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

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
	)	

JOINT COMMENTS OF CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC AND DOMINION ENERGY

CenterPoint Energy Houston Electric, LLC ("CenterPoint Energy") and Virginia Electric and Power Company d/b/a Dominion Energy Virginia and d/b/a Dominion Energy North Carolina ("Dominion Energy"), through their undersigned counsel, and pursuant to the Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding, respectfully submit these comments on the practice of overlashing, and on the proposal of the Commission to codify what communications companies represent to be longstanding legal precedent on the same.[1] The parties to these comments are investor-owned electric distribution utilities ("IOUs"), and pole owners in their respective service areas.[2]

I. INTRODUCTION

The commenters here do not oppose, and in fact, *supported* in their reply comments on the April 2017 Notice rules that codify the prior orders of the Commission with respect to the practice of overlashing.[3] Indeed, the POWER COALITION members praised the current regime as striking an appropriate balance between the needs of communications companies to improve and repair their

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1 *In the Matter of Accelerating Wireline Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, FCC 17-154 (Nov. 29, 2017) at ¶¶ 160-162.

2 The parties to these comments, CenterPoint and Dominion, also filed comments and reply on the initial Notice of Proposed Rulemaking in this proceeding (the "April 2017 Notice"), as members of the POWER Coalition. More complete descriptions of these companies, and their respective interests in this proceeding, are found in the joint comments of the POWER COALITION, dated June 15, 2017.

3 Reply Comments of the POWER COALITION, date July 17, 2017 at 15-16.

lines, and the rights of pole owners to ensure that any new capacity added to their poles is properly engineered, and will not overload, or adversely impact the safe and reliable condition of their plant.[4] However, those comments also made clear that any new rules that the Commission may adopt must clearly define the term "overlashing" in a manner consistent with its prior orders,[5] and must reaffirm certain rights accorded to pole owners under Section 224, as the Commission explicitly recognized them with respect to the practice of overlashing:

- *First*, the pole owner has the right to deny overlashing based on the same capacity, safety, reliability, and engineering considerations for which an initial attachment may be denied;[6] and
- *Second*, the pole owner has the right to assess the impact of overlashing on its poles, and to require make-ready as needed, at the expense of the host attacher;[7] and
- *Third*, the pole owner has the right to be notified of overlashing;[8]

As a practical matter, these rights can be exercised only if notice is made to the pole owner *prior to* overlashing, and only if such notice includes information sufficient to enable the pole owner to fully evaluate the impact of the proposed overlashing on the requested poles. Even to the extent that the Commission declined in prior orders to require the pole owner's affirmative consent to overlashing,

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4 *Id*.

5 As discussed in Section III below, the Commission previously defined "overlashing" as the practice whereby a service provider ***physically ties wiring to other wiring already secured to the pole… to accommodate additional strands of fiber or coaxial cable on existing pole attachments***. *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, FCC 98-20 at ¶ 59, *aff'd sub nom National Cable & Telecommunications Assn., Inc. v. Gulf Power Co*., 534 U.S. 327 (2002) ("1998 Telecom Order")(emphasis added).

6 *Southern Co. Serv. Inc.*, 313 F.3d 574, 582 (D.C. Cir. 2002); 2001 Consolidated Order at ¶73; 1998 Telecom Order at ¶ 68.

7 *Southern Co. Serv. Inc.*, 313 F.3d at 582; 2001 Consolidated Order at ¶ 77.

8 In re *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Consolidated Partial Order on Reconsideration, FCC 01-170, 16 F.C.C. Rcd. 12103 at ¶ 82, *aff'd, Southern Co. Serv. Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002) ("2001 Consolidated Order").

the rights of pole owners to *deny* overlashing based on capacity, safety, reliability, and engineering considerations are firmly grounded in Section 224,[9] and the Commission must give such rights their full effect.

In various written comments, NCTA has tried in earnest to persuade the Commission that its longstanding precedent prohibits not only formal application processes for overlashing, but also any form of requirement that a pole owner be informed in advance of where overlashing will occur, what entity will be responsible for overlashing, and what the physical properties of the overlashed strands will be.[10] The rule text proposed by NCTA certainly does not "codify" the Commission's policies on overlashing as NCTA proclaims,[11] and in fact, flatly contradicts the prior statements of the Commission as to the reasonableness of advance notice requirements for overlashing found in negotiated agreements.[12] Moreover, in restricting the required scope of any overlashing notice to merely "location and type" of the overlashed facilities, NCTA's proposal would nullify the rights of pole owners to assess the capacity, safety, reliability, and engineering impacts of overlashing, and to deny overlashing for any of the reasons permitted under Section 224.[13] From the perspective of NCTA, it appears to be acceptable that pole owners simply inspect, and remediate after the fact overlashing that is not properly engineered, or that causes violations, safety hazards, or damage to their poles, at their own expense. It is not.

In contrast, the "notice and attach" process advocated by the American Cable Association ("ACA") is both reasonable, and largely consistent with the overlashing policies articulated by the

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9 *See* 2001 Consolidated Order at ¶¶ 73-74.

10 See, *e.g.*, *Ex Parte* Letter to Marlene H. Dortch, Esq., Secretary, Federal Communications Commission, from Steve Morris, Vice President & Associate General Counsel, NCTA re: Wireline Infrastructure, WC Docket No. 17-84, (Oct. 20, 2017) at 2.

11 *Id*.

12 *See Southern Co.*, 313 F.3d at 582; 2001 Consolidated Order at ¶ 82.

13 *See supra* n. 10.

Commission in its prior orders, and upheld by the D.C. Circuit.[14] *First*, ACA's proposal specifies that notice to the pole owner shall be made prior to overlashing, to ensure that the pole owner has adequate time to review and evaluate the capacity, safety, reliability, and engineering impacts of overlashing on the requested poles. *Second*, ACA's proposal contemplates that pole owners may deny overlashing based on the same capacity, safety, reliability, and engineering considerations for which an attachment may be denied, or alternatively, prescribe make-ready that would render the poles suitable for overlashing, as requested. *Third*, ACA's proposal, equitably, would hold the host attacher – and *not* the pole owner – responsible for remediating any damage, violations, or hazards that may result from overlashing. However, ACA's proposal falls short with its recommendation of a 15-day notice period, which is far too short to enable a meaningful review, and evaluation of the capacity, safety, reliability, and engineering impacts of overlashing. Indeed, as discussed more fully in the sections that follow,[15] overlashing, like the host pole attachment, must comply with all applicable load, vertical clearance, spacing, and tension requirements imposed by the NESC, state and local codes, and the individual construction standards of utility pole owners.

From the perspectives of CenterPoint Energy and Dominion Energy, any rule adopted by the Commission must require no less than 45 days advance notice of overlashing, in the form that the pole owner specifies, which shall include all information necessary for the pole owner to assess the capacity, safety, reliability, and engineering impacts of overlashing on the requested poles, in the reasonable discretion of the pole owner; and in turn, the pole owner must be permitted to deny overlashing requests based on the same capacity, safety, reliability, and engineering considerations

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[14] *See*, *e.g.*, *Ex Parte* Letter to Marlene H. Dortch, Esq., Secretary, Federal Communications Commission, from Thomas Cohen, Counsel to the American Cable Association, re: *Ex Parte* Filing of the American Cable Association on Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, (Sept. 14, 2017) at 3.

[15] *See* Section II.

for which it would be permitted to deny an attachment under 47 U.S.C. §224(f)(2). Such rule also must provide a clear definition of "overlashing", which must refer only to coaxial and fiber cable.

II. THE COMMISSION'S LONGSTANDING PRECEDENT SUPPORTS A PROCESS THAT PROTECTS THE RIGHTS OF POLE OWNERS UNDER SECTION 224, SUCH AS THAT PROPOSED BY CENTERPORT ENERGY AND DOMINION ENERGY.

In developing its current policies on the practice of overlashing, the Commission explicitly protected certain rights accorded to pole owners under Section 224. If the Commission now intends to codify those policies, it is imperative that the Commission reaffirm the same rights in its new rule, as follows:

The pole owner must maintain the right to deny overlashing based on the same capacity, safety, reliability, and engineering considerations for which an initial attachment may be denied.

Under 47 U.S.C. § 224(f)(2), an IOU pole owner is granted an unconditional right to deny pole access "where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes." In accordance with the statute's clear mandate, the Commission declared repeatedly since 1998 that overlashing, whether by the host attacher, or by any third party, must be subject to the same capacity, safety, reliability, and engineering constraints that the statute requires.[16] Relying on this explicit protection, the D.C. Circuit upheld the new overlashing policies announced in the 2001 Consolidated Order, concluding that such policies "show due consideration for the utilities' statutory rights and financial concerns."[17] To abruptly eliminate or diminish this right in any fashion would reverse the Commission's now 20-year old precedent, and would exceed the express limitations of Section 224.

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[16] *Southern Co.*, 313 F.3d at 582 ("And a utility can also deny access to overlashers for reasons of insufficient capacity, safety, or reliability as described in the Act (citing 47 U.S.C. § 224(f)(2)). 2001 Consolidated Order at ¶ 75 ("We clarify that third party overlashing is subject to the same safety, reliability and engineering constraints that apply to overlashing the host pole attachment."); 1998 Telecom Order at ¶¶ 64, 68 ("We believe utility pole owners' concerns are addressed by Section 224's assurance that…pole attachments may be denied for reasons of safety, reliability, and generally applicable engineering purposes.").

[17] *Southern Co.*, 313 F.3d at 582.

The historic treatment of overlashing as any new pole attachment for purposes of 47 U.S.C. § 224(f)(2) is reasonable, and should not be second guessed in this rulemaking. In practical terms, "overlashing" is a modification of the previously approved host pole attachment, which materially impacts the properties of the pole attachment itself, and the engineering of the poles to which such attachment it is affixed. For example, tying new cable strands to an existing attachment adds both weight and surface area to that attachment, and changes the tension and sag of that attachment, its vertical ground clearance, and its separation from adjacent attachments. Therefore, to evaluate the capacity, safety, reliability, and engineering impacts of overlashing with respect to specific poles, the pole owner must be provided largely the same information that it would require to process an initial pole attachment application, and must be accorded the same time period – in advance of any overlashing – to complete its review of the overlashing proposed.

The rights of all electric utility the pole owners to review and evaluate the capacity, safety, reliability, and engineering impacts of overlashing, and to deny certain overlashing proposals based on the same criteria, could not be fully exercised without detailed advance notice to the pole owner, and a reasonable time period for action by the pole owner, based on such notice. To that end, any rule adopted by the Commission must require, at a minimum: (i) advance notice of all overlashing, which notice shall include all information that the pole owner indicates is needed to evaluate the capacity, safety, reliability, and engineering impacts of overlashing on its poles; (ii) a review time period of no less than 45 days; and (iii) a right of the pole owner to deny overlashing for insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes.

The pole owner must maintain the right to assess the impact of overlashing on its poles, and to require make-ready as needed, at the expense of the host attacher.

In its 2001 Consolidated Order, the Commission concluded that any "burden on the pole" that results from overlashing must be managed through make-ready work, and the pole owner must

in turn be directly reimbursed all non-recurring costs through make-ready charges, paid by the host attacher.[18] Indeed, because the Commission expressly declined to account for any costs to the pole owner associated with overlashing in its recurring annual rate formulas, such make-ready charges are both the best – and the *only* – recovery mechanism made available to electric utility pole owners under the current overlashing policies.[19] Said another way, if the Commission were to restrict, in any fashion, reasonable prior review processes that enable pole owners to assess make-ready work for overlashing, and to collect non-recurring make-ready charges, so too would it abolish any form of compensation due to the pole owner for the "burden" that overlashing places on its poles.

Although the term "make-ready" is not expressly defined in any Commission rule or order, that term is widely understood to encompass work that *precedes* an attachment under Section 224. For purposes of the pole access time line ordered by the Commission in 2011, "make-ready" is the term used to describe certain work of the pole owner, or of existing attachers, that is prescribed to provide physical space on the pole for a new installation.[20] Had the Commission ever intended for pole owners to assess the capacity, safety, reliability, and engineering impacts of overlashing after the fact, certainly the Commission would not have designated "make-ready" as the applicable cost recovery mechanism. Moreover, as a practical matter, no incentive would exist for an overlasher, or any host attacher to remit make-ready charges to the pole owner after overlashing is

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[18] 2001 Consolidated Order at ¶ 77 ("Based on our analysis and the record, we continue to believe that an attachment's burden on the pole relates to the assessment of need for make-ready changes to the pole structure, including pole change-out, to meet the strength requirements of the NESC.").

[19] *Id*. ("For example, if the addition of overlashed wires to an existing attachment causes an excessive weight to be added to the pole requiring additional support or causes the cable to sag to increase to a point below safety standards, then the attacher must pay the make-ready charges to increase the height or strength of the pole.").

[20] *See* 47 C.F.R. § 1.1420(e); *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), Report and Order and Order on Reconsideration (FCC 11-50), 26 FCC Rcd. 5240 (rel. Apr. 7, 2011).

complete.[21] Instead, the burden would most likely fall on the pole owner to remediate, at its own expense, work that causes damages to its poles, violations, or safety hazards.[22]

Just as pole owners in effect could not deny overlashing without detailed advance notice, the rights of pole owners to assess make-ready work, and to impose non-recurring make-ready charges based on the capacity, safety, reliability, and engineering impacts of overlashing would be a virtual nullity absent notice, and a reasonable time period prior to overlashing to review and evaluate all relevant information.

The pole owner must maintain the right to be notified <u>in advance</u> of overlashing.

As discussed more fully in the preceding sections, the important rights of IOU pole owners recognized, and protected under Commission's prior orders presume that pole owners be provided reasonable advance notice of overlashing, which notice must include all information necessary to evaluate the capacity, safety, reliability, and engineering impacts of overlashing as proposed. Such notice critically enables pole owners: (i) to deny overlashing pursuant to 47 U.S.C. §224(f)(2), based on the same capacity, safety, reliability, and engineering constraints for which an initial attachment may be denied; and (ii) to assess the impact of overlashing on their poles, and to require make-ready as needed, at the expense of the host attacher. Therefore, consistent with it prior conclusions, and with the express statements of the D.C. Circuit, the Commission should codify here a requirement that the host attacher provide to the pole owner reasonable advance notice of overlashing.

In its 2001 Consolidated Order, the Commission expressly stated that pole owners have the right to know the character of, and parties responsible for both pole attachments, and overlashes.[23]

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[21] In fact, the Commission's current rule that all make-ready charges be paid in advance of any work. 47 C.F.R. § 1.1420(e).

[22] The cumulative impact of overlashing by multiple attachers often makes it impossible to determine which party is responsible for damages that results from overloading. Therefore, pole owners seldom are able to recover the costs associated with remediation after the fact.

[23] 2001 Consolidated Order at ¶ 82.

To that end, the Commission concluded "it would be reasonable for a pole attachment agreement to require notice of … overlashing",[24] and even to prescribe a reasonable remedy where an attacher fails to provide such notice.[25] Based in part on such permissive assertions, the D.C. Circuit found the Commission's policies on overlashing to be consistent with the mandates of Section 224.[26] In sharp contrast, however, NCTA's proposed rule text would *foreclose* entirely contract provisions that the Commission determined to be per se reasonable in the past, and instead require pole owners to accept cursory overlashing advisories after the fact. Even if the Commission is not inclined to codify an advance notice requirement at this time, it must continue to permit IOU pole owners to negotiate reasonable notice requirements in their individual pole attachment agreements.

III. THE COMMISSION MUST DEFINE "OVERLASHING" CONSISTENT WITH ITS PRIOR ORDERS.

The current policies of the Commission on the practice of overlashing were developed for the most part in the years that immediately followed the 1996 Act, in a universe dominated by dial-up Internet access service, wireline telecommunications service, and cable systems that genuinely delivered nothing more than movies.[27] In short, those policies do not account for the enormity and sophistication of certain new equipment used to deliver high speed broadband services, or of RF-emitting small cell wireless devices, both of which communications service providers increasingly have requested to affix to existing cable spans. Indeed, the very crude definition of "overlashing" adopted by the Commission in 1998, and that on which its policies are based, contemplates simply a wire, physically tied to another wire that is already affixed to the pole.[28] The Commission must not expand that definition here. If the Commission intends to codify its precedent on overlashing,

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[24] *Id*.
[25] *Id*. at ¶ 85.
[26] *Southern Co*., 313 F.3d at 582.
[27] The current policies on overlashing were developed essentially in the 1996-2002 time frame.
[28] 1998 Telecom Order at ¶ 59.

then it too must adopt the same, commonly understood definition of "overlashing" at the time that its policies were first implemented. The practice of affixing communications equipment to cables is not "overlashing", and should be addressed, if at all, in a rulemaking established specifically for that purpose.

The wireless and "advanced communications" equipment that certain commenters propose to incorporate within the Commission's current overlashing policies present novel safety, reliability, and engineering concerns that do not exist with respect to the simple practice of tying cables.[29] For example, whereas overlashing distributes new load equally, a single device affixed to a cable strand concentrates added weight in a manner that acutely impacts the engineering of the existing line.[30] In such cases, it would be impossible to properly engineer the adjacent poles without a full pole loading analysis, as any pole owner would require for an attachment. Furthermore, strand mounted wireless devices often require ancillary equipment on the pole, which occupies pole space, but for which most attachers refuse to compensate the pole owner. If the Commission intends at any point to consider a rule that permits strand-mounted wireless attachments, these unique issues must be addressed.

Of paramount importance, however, strand-mounted wireless antennas, like all wireless pole attachments, emit potentially harmful RF levels that could not be effectively contained through a "notice and attach" process. In the case of RF-emitting pole attachments, pole owners generally require an RF analysis as a component of the application process, and prescribe design specifications intended to mitigate the RF hazards associated with the proposed wireless

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[29] *See Ex Parte* Letter from T. Scott Thompson, Counsel to Crown Castle to Marlene H. Dortch, Secretary, Federal Communications Commission, Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment* (WC Docket No. 17-84); *Broadband Deployment Advisory Committee* (GN Docket No. 17-83) (Nov. 1-, 2017) at 1-2 (proposing that the Commission expand its current definition of "overlashing" to include strand-mounted small cell antennas); Initial Comments of NCTA, filed June 15, 2017 at 5-7; Reply Comments of NCTA at 3-5.

[30] In its *ex parte* comments, Crown Castle asserts that its strand-mounted wireless devices weigh less than a typical cable. Even if that were accurate (and the commenters here do not believe that to be the case), the distribution of load is an equally critical factor in properly engineering the adjacent poles.

equipment.[31] For example, RF-emitting pole attachments must be installed at a safe distance from regularly accessed portions of the pole, and must be accompanied by appropriate signage, and a disconnect switch.[32] The "notice and attach" process proposed for overlashing would critically impede efforts regularly made by pole owners to protect their employees, contractors, and the public from the risks associated with RF-emitting devices.

CONCLUSION

WHEREFORE, CenterPoint Energy and Dominion Energy respectively request that the Commission consider these comments, and take actions, or adopt rules and policies consistent with the foregoing.

Respectfully submitted,

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Dated: January 17, 2018

[31] Pole Attachment Guidelines and Procedures of CenterPoint Energy Houston Electric, LLC at 28 (rev. Nov., 2017).
[32] *Id*. at 31-32.