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
	)	
	)	

REPLY COMMENTS OF COMCAST CORPORATION

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TABLE OF CONTENTS

Page

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Comcast Corporation ("Comcast") submits these reply comments in connection with the Further Notice of Proposed Rulemaking ("FNPRM") released on November 29, 2017 in the above-captioned proceeding.[1]

INTRODUCTION AND SUMMARY

As discussed in Comcast's opening comments, Comcast supports the Commission's proposal to codify its clear and longstanding precedent allowing broadband providers to engage in overlashing without prior approval from or notice to pole owners.[2] This precedent, enshrined in the Commission's *2001 Pole Order*[3] and upheld by a unanimous panel of the D.C. Circuit in *Southern Co. Servs. v. FCC*,[4] has served as a critical underpinning for the investments broadband providers have made in upgrading and expanding their broadband networks over the years. Codifying this precedent will help ensure that broadband providers can continue relying on

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[1] *See Accelerating Wireline Broadband 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) ("*FNPRM*").

[2] Comments of Comcast Corp., WC Docket No. 17-84, at 6-9 (Jan. 17, 2018) ("Comcast Comments").

[3] *See Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103 ¶¶ 75, 82 (2001) ("*2001 Pole Order*").

[4] 313 F.3d 574, 582 (D.C. Cir. 2002).

overlashing as an efficient means of advancing the Commission's broadband deployment goals—and will provide an even stronger deterrent to efforts by pole owners to delay broadband deployment by imposing prior approval or notice requirements notwithstanding the Commission's clear policy. A wide array of parties filing in the opening round likewise support the Commission's proposal—including not only broadband providers and others who engage in overlashing, but also multiple pole owners who recognize that overlashing brings significant public interest benefits with negligible safety risks.

Meanwhile, the objections raised in the record by a handful of electrical utility pole owners are without merit. Many of their arguments mischaracterize the Commission's overlashing precedent to seek prior approval or prior notice requirements. Additionally, while they repeatedly assert that safety and reliability considerations compel the adoption of a prior approval or prior notice regime, both the Commission and the D.C. Circuit have already specifically considered and rejected those arguments. The electrical utility commenters overlook, among other things, that overlashers have every incentive to maintain the safety and reliability of the poles that support their facilities; that communications providers are required to adhere—and do adhere—to generally accepted engineering standards when overlashing; and that Section 224(f)(2) provides a solid regulatory backstop ensuring that overlashers are accountable for any safety or reliability issues they may cause. The Commission also should reject the utilities' claim that a prior notice rule would not hinder broadband deployment; some pole owners have devised burdensome preconditions on overlashing, and would seize on such a rule in seeking to justify these requirements. Codifying existing precedent would help put an end to such conduct.

DISCUSSION

I. A WIDE ARRAY OF COMMENTERS SUPPORT CODIFYING THE COMMISSION'S LONGSTANDING OVERLASHING PRECEDENT

The comments filed in the opening round reflect widespread support for codifying the Commission's existing precedent allowing broadband providers to overlash without approval from or prior notice to utility pole owners. Cable broadband providers are unanimous in urging the Commission to codify this longstanding approach to overlashing. NCTA explains that "the Commission's policy of encouraging unrestricted overlashing, including its decision to prohibit prior approval requirements for overlashing, is a critical element of the regulatory foundation on which hundreds of billions of dollars of new investment have been made," and that codification of this precedent will "provide[] greater certainty to cable operators that continue to face resistance from utilities" when engaging in overlashing.[5] The American Cable Association likewise urges the Commission to "codify existing law" on overlashing and notes that, "[b]y adopting clear overlashing rules, the Commission will ensure overlashers receive timely and cost-effective pole access, spurring broadband deployment."[6]

The Commission's proposal to codify existing overlashing precedent also finds support from pole owners. For instance, Verizon, which owns a significant number of poles throughout its wireline footprint, acknowledges that "some pole owners are imposing advance-approval requirements on overlashing," and recommends that, "[t]o remove any uncertainty, the Commission should codify its overlashing precedents."[7] Verizon goes on to explain that, in

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[5] Comments of NCTA – The Internet & Television Association, WC Docket No. 17-84, at 2-3 (Jan. 17, 2018).

[6] Comments of the American Cable Association, WC Docket No. 17-84, at 2 (Jan. 17, 2018) ("ACA Comments").

[7] Comments of Verizon, WC Docket No. 17-84, at 19 (Jan. 17, 2018).

codifying this precedent, "the Commission should be careful to avoid inadvertently placing new restrictions on overlashing."[8] Accordingly, Verizon suggests that, in addition to reaffirming that no prior approval is required, the Commission "should refrain from adding an advance notice requirement to overlashing"—and indeed proposes that the Commission "should go further and prohibit utilities from requiring advance notice of overlashing because such a requirement would be cumbersome and inefficient."[9] Another pole owner, Crown Castle International, similarly urges the Commission to "codify its existing overlashing precedent"—noting that "[o]verlashing is vital to the timely delivery of next-generation broadband services," and observing that "the Commission's current policies on overlashing have proven very workable, effectively promoting the deployment of wireline and wireless broadband solutions."[10]

Support for the Commission's proposal also comes from the broader communications industry. The Fiber Broadband Association ("FBA")—an organization with 250 members representing an array of "telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities, and municipalities"—explains in its comments that "the Commission's precedent to facilitate overlashing is sound" and should be codified.[11] FBA notes that Commission precedent does not mandate "approval from or consent of the utility for overlashing" and "has never required

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[8] *Id.*

[9] *Id.*

[10] Comments of Crown Castle International Corp., WC Docket No. 17-84, at 1-2 (Jan. 17, 2018) ("Crown Castle Comments").

[11] Comments of the Fiber Broadband Association, WC Docket No. 17-84, at 1-2 & n.1 (Jan. 17, 2018) ("FBA Comments").

overlashers to provide advance notice to utilities"[12]—an approach that has "unquestionably spur[red] and accelerate[d] broadband investment and deployments."[13]

FBA also provides economic evidence showing that, "[w]hile fiber construction costs vary depending on many factors, including topography, labor costs, and scale, there is no doubt that these costs are significantly reduced when an attacher can overlash instead of undertaking a new attachment."[14] These findings certainly accord with Comcast's experience; because overlashing considerably "reduc[es] the cost of installing and financing infrastructure facilities," overlashing has become "a principal method by which Comcast adds fiber to its broadband network, and thus plays a critical role in Comcast's current and future broadband deployment plans."[15] Given the importance of overlashing to the fulfillment of the Commission's broadband deployment goals, Comcast stands with this diverse array of commenters in supporting the Commission's proposal to codify longstanding precedent allowing overlashing without approval from or prior notice to pole owners.

II. THE COMMISSION SHOULD REJECT CALLS FOR NEW APPROVAL OR NOTICE REQUIREMENTS

Opposing this broad group of stakeholders, some electrical utility pole owners urge the Commission to revisit its longstanding overlashing precedent and to adopt new prior approval or prior notice rules that would contravene that precedent. Notably, a few of these electrical utility

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[12] *Id.* at 7-8 (internal quotation marks and citations omitted).

[13] *Id.* at 4.

[14] *Id.* at 2; *see also id.* at 2-3 (citing a study showing that, as a general matter, "while the average cost for new aerial construction is approximately $51,000 per mile, the cost for overlashing is less than $15,000 per mile in a metro area and, due to lower labor costs, only about $12,000 per mile in a rural area").

[15] Comcast Comments at 5-6 (internal quotation marks and citations omitted).

pole owners even claim they "support[]" the FNPRM's proposal to "codify the prior orders of the Commission with respect to the practice of overlashing"—but then mischaracterize that precedent as *requiring* providers to seek approval or provide notice from pole owners before overlashing their own facilities.[16] The Commission should reject these efforts by electrical utility pole owners to mislead the agency into adopting a more restrictive overlashing policy under the guise of reaffirming existing law.

Existing precedent on overlashing could not be clearer: ISPs are not obligated as a regulatory matter to seek prior approval from or provide prior notice to pole owners when engaging in overlashing. In its *2001 Pole Order*, the Commission specifically ruled that overlashers need not "obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment."[17] The Commission also considered and rejected proposals to impose a prior notice requirement on overlashing in its *2001 Pole Order*. While the Commission asserted that "it would be reasonable" for a pole owner and an attacher to *agree* to a mutually beneficial notice period, it did not authorize pole owners to impose prior

[16] Comments of Centerpoint Energy Houston Electric, LLC and Dominion Energy, WC Docket No. 17-84, at 1-2 (Jan. 17, 2018); *see also, e.g.*, Comments of Ameren Services Company *et al.*, WC Docket No. 17-84, at 24 (Jan. 17, 2018) ("Ameren *et al.* Comments") (urging the Commission to "clarify" its "longstanding precedent regarding overlashing" but suggesting that this precedent contemplates mandatory advance notice); Comments of Edison Electric Institute, WC Docket No. 17-84, at 2 (Jan. 17, 2018) ("Edison Electric Comments") (asserting that the Commission should be "wary of misconstruing" the "notice requirements inherent within its precedent" on overlashing).

[17] *2001 Pole Order* ¶ 75; *see also Cable Television Ass'n of Georgia v. Georgia Power Co.*, Order, 18 FCC Rcd. 16333 ¶ 13 (EB 2003) (finding that a utility pole owner's insistence on a provision in pole attachment agreements requiring its "written consent to any overlashing" was "unjust and unreasonable").

notice requirements *unilaterally* on overlashers—much less adopt an industry-wide rule mandating the provision of notice prior to overlashing.[18]

It is noteworthy that many of the electrical utility pole owners who now mischaracterize this clear precedent were petitioners in the judicial challenge to the *2001 Pole Order* before the D.C. Circuit—which then unanimously upheld that *Order* in *Southern Co.*[19] Indeed, these utility pole owners largely advance the same arguments in this proceeding as they raised over 15 years ago in the *Southern Co.* appeal.

Specifically, the utility pole owners in *Southern Co.* "contend[ed] that without a rule that overlashers give prior notice to utilities, owners cannot exercise their right to deny access for the reasons listed in the statute," such as "insufficient capacity" or asserted "safety or reliability" issues under Section 224(f)(2)[20]—a claim these same parties now rehash in this proceeding.[21] The D.C. Circuit, however, expressly rejected these arguments there, and the Commission should do so here as well. The court noted, for instance, that the Commission's *2001 Pole Order* "allow[s] utilities to charge overlashers 'make ready' costs if the overlashing wires require enhancing the strength of the pole."[22] The court also explained that "[o]verlashers are not required to give prior notice to utilities before overlashing," but may "negotiat[e]" with utilities on coordination measures that are mutually acceptable to both parties.[23] In light of these considerations, the D.C. Circuit concluded that the Commission's approach to overlashing "show[s] due consideration for

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[18] *Id.* ¶ 82.

[19] 313 F.3d at 582.

[20] *Id.*

[21] *See, e.g.*, Edison Electric Comments at 3; Ameren *et al.* Comments at 8-9.

[22] *Southern Co.*, 313 F.3d at 582 (citing 47 U.S.C. § 224(f)(2); *2001 Pole Order* ¶¶ 74, 77).

[23] *Id.* (citing *2001 Pole Order* ¶ 82).

the utilities' statutory rights and financial concerns," and appropriately "balanced [such concerns] with the efficiency gains that overlashing brings to the industry."[24]

There is no reason to revisit this longstanding, judicially validated precedent on overlashing. The Commission already noted in its *FNPRM* that pole owners made similar arguments based on alleged "safety concerns" in the previous round of comments in this proceeding, and that the Commission saw "no reason" to "disturb [its] longstanding precedent" or to "reopen that precedent here."[25] Nor have utility pole owners offered anything new in this round of comments that would warrant upsetting the balance struck by the Commission's overlashing policy. The electrical utilities rely largely on vague assertions that they are somehow uniquely "experienced and qualified to recognize and address" potential safety issues with poles,[26] and that continuing to allow overlashing without utilities' prior approval or notice would negatively impact the safety and reliability of their poles.[27] But these contentions rest on several false premises.

First, they incorrectly imply that utility pole owners are the *only* parties interested in ensuring the safety and reliability of poles—when the record makes clear that, because overlashers "already have attachments on poles, 'they have the same interest in maintaining safe and reliable outside plant, networks and support structures as the utilities.'"[28] Second, they suggest that

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[24] *Id.* (citing *2001 Pole Order* ¶ 73).

[25] *FNPRM* ¶ 162 n.509.

[26] Comments of the Utilities Technology Council, WC Docket No. 17-84, at 3 (Jan. 17, 2018) ("UTC Comments").

[27] Comments of the Utility Coalition on Overlashing, WC Docket No. 17-84, at 2 (Jan. 17, 2018).

[28] FBA Comments at 5 (quoting Comments of NCTA – The Internet & Television Association, WC Docket No. 17-84, WT Docket No. 17-79, at 6 (June 15, 2017)); *see also* Comcast Comments at 8 n.23 (explaining that "cable overlashers, who already have cable facilities attached to a pole, have the same incentive to ensure the integrity and safety of utility poles as pole owners themselves do, since any damage to a utility pole threatens to cause interference to the cable facilities attached to the pole").

broadband providers overlash without following any guidance for the safe installation of facilities—when, in fact, Commission precedent indicates that overlashers should "compl[y] with generally accepted engineering practices,"[29] and the record shows that overlashers do indeed "follow industry standard engineering practices," including the National Electric Safety Code ("NESC").[30] As ACA explains, "[c]able operators and telecommunications providers have safely overlashed fiber and advanced communications equipment to existing facilities for decades without overloading poles," and "are well aware they need to comply with generally accepted engineering practices to safeguard pole safety and reliability."[31] Third, the utilities' arguments ignore the fact that, under Section 224(f)(2), overlashers are accountable for any actual safety or reliability issues they cause.[32] This legal backstop appropriately ensures that overlashing remains subject to high safety and reliability standards without the need for approval or notice requirements that would unduly impede broadband deployment.

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[29] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd. 6777 ¶ 64 (1998).

[30] FBA Comments at 5; *see also, e.g.*, *id.* ("As the Power and Communication Contractors Association ('PCCA'), which represents 85 percent of the construction companies performing pole attachment work, including FBA members, stated in recent meetings with Commission staff, '[s]afety is paramount in contractor operations, and PCCA contractors perform quality work for all carriers large and small, urban and rural.' These contractors will place new strand instead of overlashing if field engineering identifies a potential safety issue." (quoting Letter of Eben M. Wyman, Principal, E. Wyman Associates, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84, at 2 (Nov. 30, 2017)).

[31] ACA Comments at 8.

[32] 47 U.S.C. § 224(f)(2); *see also 2001 Pole Order* ¶ 77 ("[I]f 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 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.").

The Commission also should look with skepticism at some utilities' efforts to couch their proposals as involving only an advance notice requirement, as if such a rule would be meaningfully different in practice from an advance approval requirement.[33] Under a mandatory advance notice regime, utilities would have a free hand to engage in the kinds of dilatory tactics that led the Commission to propose reaffirming and codifying its pro-overlashing precedent in the first place. Utilities could, for instance, attempt to rely on a prior notice rule to require broadband providers to submit detailed and time-consuming pole load studies prior to any overlashing, based on idiosyncratic standards that go far beyond generally accepted engineering practices.[34] Moreover, utilities "may use the notice process to try and force service providers to pay for the correction of preexisting pole overloading or other safety violations caused by other attachers."[35] Thus, as a practical matter, utilities may well find ways to transform a prior notice requirement into something very closely resembling a prior approval regime. And at a minimum, "requiring advance notice will open up the overlashing process to further delays and increased costs" in much the same way as an advance approval requirement would.[36]

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[33] *See, e.g.*, UTC Comments at 3-5.

[34] *See* FBA Comments at 7 (noting that "some utilities require detailed pole load studies for every pole affected by an overlashing," and that these and other barriers to swift deployment are "tantamount to a permitting requirement" (internal quotation marks and citations omitted)); Crown Castle Comments at 4-5 (explaining that "many of the new standards or policies adopted by utilities inhibit the deployment of broadband by imposing 'construction standards' far in excess of National Electric Safety Code ('NESC') and other industry-wide standards").

[35] FBA Comments at 9.

[36] *Id.* Additionally, the utilities' suggestion that all certified states under Section 224 have embraced prior approval or prior notice requirements is simply untrue. *Cf.* Ameren *et al.* Comments at 12. For instance, the New York Public Service Commission has specifically declined to adopt a rule enabling pole owners to review all overlashing in advance, and has observed that overlashers are fully capable of "assur[ing] that the existing facilities and those overlashed are in compliance with the NESC." *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Case 03-M-0432, Policy Statement on Pole

CONCLUSION

For the reasons discussed herein and in Comcast's opening comments, Comcast supports the Commission's proposal to codify its longstanding and well-founded precedent authorizing broadband providers to engage in overlashing without seeking approval from or providing prior notice to utility pole owners.

Respectfully submitted,

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Attachments, Appendix A at 8-10 (Aug. 6, 2004), *available at* http://www.utilityregulation.com/content/orders/04NY0432E.pdf. The Maine Public Utilities Commission likewise has made clear that its rules allow "overlashes without prior authorization of the pole owner" and without prior notice. *Amendment to Chapter 880*, Order Amending Rule and Factual and Policy Basis, Docket No. 2017-00247 (Jan. 12, 2018), *available at* https://mpuc-cms.maine.gov/CQM.Public.WebUI/Common/CaseMaster.aspx?CaseNumber=2017-00247.