹⁹ wherein Congress “contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime.”²⁰ It would render the “insufficient capacity” exception virtually meaningless. Congress does not enact “meaningless” exceptions.²¹

B. Mandated Pole Changeouts Would Violate the Express Language of 47 U.S.C. § 224(f)(2).

Make-ready is the process by which a pole with insufficient space (a/k/a capacity) is either rearranged or changed-out to facilitate access for an additional attachment. Section 224(f)(2) precludes forced make-ready and gives electric utility pole owners the unequivocal

¹⁹ *Southern Co.*, 293 F.3d at 1346-47.

²⁰ *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370 (11th Cir. 2002).

²¹ It is common knowledge that electric utilities replace poles for their own various needs. To adopt Petitioners’ arguments (which do not distinguish between the various reasons that electric utilities replace poles) would likely result in pole changeouts always being required for attachers. This would render the “insufficient capacity” exception meaningless – which the Commission cannot do. *See, e.g., Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-26 (1978) (holding that because an act addressed the issue at hand and limited the types of damages that could be recovered, the court was not “free to ‘supplement’ Congress’ answer so thoroughly that the Act becomes meaningless” and that “[t]here is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted.”); *Almendarez, et al. v. Barrett-Fisher Co., et al.*, 762 F.2d 1275, 1280 (5th Cir. 1985) (“We cannot ascribe to Congress such an intention to enact meaningless or futile legislation. When Congress amends a law the amendment is made to affect some purpose.”) (internal citations omitted); *Tayssoun Transp., Inc. v. Universal Am-Can, Ltd.*, 2005 U.S. Dist. LEXIS 41093, *49 (S.D. Tex. 2005) (“Congress would not enact a meaningless provision of law ...”); *Salle v. Meadows*, 2007 U.S. Dist. LEXIS 92343 (M.D. Fla. 2007) (refusing to adopt an interpretation of a statute which would render a portion of the statute meaningless stating that “[i]f Congress intended” for all persons to fall within a statute, there would be no need for an exception); *Nickels v. Espy*, 1993 U.S. Dist. LEXIS 9443, *14 (N.D. Ill. 1993) (“This Court will not ascribe a wholly meaningless enactment to Congress.”).

right to refuse to expand facilities where there is insufficient capacity.²² Specifically, § 224(f)(2) provides:

[A] utility providing electric service may *deny* a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is *insufficient capacity* ...²³

Petitioners' claim that requiring a "changeout [still] leaves ample room for access to be denied for actual 'insufficient capacity'" is baffling.²⁴ There is no clearer example of "insufficient capacity" than a situation where the existing pole ripped from the ground, a new pole must be installed, and all ILEC, CATV, CLEC and other attachments, as well as the electric equipment, must be transferred to the newly installed pole. If this is not the type of "forced build-out" prohibited by the Act then no such thing exists.²⁵

C. Capacity Expansion Through Pole Changeouts is Prohibited by *Southern Co.*

Not only would a changeout requirement violate the clear language of the Act, it also would violate well-established legal precedent.

²² At least one cable attacher has acknowledged that "cable operators cannot compel a utility to create 'surplus' pole space for their use." Time Warner Cable Initial Comments, p. 8

²³ 47 U.S.C. § 224(f)(2) (emphasis added).

²⁴ Petition, p. 11.

²⁵ See Oncor Initial Comments, pp. 16-19; *see also* Oncor Reply Comments, pp. 2-3.

Unlike the other cases cited in the Petition,²⁶ *Southern Co.* directly addresses pole “capacity” and pole changeouts. In *Southern Co.*, electric utilities appealed the Commission’s rulemaking requiring “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.”²⁷ The Commission had previously stated that capacity expansion included steps taken “to rearrange or **change out** existing facilities at the expense of the attaching parties in order to facilitate access.”²⁸ The Eleventh Circuit held that the FCC’s attempt to mandate capacity expansion was “**contrary to the plain language of § 224(f)(2).**”²⁹ Specifically, in overturning the Commission’s requirement that utilities expand capacity to meet requests for new attachments, the Court stated:

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.

²⁶ Petitioners cite the Administrative Law Judge Initial Decision in *Florida Cable Telecomms. Ass’n v. Gulf Power Co.*, 22 FCC Rcd 1977 (2007), and *Alabama Power* as support for their arguments. Unlike *Southern Co.*, the issue before the court in both cases was rates – not whether access to poles could be denied on the grounds of insufficient capacity. Notably, the *Gulf Initial Decision* is still pending Commission review. It is non-final and, therefore, Petitioners’ reliance on it as final and determinative authority on whether pole changeouts can be required is inappropriate. To the extent *Alabama Power* commented on capacity issues, it did so in a manner that rebuts Petitioners’ arguments. Specifically, *Alabama Power* acknowledged the *Southern Co.* holding that forced buildout could not be required. *Alabama Power*, 311 F.3d at 1364 n.8 (stating that in *Southern Co.*, “[t]he panel could not reconcile the no-capacity excuse allowed under the statute with the forced build-out rules required under the FCC’s regulations, and thus held the regulations to be *ultra vires*.”). The Court further stated that “Congress contemplated a scenario in which poles **would reach full capacity** when it created a statutory exception to the forced-attachment regime.” *Id.* at 1370 (emphasis added). Petitioners also cite *Cavalier Tel. LLC v. VEPCO*, 15 FCC Rcd. 9563 (2000), supplemented by 15 FCC Rcd. 17962 (2000), vacated pursuant to joint motion by 17 FCC Rcd. 24414 (2002). Petition, p. 12. Not only was *Cavalier* subsequently vacated, but it also preceded *Southern Co.* which reversed the Commission rule relied upon in *Cavalier*.

²⁷ *Southern Co.*, 293 F.3d at 1346 (quoting *Order on Reconsideration*, 14 FCC Rcd. 18049, ¶ 51 (Oct. 20, 1999)).

²⁸ *Order on Reconsideration*, 14 FCC Rcd 18049 at ¶ 53.

²⁹ *Southern Co.*, 293 F.3d at 1346 (emphasis added).

... By attempting to extend those generally applicable rules into an area where the statutory text clearly directs that they not apply, the FCC is *subverting the plain meaning of the Act*.³⁰

The Court further stated that “[i]f utilities are required to expand the capacity of their plant at the request of a third party, ‘it is hard to see how you can give section 224(f)(2) *any meaning at all* ...’”³¹ It could not be clearer that the FCC cannot implement “forced build-out rules,” including pole changeouts.³² To adopt the changeout requirements urged by Petitioners would be “subverting the plain meaning of the Act.”³³

Petitioners misstate and misapply the holdings in *Southern Co.* by arguing: (1) *Southern Co.* only applies where the parties “agree” that a pole is at full capacity and, therefore, pole owners can not “refuse to replace a pole in its sole discretion”³⁴; (2) the term “insufficient

³⁰ *Id.* at 1346-47 (internal citations omitted) (emphases added).

³¹ *Id.* at 1346 (quoting *Order on Reconsideration*, 14 FCC Rcd. at 18099 (Powell, Comm’r, concurring in part and dissenting in part)); *See also* Petition for Reconsideration and Request for Clarification filed by the Florida IOUs, pp. 13-23; Petition for Reconsideration and Request for Clarification filed by Oncor, p. 2 (adopting petition filed by the Florida IOUs). This is wholly inconsistent with the position asserted in the Order and the Petition that “[r]equiring pole replacement as part of makeready [sic] still ensures that ‘insufficient capacity’ is given *some meaning*.” Petition, p. 14 (citing and quoting Order, ¶ 16) (emphasis added).

³² *Alabama Power*, 311 F.3d at 1363, n.8 (describing the *Southern Co.* decision as finding FCC rules that were designed to “force [] power companies to enlarge pole capacity at the request (and expense) of attaching cable and telecommunications companies” were “forced build-out rules” and, therefore, “*ultra vires*.”). Thus, *Alabama Power* clearly recognized that the need to “build out” to accommodate an attachment equated to “no capacity” to accommodate the proposed attachment; therefore, triggering the electric utility’s right to deny access pursuant to § 224(f)(2).

³³ *Southern Co.*, 293 F.3d at 1347. As other electric utilities have already explained, the argument that parties must agree before insufficient capacity can exist “misrepresents the context of the Eleventh Circuit’s specific statements and the ultimate holding of *Southern Co. v. FCC*.” *See* NPRM Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, p. 30 (March 7, 2008).

³⁴ Petition, p. 5. As an example of where the parties may “agree” on “insufficient capacity,” Petitioners cite situations where “pole change-outs cannot practically occur due to terrain, obstructions, or zoning restrictions.” Petition, p. 5 n. 8. In actuality, there are very few instances where there is a disagreement between Oncor and its attachers as to whether or not

capacity” is ambiguous³⁵; and (3) failure to adopt pole changeout requirements would violate Section 224(f)’s nondiscrimination principles. First, nothing in *Southern Co.* – or the Act – requires the parties to “agree” that insufficient capacity exists before an electric utility can deny access.³⁶ Moreover, in no way does *Southern Co.* hold that the term “insufficient capacity” is ambiguous for purposes of capacity expansion. The portion of *Southern Co.* cited by Petitioners regarding “ambiguity” is discussed in the context of reserved space only – not capacity expansion.³⁷ *Southern Co.* also rejects Petitioners’ argument that enabling utilities to refuse changeouts would be “discriminatory.”³⁸

make-ready is required. If the parties agree that make-ready (capacity expansion) is required to accommodate the attachment, insufficient capacity exists. In other words, if a pole must be replaced to accommodate the attachment, the existing pole has insufficient capacity and an electric utility may exercise its statutory right to deny access. If the Commission adopted Petitioners’ arguments, it would actually result in providing *attachers*’ with the unilateral right to determine the existence of insufficient capacity, as they would always claim that insufficient capacity existed and that the pole must be replaced. They would have no incentive to find insufficient capacity.

³⁵ Petition, p. 5.

³⁶ Inclusion of the phrase “when it is agreed that capacity is insufficient” in the portion of the case discussing expansion of capacity was simply the Eleventh Circuit’s confirmation that, in that section, it was *not* addressing the issue of *when* capacity is insufficient (as that was addressed in the subsequent portion discussing denial of access based on the reserved space of the utility). *Southern Co.* does not hold that an electric utility can only deny access on grounds of insufficient capacity if, and only if, the attacher agrees that insufficient capacity exists.

³⁷ Specifically, the court analyzed whether a utility could deny access on grounds of “insufficient capacity” when there was “actual ... usable physical space on a pole” that was simply reserved by the utility. *Southern Co.*, 293 F.3d at 1347-49. The Court was not analyzing a situation where there was insufficient space due to the number and spacing of actual attachments. Instead, the Court discussed a hypothetical situation where a utility simply “reserved unused space” for its own use.

³⁸ Petition, p. 12. In *Southern Co.*, the Commission suggested that the nondiscrimination principle that motivated the 1996 Telecommunications Act also mandated that the Commission prohibit a utility from “favoring itself over other parties with respect to the provision of telecommunications or video programming services.” *Southern Co.*, 293 F.3d at 1346 (quoting *First Report and Order, 11 FCC Rcd 15499*, ¶ 1157 (Aug. 1, 1996)). The Commission argued that its rule requiring capacity expansion was simply one manner in which

Regardless of the creative ways in which Petitioners attempt to avoid the *Southern Co.* holding, it rebuts their arguments. The Commission cannot force electric utilities to expand capacity to accommodate attachers. A pole changeout requirement would do just that.

D. There is No Evidence that Pole Changeout Requirements Would Advance Broadband Deployment.

Although Petitioners make blanket statements that a pole changeout requirement utilizing their definition of insufficient capacity would advance broadband deployment, they cite no evidence whatsoever supporting the claim. Instead, Petitioners, consistent with their approach in previously filed comments, simply cite to the language of the Order itself and make general, unsupported statements that failure to adopt its arguments would cause “even greater barriers than exist today.”³⁹ Both the Petition and the record of this docket are utterly devoid of any proof that adopting pole changeout requirements will advance broadband deployment or that the current practice regarding pole changeouts (*i.e.*, allowing parties to work together to address capacity concerns, including pole changeouts, in a manner consistent with the Act) is somehow causing the few unserved areas to remain without access to broadband services.⁴⁰ Not only would adoption of pole changeout requirements be outside the Commission’s limited authority, but adoption of such requirements is unnecessary and unwarranted.

the Commission was implementing the intent of Congress to prevent utilities from exploiting their ownership of the infrastructure to deny competitors access to their markets. *Southern Co.*, 293 F.3d at 1346. The Commission argued that it was “merely mandat[ing] that utilities make room for third parties in the same manner in which they would if they needed additional space for their telecommunications operations.” *Id.* However, the Court rejected the Commission’s arguments, finding that the “FCC’s attempt to mandate capacity expansion is outside of the purview of its authority under the plain language of [§ 224(f)(2)].” *Id.* at 1347.

³⁹ Petition, p. 13.

⁴⁰ See Oncor Initial Comments, pp. 3-10; see also Oncor Reply Comments, pp. 1-11.

III. CONCLUSION

The pole changeout requirements urged by Petitioners are: (1) outside the Commission's statutory authority; (2) inconsistent with an electric utility's right to deny access pursuant to 47 U.S.C. § 224(f)(2) and other binding authority; and (3) unnecessary and unwarranted. The granting of the Petition would render virtually meaningless the plain language of the Act and fly in the face of clear and binding authority holding that the Commission can not force capacity expansion. Therefore, the Petition should be denied.

Respectfully submitted,

/s/ J. Russell Campbell

J. Russell Campbell

Allen M. Estes

Lindsay S. Reese

BALCH & BINGHAM LLP

1901 Sixth Avenue North

Suite 1500

Birmingham, AL 35203-4644

T: (205) 251-8100

F: (205) 226-8799

**COUNSEL FOR ONCOR
ELECTRIC DELIVERY
COMPANY LLC**