

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

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In the Matter of)	
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Implementation of Section 224 of the)	WC Docket No. 07-245
Act;)	
)	
A National Broadband Plan for Our)	GN Docket No. 09-51
Future)	
)	
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REPLY OF THE ALLIANCE FOR FAIR POLE ATTACHMENT RULES

America Electric Power Service Corporation
Duke Energy Corporation
Entergy Services, Inc.
Florida Power & Light Company
Progress Energy
Southern Company

Sean B. Cunningham
Hunton & Williams LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

Counsel to the Alliance

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Pursuant to section 1.429 of the Federal Communications Commission’s (“FCC” or “Commission”) Rules, the American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Progress Energy, and Southern Company (collectively hereinafter “the Alliance for Fair Pole Attachment Rules” or “the Alliance”), by their counsel, hereby submit this Reply to the comments of Time Warner Cable, Inc. (“TW Cable”)¹ and CTIA–The Wireless Association (“CTIA”)² in response to petitions for reconsideration filed in the above-referenced proceeding.

¹ *In the Matter of Implementation of Section 224 of the Act A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Comments of Time Warner Cable, Inc. Regarding the Petitions for Reconsideration (filed Nov. 1, 2010) (“TW Cable Comments”).

² *In the Matter of Implementation of Section 224 of the Act A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Comments of CTIA–The Wireless Association (filed Nov. 1, 2010) (“CTIA Comments”).

COMMENTS

In their comments in support of the State Cable Associations' petition for declaratory ruling, CTIA and TW Cable argue that section 224 supports the State Cable Associations' proposal to require electric utilities to replace poles to make room for new attachments. For the reasons set forth below, CTIA and TW Cable are wrong. Section 224 provides no support for a pole replacement mandate.

I. SECTION 224 APPLIES ONLY TO EXISTING POLES, NOT TO THE REPLACEMENT OF EXISTING POLES WITH NEW POLES.

CTIA's and TW Cable's arguments for a pole replacement mandate are narrowly focused on the scope of an electric utility's right under section 224(f)(2) to deny access for reasons of capacity. Their comments erroneously presuppose that attaching parties have an underlying right of access to poles that do not yet exist and, therefore, a right to compel electric utilities to *replace* existing poles with new poles. As explained in the Alliance's opposition to the State Cable Associations' Petition for Reconsideration, no such right exists.³ Section 224(f)(1) addresses access to poles "owned or controlled" by the electric utility. Poles that are not yet constructed are not poles owned or controlled by the electric utility. Section 224 does not otherwise provide the Commission with any authority to mandate pole replacement.

Neither CTIA nor TW Cable addresses the text of section 224(f)(1), which is expressly limited to poles owned or controlled by the electric utility. CTIA merely asserts that "legally, pole replacement is not the different breed of cat that the electric utility pole owners portray."⁴ CTIA's claim fails to acknowledge a basic distinction: section 224 applies only to "cats" owned

³ *In the Matter of Implementation of Section 224 of the Act A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Opposition of the Alliance for Fair Pole Attachment Rules at 2-5 (filed Nov. 1, 2010).

⁴ CTIA Comments at 9.

or controlled by the electric utility — not to cats that do not yet exist or are otherwise not owned or controlled by the electric utility. Nor does section 224 provide for the *replacement* of existing cats with new cats. Arguments about the scope of an electric utility’s right to deny access to existing facilities under 224(f)(2) prove nothing, because there is no underlying right of access to non-existent poles in the first place.

II. SECTION 224 DOES NOT SUPPORT CTIA’S AND TW CABLE’S ATTEMPTS TO DEPRIVE ELECTRIC UTILITIES OF THEIR RIGHT TO DENY ACCESS FOR REASONS OF INSUFFICIENT CAPACITY.

Section 224(f)(1)’s exclusive focus on existing poles is further confirmed by section 224(f)(2), which expressly gives electric utilities the right to deny access to such poles where there is insufficient capacity. As the 11th Circuit held in *Southern Company v. FCC* (“*Southern Company*”), “[s]ection 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 That exception applies, of course, when there is insufficient capacity on a utility’s existing facilities to accommodate the requested attachments.

CTIA and TW Cable, however, attempt to eviscerate the court’s holding by arguing that the utility’s right to deny access applies only where it is “agreed” that there is insufficient capacity and where the electric utility itself would not have replaced the pole or poles in question. These arguments, if accepted, could exclude every possible situation in which an applicant requests pole replacement and, therefore, render the electric utility’s right to deny access for reasons of insufficient capacity a nullity. As the court in *Southern Company* observed, “it is hard to see how [section 224(f)(2)’s language regarding insufficient capacity] could have any independent meaning if utilities were required to expand capacity at the request of third

⁵ *Southern Company v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002) (“*Southern Company*”).

parties.”⁶ It is likewise hard to see how the court’s holding in *Southern Company* could have any “independent meaning” if the electric utility’s right under section 224(f)(2) were, in effect, eliminated.

A. By requesting pole replacement, an attaching party necessarily agrees that existing capacity is insufficient.

CTIA and TW Cable argue that *Southern Company* applies only “where it is agreed that capacity on a given pole or other facility is insufficient to accommodate a proposed attachment.”⁷ Where attachers withhold their agreement, CTIA reasons, the FCC can require pole replacement. This argument makes absolutely no sense, because it purports to empower attachers to override objective reality with their own subjective and self-serving assertions about sufficiency. Where the attaching party does not “agree” that there is a lack of capacity, it would have no reason to request pole replacement; rather, it would assert that the existing pole has enough space to accommodate its attachments and insist on access to that space. To request pole replacement is to acknowledge that the existing pole is not tall enough (i.e., does not have sufficient capacity) to accommodate the new attachment.

If CTIA and TW Cable mean that an attaching party could somehow simultaneously (1) request the replacement of an existing pole with a taller pole and (2) disagree that a taller pole is needed, the result would be that the attaching party would always have the option to “disagree” that there is insufficient capacity and use that disagreement to compel pole replacement. As a result, in the words of the *Southern Company* court, electric utilities would be “required to expand capacity at the request of third parties” — i.e., electric utilities would always be subject to

⁶ *Id.* at 1347.

⁷ CTIA Comments at 7, quoting *Southern Company* at 1346-47; *see also* TW Cable Comments at 16.

mandatory pole replacement entirely at the discretion of such third parties and entirely in contradiction to the holding of *Southern Company*. The Commission should, therefore, reject CTIA's and TW Cable's request to compel pole owners to add new pole capacity at the request of applicants who disagree that such new capacity is needed.

B. An electric utility may deny access by third parties for reasons of insufficient capacity regardless of whether it replaces poles to accommodate its own operations.

CTIA observes that an electric utility may deny access for reasons of insufficient capacity only on a “non-discriminatory basis.”⁸ CTIA and TW Cable erroneously argue that it is “discriminatory” for an electric utility to deny access to a third party in any situation where the utility would replace poles “to meet its own needs”⁹ or “for its own new attachment.”¹⁰ CTIA further argues that *Southern Company* does not preclude the Commission from requiring electric utilities to replace poles to make room for communications attachers when the electric utility “would do so for itself.”¹¹ CTIA and TW Cable are wrong. *Southern Company* squarely precludes the Commission from mandating pole replacement where the utility has a need to replace poles to support its own operations.

1. *Southern Company* expressly rejects the nondiscrimination argument for the requested relief.

In its Order on Reconsideration that was the subject of the *Southern Company* appeal, the Commission concluded that the principle of nondiscrimination under section 224(f) requires an electric utility to expand capacity to accommodate requests for attachment “just as it would

⁸ CTIA Comments at 7, quoting 47 U.S.C. § 224(f)(2).

⁹ CTIA Comments at 7.

¹⁰ TW Cable Comments at 15.

¹¹ CTIA Comments at 7; *see also* TW Cable at 15, 17.

expand capacity to *meet its own needs*.”¹² On appeal, the court overturned this ruling, concluding that the Commission’s attempt to override the electric utility’s right to deny capacity for reasons of insufficient capacity “is subverting the plain meaning of the Act.”¹³ In urging the Commission to mandate pole replacement on grounds that it is discriminatory for an electric utility to deny pole replacement requests while adding capacity to “meet its own needs,” CTIA is not only asking the Commission to administratively overrule the 11th Circuit’s holding, but it is also actually *quoting verbatim the rule text that was overturned*. The Commission should, indeed must, reject CTIA’s and TW Cable’s argument.

2. Requiring pole replacement to accommodate third parties where an electric utility replaces poles to meet its own needs would render meaningless the electric utility’s right to deny access for reasons of insufficient capacity.

As noted above, the court in *Southern Company* concluded that the language of section 224(f)(2) allowing an electric utility to deny access for reasons of insufficient capacity would have no “independent meaning” if electric utilities were required to replace poles upon request by third parties.¹⁴ Even apart from the court’s definitive holding, it is evident that applying the nondiscrimination principle to the utility’s own operations would render meaningless the utility’s right to deny access for reasons of insufficient capacity.

In effect, CTIA and TW Cable seem to be arguing that, if any electric utility has ever replaced a pole — or will conceivably ever replace a pole in the future — to support its own operations, it must replace poles to accommodate third party attachments upon request. This proposal shows a complete lack of understanding of electric industry operations. Electric

¹² *Southern Company* at 1346, quoting *Order on Reconsideration*, 14 FCC Rcd. 18049, para. 51 (Oct. 20, 1999) (emphasis added).

¹³ *Id.* at 1347.

¹⁴ *Id.*

utilities are obligated under State laws to provide reliable electric power service at just and reasonable rates to electric consumers. To meet this obligation, an electric utility must always reserve the right to expand pole capacity to provide for electric service reliability and to accommodate electricity demand increases.¹⁵ There would, therefore, never be any circumstance in which an utility could permissibly deny a request for pole replacement if CTIA's and TW Cable's flawed logic were adopted. Requiring pole replacement to accommodate third parties whenever there is a history or a possibility of pole replacement to accommodate the electric utility's own operations would, therefore, make it impossible for an electric utility ever to exercise its section 224(f)(2) right to deny access for reasons of insufficient capacity.

III. SECTION 224(H) AND 224(I) PROVIDE NO FOUNDATION FOR REQUIRING POLE REPLACEMENTS.

In support of its claim that pole replacement is the same “breed of cat” as making space available on an existing pole, CTIA cites sections 224(h) and (i) as “[o]ther subsections of the Pole Act [that] not only contemplate pole replacements, but acknowledge that the occurrence of pole replacements is sufficiently prevalent across the industry to require statutory cost-allocation and accounting principles.”¹⁶ As noted above, by presuming erroneously that section 224 provides a right of access to non-existent poles, CTIA confuses the full utilization of an existing

¹⁵ It should be noted that the nondiscrimination language of section 224(f) does not apply to any capacity expansion by the utility in support of its own operations — including its telecommunications operations. On appeal, the Commission argued that the nondiscrimination principle of the Telecommunications Act of 1996 mandates that the FCC prohibit a utility from “favoring itself over other parties with respect to the provision of telecommunications ... services” and that, accordingly, its Reconsideration Order “merely mandates that utilities make room for third parties in the same manner in which they would if they needed additional space for their telecommunications operations.” *Southern Company* at 1346. In direct response to this argument, the court stated that “[t]he FCC’s position is contrary to the plain language of § 224(f)(2).” *Id.* The court rejected the Commission’s argument and overturned the pole replacement mandate.

¹⁶ CTIA Comments at 9, n. 33.

pole with the replacement of a pole. In citing the aforementioned subsections, CTIA goes beyond cat breeding into what could be more accurately described as re-engineering the feline genetic code to produce an entirely different species of animal. Unless the U.S. Code is likewise transmogrified to suit CTIA’s purposes, however, neither subsection (h) nor subsection (i) can provide any support for the proposed pole replacement mandate.

A. Section 224(h) provides for notice to third parties where an electric utility – at its own discretion – modifies a pole.

Section 224(h) neither provides nor implies an obligation to replace poles at the request of third parties. This subsection simply requires that, whenever a pole owner “intends to modify or alter such pole,” the owner shall provide written notice to existing attachers to give such attachers “a reasonable opportunity to add to or modify its existing attachment.”¹⁷ Even if “modify or alter” is construed to include replacements, there is no suggestion that such modification, alteration, or, as the case may be, replacement is mandatory. On the contrary, the notice requirement applies if and when the pole owner chooses to alter its pole. No requirement to replace or otherwise alter the pole is specified or implied.

B. Section 224(i) applies to attachments, not poles.

Section 224(i) provides that new attachers are not required to bear the costs of “rearranging or replacing its *attachment*, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity....”¹⁸ Thus, this provision applies to replacing or rearranging *attachments*, not poles, where such rearrangement or replacement of the attachment is required as a result of a new or modified attachment by another party. To suggest that this provision somehow refers to

¹⁷ 47 U.S.C. § 224(h).

¹⁸ 47 U.S.C. § 224(i) (emphasis added).

pole replacement is as disingenuous as it is erroneous.

WHEREFORE, THE PREMISES CONSIDERED, the Alliance for Fair Pole Attachment Rules respectfully requests that the Commission reject the comments of TW Cable and CTIA.

Respectfully submitted,

/s/ Sean B. Cunningham

Sean B. Cunningham
Hunton & Williams LLP
1900 K Street, N.W.
Washington D.C. 20006
Tel: (202) 955-1500
Fax: (202) 955-2201

Counsel to the Alliance

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