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March 16, 2011

EX PARTE

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte WC Docket No. 07-245; GN Docket No. 09-51

Dear Ms. Dortch:

This is in further support of the Petition for Reconsideration filed by the State Cable Associations and Cable Operators concerning the Commission's construction of "insufficient capacity" under Section 224(f)(2)[1] and in response to the March 10, 2011 *ex parte* filed by the Florida IOUs (Progress Energy Florida, Tampa Electric, Florida Power & Light, Florida Public Utilities and Gulf Power).[2] The Commission should revisit its *Pole Order* on this issue to require utilities that perform pole changeouts for themselves, joint owners, or other joint users to also changeout poles on a nondiscriminatory, cost-justified basis for other existing or new attachers, unless external factors physically preclude installing taller poles. We explain below that the decision in *Southern Co. v. FCC*, 293 F.3d 1339 (11th Cir. 2002), did not condone discriminatory *denials* of access, and the terms of 47 U.S.C. § 224(f)(2) expressly *prohibit* discriminatory denials of access. Accordingly, under both § 224 and *Southern Co.* utilities may deny access for insufficient capacity *only* on a nondiscriminatory basis—that is, by applying the same nondiscriminatory terms and conditions with respect to pole replacement that it imposes on third parties and itself.

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[1] *See* Petition for Reconsideration or Clarification of Alabama Cable Telecommunications Association, *et al.*, WC Docket No. 07-245, GN Docket No. 09-51, Sept. 2, 2010 (seeking review of pole changeout conclusions in *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 25 FCC Rcd. 11864 (2010) ("*Pole Order*")); Reply to Oppositions to Petition for Reconsideration of Alabama Cable Telecommunications Association, *et al.*, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 12, 2010. CTIA and Time Warner Cable supported the Petition. Comments of Time Warner Cable Inc. Regarding Petitions for Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 1, 2010, at § II; Comments of CTIA – the Wireless Association, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 1, 2010, at 6-9.

[2] *See ex parte notice* dated March 10, 2011 filed by Eric Langley, Balch & Bingham LLP.

Pole replacements have been a routine part of pole ownership and pole makeready for decades.[3] When utilities (or joint owners) need additional height, and the pole location can accommodate it, they replace poles with taller poles (of varying heights, from 35-50 feet) that they hold in store ("pole yards") for all pole replacements and renewals.[4] The only difference in changeout procedure is who pays for it. For a utility's own purposes (adding new primary or secondary power lines), the utility pays and everyone moves their facilities to the new pole.[5] When it is a joint user or owner, the party requesting the changeout pays, just as provided in § 224(i).[6]

Changeouts are not requested by attachers because they are easier or less expensive alternatives. They are sought only when measures like boxing, bracketing, or rearrangement will not allow further access to a given pole.[7] However, in considering these options, when utilities

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[3] *See* Deposition of Ben Bowen, Gulf Power Project Service Specialist, Senior ("Bowen Dep."), *Florida Cable Telecommunications Association, Inc., et al. v. Gulf Power Co.*, EB Docket No. 04-381 ("*FCTA v. Gulf Power*"), Hearing Exhibit 84 at p.17, ll 18-19 (poles are changed out daily), at p. 53 ll. 16-21 (changeouts typically done for height and strength), at p. 56 ll. 3-18 (taller poles set based on need and terrain up to 50 foot), at p. 57 ll. 7-13 (different height poles kept in each district office's pole yard); Deposition of Rex Brooks, Gulf Power Senior Engineering Representative (Retired) ("Brooks Dep."), Hearing Exhibit 85 at p.45 ll.18- 23, p. 46 ll. 1-4, ll. 16-23; p. 47 ll. 1-19 (explaining only occasional denials of access due to engineering where utility could not physically change the height of the pole, with an example given of a two-pole configured transformer platform that limits height changes due to necessary clearances and strain on adjacent poles) (all excerpts Exhibit 1 hereto). Based on such testimony, the judge in *FCTA v. Gulf Power*, ALJ Initial Decision, 22 FCC Rcd. 1997, ¶ 20 (2007) confirmed 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.

[4] Bowen Dep. at p. 56 ll. 22 -23; p. 57 ll.1-13. Routine replacements occur for telephone company joint users as well. Brooks Dep. at p. 21 ll. 3-20. "Q: So, for your own needs, as far as electrifying the service area, could also be a reason for changing out a pole? A: Yes." Deposition of Michael Dunn, Gulf Power's Manager of Project Services (Retired) ("Dunn Dep."), Hearing Exhibit 86, p. 62 ll. 17-20. "Q: Say I want to attach to a pole on such and such street and you say I'm sorry, that pole is at full capacity what usually happens next? A: You have a choice of going underground or rearranging the pole or of changing out the pole or of taking a different route." Bowen Dep. at p. 153 ll. 12-17.

[5] Brooks Dep. at p. 21 ll. 3-16; Bowen Dep. at p. 266 ll.3-23; p. 267 ll.1-14. The process was described where a new attacher needs a new pole set to accommodate its attachment, pays for the new pole and then the utility will "come out, set the new pole, and once we made our transfers and everything is moved over then we would notify the other attachers on the pole that there is a changeout involved and we would list them in order of priority and the first one to go would be the highest attacher to the lowest attacher. Once the lowest attacher is transferred then we would tell the permitting company that they are clear to go." Bowen Dep. at p. 45 ll. 18-23 – p. 46 ll. 1-9.

[6] "Q: Now, if a third party comes along … and you have a number of poles that you need to change out for the new attachment to be safe … who pays the cost of the change-out of that pole? A: If there is not existing room to accommodate the new attachment and the entities that are on the pole are in their proper space, then the new company requesting that room be made is responsible for paying [the utility] for the change-out…." Dunn Dep. at p. 63 ll. 23-25; p. 64, ll. 1-3.

[7] "Q: You mentioned in a few instances there might be poles where for engineering you can't put a taller pole in, can you give me an example? A: If you're familiar with a regulator station it regulates the voltage, it's a two pole configuration with three regulators on a platform and because you're limited sometimes in the change of your line going from a shorter pole to a taller pole and in order to get their clearance underneath that platform and maintain

refuse changeouts, they deny access to poles, which Section 224(f)(2) allows only when two conditions are met: there must be insufficient capacity due to safety, reliability, or generally applicable engineering reasons, *and* any such denial for any one or more of those reasons must be on a nondiscriminatory basis.

Southern Co. explicitly rejected any interpretation of Section 224(f)(2) that would allow the utility pole owner to deny access unilaterally: "Petitioners' construction of the Act, which claims that the utilities enjoy the unfettered discretion to determine when capacity is insufficient, is not supported by the Act's text."[8] *Southern Co.* also pointed to the precise formulation for making sense out of Section 224(f) while respecting its limits and its requirement for nondiscrimination. *Southern Co.* turned on Section 224(f)(1)'s nondiscriminatory grant of access requirement, not Section 224(f)(2)'s nondiscriminatory denial of access standard, which underlies the petition for reconsideration of the *Pole Order* as to nondiscriminatory changeout. In *Southern Co.,* the court found that the nondiscriminatory access requirement in 224(f)(1) did not require the utility to grant access to all poles in all locations as they FCC had directed. What *Southern Co.* did not address was the second half of the calculus – that putting aside any access requirement, any access *denial* must also be nondiscriminatory under 224(f)(2). In other words, a utility may not expand capacity for some attachers while refusing to do so for others.

Commissioner Powell elaborated on this point, and the court agreed: "the better reading is that [on] request for attachment, [a] utility is not mandated to expand capacity … [by] the non-discrimination principle [in] section 224(f)(1)," but rather "must only ensure … denials … are done [ ] on a non-discriminatory basis" as Section 224(f)(2) requires.[9] In other words, to meet the statutory requirement that access denials under Section 224(f)(2) be nondiscriminatory, a utility's insufficient capacity denial must be based on the same nondiscriminatory terms and conditions with respect to pole replacement that it "imposes on third parties as well as itself."[10] Accordingly, where, as in almost all instances, changeout is a form of makeready utilized for the utility itself or some attachers, it cannot be denied to other attachers in a discriminatory manner.

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proper ground clearance you might have to go up substantially with those two poles so that there's too much strain on the line coming into it from the adjacent poles, so you might have to object to changing those out to anything taller because of those constraints…." Brooks Dep. at p. 46, ll. 16-23 – p. 47 ll. 1-7.

[8] 293 F.3d at 1347-48.

[9] *Southern Co.*, 293 F.3d at 1346; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 18049, 18099 (1999) ("*Local Competition Recon. Order*").

[10] The Commission required that "terms and conditions [of attachment] must be applied on a *nondiscriminatory basis*," as that term applies to all local competition/interconnection matters, including pole attachments. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16073 & n.2833 (1996) ("*Local Competition Order*") (citing §§ IV.G & V.G in same). "Nondiscriminatory" is defined as requiring an entity to apply the same terms and conditions it "imposes on third parties as well as itself," *id.* at 15612 (in § IV.G), which can be avoided only where "it [is] technically infeasible" to provide "equal-in-quality" treatment. *Id.* at 15658-59 (in § V.G). This part of the Commission's ruling was not reversed in *Southern Co.* or by any other court.

Adopting this approach would be faithful to all parts of the Act. There may indeed be locations without the physical capacity to raise lines and still pass under overpasses, trolley wires, or some other engineering impossibility, and the outcome would be the same regardless of who made the request to replace the pole.[11] There may be other instances, as EEI has said, where "community standards, engineering, and access issues … preclude ever-larger poles from being used."[12] But there must be a nondiscriminatory basis for that denial. The *Southern Co.* court thrice repeated that it was rejecting the capacity expansion requirement only "*where it is agreed* that capacity… is insufficient to accommodate a proposed attachment (emphasis added)."[13] In construing Section 224(f)(2), the court held that when the question of "'insufficient capacity' … is ambiguous," (*i.e.*,, when the parties do *not* agree that capacity is insufficient), the FCC is given the "discretion [to] fill[ ] that 'gap in the statutory scheme.'"[14]

Requiring such nondiscriminatory changeout still gives meaning to the right of utilities to deny access for safety, reliability, or generally applicable engineering reasons. As noted above, the record here and in prior proceedings shows that changeout will not be required if it is physically impossible, cost-ineffective, or not already the utility's practice, or if regulatory or other barriers are present, including terrain or zoning limitations. The petitioners seeking reconsideration have sought only to clarify that changeouts are required on a nondiscriminatory basis and for legitimate engineering purposes. At bottom, all that is sought is the ability to bring to the Commission disputes over whether capacity is truly insufficient and access denials are truly being made on a nondiscriminatory basis.

There must be a forum to test unilateral claims by utilities, and the Court left it to the Commission to serve as the forum for resolving claims of *discriminatory* denials for insufficient capacity. Exercising that discretion in favor of nondiscriminatory access meets the purpose of the Pole Act and today's broadband imperatives.

Respectfully yours,

John D. Seiver
Counsel for State Cable Associations and Cable Operators

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[11] *Southern Co.* also accepted the FCC's application of Section 224 to all of a utility's poles once *any* pole owned by it was used for communications purposes "regardless of whether the [particular pole to which attachment may be sought] is presently being used for telecommunications purposes." *Southern Co.*, 293 F.3d at 1350. Similarly, once it is established that a pole owner changes out poles for itself or others, pole replacement throughout the utility's service area would be part of the makeready process for access that could not be discriminatorily denied.

[12] Opposition of Edison Electric Institute, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 1, 2010, at 7.

[13] *See Southern Co.*, 293 F.3d at 1346, 1347, 1352.

[14] *Pole Order*, 25 FCC Rcd. at 11871 (quoting *Southern Co.*, 293 F.3d at 1348).

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Attachments: Exhibit 1 – Deposition Excerpts