BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WIRELINE COMPETITION BUREAU

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

REPLY COMMENTS OF THE ELECTRIC UTILITIES ON OVERLASHING

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American Electric Power Service Corporation
Duke Energy Corporation
Entergy Corporation
Oncor Electric Delivery Company LLC
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EXECUTIVE SUMMARY

The Commission should make it abundantly clear that advance notice of overlashing is a reasonable term or condition for pole attachment, and the Commission should expressly disavow any of its prior precedent that might be interpreted otherwise. The comments filed by attaching entities demonstrate the need for clarification of the Commission's "existing precedent" on overlashing. Attaching entities continue to take the untenable position that advance notice of overlashing is, on the one hand, unreasonable on its face, while at the same time arguing, on the other hand, that such a provision would be reasonable if the attaching entity agreed to it. This would make the attaching entity the sole arbiter of the reasonableness of a term or condition. Though many attaching entities feel this way about overlashing (and many other pole attachment issues), that is not the way it works.

The Electric Utilities are not urging a far-fetched or a novel approach to overlashing. The Electric Utilities are simply asking for a rule (or a statement of policy or a mere clarification of existing precedent) that (a) breathes life into an electric utility's right to deny overlashing for reasons of insufficient capacity, safety, reliability or engineering purposes, (b) recognizes that structural science is a real thing, and (c) aligns the Commission's policy on overlashing with the policy of all but one state public utility commission to address this issue within the past ten years. The attaching entities, on the other hand, are urging an approach that tortures the Commission's existing precedent, eviscerates an electric utility's statutory rights under Section 224(f)(2), rejects structural science, and flies in the face of the overwhelming weight of state authority on this issue. As the Commission has noted: "state experience with regulation of pole attachments provides an invaluable opportunity for the Commission to observe what works and what does not work to achieve policy goals."[1]

Some attaching entities argue (a) that electric utilities have nothing to worry about because the attaching entities care about the integrity of the infrastructure as much as the electric utilities, and (b) that any problems created by overlashing can be fixed after the fact. Setting aside the specious claim that attaching entities are as concerned about the integrity of the infrastructure as electric utilities, it is the electric utilities—not the attaching entities—who answer to state public utility commissions on the matter of infrastructure integrity. And perhaps this is why all but one state public utility commission to address this issue within the past ten years has adopted or ratified some form of advance notice requirement. Further, the argument that problems created by overlashing can be fixed after the fact undermines the attaching entities' argument regarding their relative level of concern for the integrity of the infrastructure (or the safety of their own workers).

This should not even be a close issue. With the demand for broadband increasing, so will the demand for overlashing (and with it, the burden on the infrastructure). At this point, the stakeholders should be discussing the finer points of the process (timing, data transmittal, etc.)—not whether advance notice is reasonable in the first instance. The Commission can, and should,

[1] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, ¶ 7 (2011) ("2011 Order").

quiet this issue by making it clear that advance notice is reasonable. This is a necessary first step toward facilitating a discussion about processes that fairly balance the safety and reliability of the infrastructure with the benefits afforded to incumbents through efficient overlashing processes. The Electric Utilities look forward to further engaging with the Commission and the stakeholders on this important issue.

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Ameren Services Company, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company, Tampa Electric Company and Westar Energy, Inc. (the "Electric Utilities") collectively own and maintain more than 21 million distribution poles in 20 states across the Southeast and Midwest. The Electric Utilities submitted initial comments in connection with the Commission's Further Notice of Proposed Rulemaking regarding overlashing in the above-referenced docket, and respectfully submit the following reply comments.[2]

I. THE COMMISSION'S "EXISTING PRECEDENT" ON OVERLASHING IS, APPARENTLY, IN NEED OF CLARIFICATION.

The comments filed by Comcast, NCTA—The Internet & Television Association ("NCTA") and the American Cable Association ("ACA") illustrate the need for clarification of the Commission's existing precedent on overlashing. These entities believe (or at least contend) that the Commission's existing precedent prohibits a pole owner from requiring advance notice of

[2] *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 (Rel. Nov. 29, 2017) (the "FNPRM"). All citations to "Comments" herein are citations to comments filed on January 17, 2018 in response to the FNRPM, unless otherwise specifically noted.

overlashing. Comcast Comments, 6 ("Existing Commission and judicial precedent is clear in prohibiting utility pole owners from imposing approval or notice requirements on overlashing."); NCTA Comments, 2; ACA Comments, 5. In essence, these entities contend that, under the Commission's existing precedent, an advance notice requirement is unreasonable on its face. This cannot be the case because, as the D.C. Circuit specifically observed, "the FCC rules do not preclude pole owners from negotiating with pole users to require notice before overlashing." *S. Co. Services, Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002). Comcast and ACA attempt to finesse this point by arguing that, while an advance notice requirement is unreasonable on its face, an attaching entity might nevertheless agree to such a provision through negotiation. Comcast Comments, 7; ACA Comments, 5. There are at least two reasons why this argument does not hold water.

First, even if a pole owner negotiated for such a provision, it would be unenforceable if, as the attaching entities apparently contend, the provision was unreasonable on its face. Under the Commission's existing "sign and sue" rule, the fact that an attaching entity has agreed to a provision does not necessarily mean the provision is binding. Second, even if such a negotiated provision would ultimately be enforceable, it leaves the pole owner completely at the mercy of the attaching entity during the negotiation. The reasonableness of a term or condition cannot depend on an attaching entity's acquiescence. An advance notice requirement is either a reasonable term or condition, or it is not. If it is reasonable—as the Commission and the courts have indicated—a pole owner should be allowed to require advance notice regardless of an attaching entity's disposition toward such a provision.

In addition to being internally inconsistent, the attaching entities' understanding of the Commission's existing precedent appears to be at odds with the Commission's **own** understanding

of its prior precedent. The FNPRM seeks comment on "codifying a rule that overlashing is subject to a notice-and-attach process" which the Commission describes as a codification of its "longstanding precedent regarding overlashing." FNPRM, ¶ 162. The organization of the words in the phrase "notice-and-attach" is important. The word "notice" precedes the word "attach." The attaching entities, on the other hand, contend that the Commission's "longstanding precedent" supports the exact opposite: an "attach-and-notify" process. Fiber Broadband Association ("FBA") Comments, 8; Verizon Comments, 19.

The attaching entities' inability to see clearly on this issue not only impacts their interpretations of the Commission's precedent, but also impacts their ability to read. Even while citing the very paragraph of FNPRM that describes a "notice-and-attach" process as a codification of the Commission's "longstanding precedent," Comcast nonetheless describes the FNPRM as asking "whether the Commission should codify in its rules longstanding precedent permitting overlashing without … prior notice to utility pole owners." Comcast Comments, 6, citing FNPRM ¶ 162. That may be what Comcast **wishes** the FNPRM said, but it is not what the FNPRM actually says. Verizon and the FBA, to their credit, at least acknowledge what the FNPRM actually said—that a codification of the Commission's existing precedent would involve a "notice-and-attach" process (rather than their preferred "attach-and-notify" process). Verizon Comments, 19; FBA Comments, 8. But for some attaching entities, like Comcast, the mere mention of the term "overlashing" triggers such a crazed reaction that they, quite literally, cannot tell left from right.

As long as attaching entities have space or comfort to make the arguments they are making here with respect to the Commission's existing precedent on overlashing, or to close their eyes and pretend that left is right, the problems will continue. To resolve these problems, the Commission should:

- Clarify, in unmistakable terms, that advance notice of overlashing is a reasonable term or condition for pole attachment; and
- Disavow any of its prior precedent to the extent it is capable of interpretation in a manner that it inconsistent with this clarification.

This not only would pave the way for implementation of reasonable advance notice processes, but also would align the Commission's policy with the policy of all but one state public utility commission to address this issue within the past ten years.

II. NONE OF THE ATTACHING ENTITIES EVEN MENTIONED—LET ALONE ADDRESSED—THE OVERWHELMING STATE PUBLIC UTILITY COMMISSION AUTHORITY SUPPORTING ADVANCE NOTICE OF OVERLASHING.

All but one state public utility commission to address overlashing processes in the past ten years has either ratified or adopted some form of advance notification requirement: North Carolina (2018); Arkansas (2016); Ohio (2016); Washington (2015); Louisiana (2014); Iowa (2013); Utah (2012); and Connecticut (2008).[3] None of the attaching entities addressed any of these state public

[3] *See* Electric Utilities' Comments, 12-17. On January 9, 2018, the North Carolina Utilities Commission, in a decision adjudicating various aspects of the pole attachment relationship between Time Warner Cable and the North Carolina electric cooperatives, adopted an advance notice requirement ranging between 30 days and 2 days, depending on the number of poles impacted by the proposed overlashing project. *Time Warner Cable Southeast LLC v. Carteret-Craven Elec. Membership Corp.*, 2018 N.C. PUC LEXIS 14, 147 (N.C. Utilities Comm'n Jan. 9, 2018). The lone state commission outlier in the past ten years is Maine. On January 12, 2018, the Maine Public Utilities Commission—without addressing any request for advance notification, without discussing the safety and reliability issues attendant to overlashing, and without mentioning any precedent from the FCC or other state utility commissions—adopted an after-the-fact notification requirement. Amendment to Chapter 880—Attachments to Joint-Use Poles; Determination and Allocation of Costs; Procedure, 2018 Me. PUC LEXIS 10, 37-38, 82 (Maine Pub. Util. Comm'n Jan. 12, 2018). This decision, which was released three business days prior to the January 17, 2018 initial comment deadline in the present proceeding, was unknown to the Electric Utilities as of the date of filing their initial comments.

utility commission decisions (or any state-level treatment of the issue, for that matter). As the FCC observed in its 2011 Order:

> [S]tate experience with regulation of pole attachments provides an invaluable opportunity for the Commission to observe what works and what does not work to achieve policy goals. State efforts to date on establishing fair access rules—including timelines—have been particularly instructive as the Commission attempts to balance the needs of communications companies to deploy vital network facilities with the needs of utility pole owners, including the need to protect safety of life and the reliability of their own critically important networks.

2011 Order, ¶ 7.

To be clear, the attaching entities are asking the Commission to go against the judgment of all but one state public utility commission to address this issue within the past ten years. Importantly, many of the state public utility commissions that have addressed this issue have specifically addressed the connectivity between advance notice of overlashing and the preservation of network integrity. For example:

- The **Arkansas Public Service Commission**, in its order adopting a rule subjecting overlashing to the same application requirement as any other attachment, stated, "The evidence continues to support the need for a permit for overlashing because of safety and reliability concerns." *In the Matter of a Rulemaking Proceeding to Consider Changes to the Arkansas Public Service Commission's Pole Attachment Rules*, Docket No. 15-019-R; Order No. 7, 2016 Ark. PUC LEXIS 360, *10 (Ark. Pub. Serv. Comm'n Oct. 12, 2016).
- The **Ohio Public Utilities Commission**, in approving Dayton Power & Light's pole attachment tariff requirement of advance permission for overlashing, stated "that overlashing an existing facility increases the load on a pole and that it is necessary to determine whether a pole can safely accommodate the additional load before the

facility is overlashed." *In the Matter of the Application of Dayton Power and Light Company to Amend Its Pole Attachment Tariff*, 2016 Ohio PUC LEXIS 821, ¶¶ 79-83 (Pub. Utilities Comm'n of Ohio Sept. 7, 2016).

- The **Iowa Utilities Board**, in adopting an advance notice requirement for overlashing, stated, "Overlashing of existing lines by a communications company may create situations that the pole owner will need to address prior to the overlashing being installed." *In Re: Pole Attachments Rule Making [199 IAC Chapter 27] and Amendment to 199 IAC 15.5(2)*, Docket No. RMU-2012-0002, 2013 Iowa PUC LEXIS 515, *19-20 (Iowa Utilities Bd. Dec. 2, 2013).
- The **Connecticut Department of Public Utility Control** ("DPUC"), in approving Connecticut Power & Light's pole attachment tariff requirement of advance notice for overlashing, stated, "Providing advanced notice is certainly not an unreasonable or burdensome requirement, and the Department believes such notice is necessary to preserve CL&P's ability to manage the physical integrity of the pole infrastructure." *Application of the Connecticut Light & Power Company to Amend Its Rate Schedules*, Decision, 2010 Conn. PUC LEXIS 65, * 332 (Conn. Dept. of Public Util. Control June 30, 2010). The DPUC also went out of its way to express "disappointment" with the state cable association's position opposing any form of advance notice of overlashing. *Id.*

It is disappointing, indeed, that attaching entities continue to advocate for rules (or interpretations of existing Commission policy) that would prohibit any kind of advance notice requirement. This should not even be a close issue. If the Commission is going to entertain a discussion about overlashing processes at all, the stakeholders should be discussing the finer points

of the advance notification process (timing, data transmittal, etc.)—not whether advance notice is reasonable in the first instance.

State public utility commissions are charged with overseeing—and staffed with the expertise to oversee— the safety and reliability of electric infrastructure. The fact that all but one state commission to address this issue within the past ten years has ratified or approved some sort of advance notice requirement is telling. The Electric Utilities respectfully request that the Commission follow the lead of the state public utility commissions on this important issue of infrastructure safety and reliability.

III. THE "ATTACH-AND-NOTIFY" OVERLASHING RULE URGED BY ATTACHING ENTITIES WOULD CONFLICT WITH AN ELECTRIC UTILITY'S RIGHT TO DENY ACCESS UNDER SECTION 224(f)(2) AND IGNORE THE SAFETY AND RELIABILITY CONCERNS POSED BY OVERLASHING.

A. None of the Attaching Entities Even Attempted to Reconcile Their Advocacy for an "Attach-and-Notify" Rule with an Electric Utility's Right to Deny Access Under Section 224(f)(2).

Most of the attaching entities urge the Commission to adopt a rule requiring only after-the-fact notice of overlashing. *See, e.g.* Comcast Comments, 1; Verizon Comments, 19-20; NCTA Comments, 1; FBA Comments, 8; CenturyLink Comments, 6.

Even the ACA, which previously advocated in this very docket for a rule requiring 14 or 15 days advance notice of overlashing, appears now to be walking back its original support for advance notice given that NCTA, Comcast, and others are advocating for an after-the-fact notice rule. In its initial comments on the original NPRM in this docket, ACA wrote:

> Because overlashing generally does not overload poles and is not a new attachment, it is well-established that overlashing can be done through a "Notify and Attach" process. **The rule ACA proposes would allow attachers to demand provisions that allow them to overlash after giving the utility 14-days' notice.**

ACA Comments, Docket No. 17-84, 29-30 (June 15, 2017) (emphasis added). Similarly, ACA wrote in its reply comments on the original NPRM: "ACA notes that utilities either permit or are required to permit attachers to provide 15-days' (or similarly brief) advance notice of planned overlashes and recommends the Commission confirm the right to overlash without an application and codify the 15-day timeframe to prevent utilities from unreasonably delaying or denying overlashes on existing attachments." ACA Reply Comments, Docket 17-84, 8 (July 17, 2017). In an ex parte letter to the Commission in September 2017 in this docket, ACA wrote "ACA therefore has recommended that the Commission adopt a 'notify and attach' process, allowing attachers to overlash after providing 15 days' notice to the pole owner." ACA Ex Parte Letter, Docket No. 17-84, 3 (Sept. 14, 2017). Changing course, in its initial comments on the overlashing inquiry in the FNPRM, ACA now takes the position that "the Commission should codify its rule permitting overlashing without application requirements, prior utility approvals, or unrelated or otherwise unwarranted charges."). ACA Comments, 9. ACA makes no mention of the position it consistently took (at least in public) on this issue for the entire second half of 2017. Why? Is ACA dispensing with reasonableness and pragmatism due to pressure from NCTA, Comcast and other cable interests? Is it abandoning its previously held (and consistently stated) position for regulatory leverage?

Whatever the motivation for its flip-flop, neither ACA nor any of the other attaching entities even cite to Section 224—much less, attempt to reconcile an electric utility's right to deny access under section 224(f)(2) with their proposed after-the-fact notice rule. Section 224(f)(2) provides that "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 and for reasons of safety, reliability and

generally applicable engineering purposes." 47 U.S.C. § 224(f)(2) (emphasis added). The Commission has previously held that Section 224(f)(2) applies to overlashing. *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, 13 FCC Rcd 6777, ¶ 64 (Feb. 6, 1998) (the "1998 Order") ("We believe utility pole owners' concerns [regarding overlashing] are addressed by Section 224's assurance that pole owners receive a just and reasonable rate and that pole attachments may be denied for reasons of safety, reliability, and generally applicable engineering purposes."). **How can a utility exercise its right to *deny* access if it does not even receive notice *prior* to such access?** No attaching entity has even attempted an answer to this question. The only way electric utilities can exercise their rights under Section 224(f)(2) is through advance notice of overlashing.

B. An "Attach-and-Notify" Rule Would Ignore the Safety and Reliability Concerns Posed by Overlashing that Overloads the Pole or that Exacerbates Existing Violations.

In addition to ignoring an electric utility's right to deny access under § 224(f)(2), the attaching entities advocating for an "attach-and-notify" rule also ignore the potential danger posed by overlashing. CenturyLink, for example, argues that "prior approval of wire-to-wire overlashing is unnecessary." CenturyLink Comments, 5. CenturyLink writes:

> CenturyLink allows parties to overlash fiber optic cable to their own or others' attachments on CenturyLink poles, subject to a requirement that the overlashing party provide appropriate notice, detailed description, and pole loading analysis to CenturyLink within 10 days of the overlashing, as part of its permitting policy….After receiving notice, CenturyLink typically conducts a post-inspection of the overlashed facilities to ensure they comply with CenturyLink's standards and applicable safety and electric codes and do not pose loading concerns. This includes inspection of the underlying cable attachment to ensure it is also in compliance. The National Electric Safety Code requires that the cable being overlashed be in compliance prior to the overlash taking place. If inspection reveals violations, overlashing parties and/or the owners of the host attachments holding the contract with CenturyLink are responsible for any make-ready and associated

> actual costs required to correct deficiencies or overloading identified in these inspections….Thus, if CenturyLink concludes on inspection that the overlash cannot be accommodated due to safety or engineering concerns, the overlashed facilities may have to be removed.

(CenturyLink Comments, 5-6).

There are many problems with this approach. First, under CenturyLink's policy, an attaching entity has the right to overlash into existing violations and to knowingly overload the pole. This is poor stewardship, to say the least. Second, as CenturyLink admits, "The National Electric Safety Code requires that the cable being overlashed be in compliance **prior to** the overlash taking place." (CenturyLink Comments, 5) (emphasis added). CenturyLink's "fix it later" policy openly rejects this part of the NESC, and exposes communications workers to danger if, for example, the existing violation is insufficient clearance between the overlashed communications lines and an electric conductor. Third, CenturyLink's "fix it later" approach is inconsistent with the Commission's precedent. In *Kan. City Cable Partners d/b/a Time Warner Cable of Kan. City v. Kan. City Power & Light Co.*, 14 FCC Rcd. 11599, ¶ 26 (July 15, 1999), the Commission held: "[TWC] of Kansas City **SHALL NOT overlash its own lines**…to poles which have been identified as not meeting the requirements of the [NESC], or which have been determined would be in violation of the [NESC] upon overlashing. . . **until the necessary** pole change-out and/or **make-ready work for that pole is completed**." (bolded and underlined emphasis added; capitalization in original). Fourth, as CenturyLink seems to admit, where make-ready is required, its policy actually disrupts fiber deployment, because where the need for make-ready is identified during post-inspection, the attaching entity must remove its recently-completed overlashing so that the make-ready process can occur, before overlashing once again. This is a waste of time and resources that needlessly endangers the safety of workers, the public, and the infrastructure. Fifth, as a practical matter, and also as noted by CenturyLink, an after-the-fact

notice policy often becomes a "no-notice" policy. *See* CenturyLink Comments, 6-7 ("Unfortunately, some attaching entities fail to give such notice. Given potential risks to safety and property, the Commission therefore should make clear that a failure to provide notice of overlashing will render the host attachment unauthorized...").

The attaching entities also argue that electric utilities should not be concerned about the potential dangers to workers, the public, and electric infrastructure posed by after-the-fact notice of overlashing because pole license agreements often contain indemnification provisions requiring the licensee to indemnify the pole owner for any damages that may arise as a result of the licensee's attachments. ACA Comments at 8 ("In addition, overlashers commonly must indemnify utilities under their pole attachment agreements for corrections or damages resulting from their work. Consequently, public safety and utility property rights remain protected throughout the overlashing process."); *see also* FBA Comments, 6.[4] However, the fact that attaching entities are often subject to indemnity obligations does not protect the contractor who unwittingly enters the power space to perform an overlashing because the clearance to power violation has not been identified prior to the overlashing; it does not protect the truck driver whose truck snags a low-hanging overlashed cable; it does not protect the thousands of people whose homes are burned when an unsecured overlashing sparks a massive wildfire; and it does not protect the electric utility customers who lose power when an overlasher overloads poles that fail in an ice or wind storm and cause a widespread outage. Financial indemnification, while important, does not prevent bad things from happening to people or property. For the attaching entities, this might be all about the money. For the Electric Utilities, it is about protecting people and property by mitigating risk on the front end.

[4] The claim that "indemnity makes it OK" is ironic given that attaching entities **routinely** push back on the very type of indemnity provisions that would protect against the risks attendant to overlashing into an existing violation.

IV. NONE OF THE ATTACHING ENTITIES ADDRESS, IN ANY MEANINGFUL DETAIL, THE LOADING AND CLEARANCE VIOLATION CONCERNS ATTENDANT TO OVERLASHING.

Noticeably absent from the comments filed by attaching entities is any meaningful discussion of the engineering concerns associated with overlashing, whether with respect to loading or existing clearance violations. These attachers instead attempt to gloss over the crucial engineering issues by assuring the Commission that they are just as concerned with the safety and reliability of the electric system as electric utilities. FBA Comments, 5, citing NCTA Comments, Docket No. 17-84, 6 (June 15, 2017) ("overlashers…have the same interest in maintaining safe and reliable outside plant, networks and support structures as the utilities"); ACA Comments, 8. Respectfully, as the experience of the Electric Utilities has demonstrated over many decades, this is not just a patently false assertion – it is an *outrageous* assertion. Even setting aside the subjective evaluation of "who is more concerned with safety and reliability," the Electric Utilities, unlike cable operators, answer directly to state utility commissions on matters of safety and reliability.

The attaching entities that even bother to address the engineering issues falsely assert that the Commission has previously found that overlashing does not raise serious engineering concerns. *See* FBA Comments, 4 ("The Commission has consistently refused to agree with utilities that overlashing undermines pole safety and reliability. For instance, the Commission found in 1998 that '[o]verlashing has been in practice for many years'[5] without incident and that overlashers can address potential safety concerns by compliance with 'generally accepted engineering practices.' Three years later, the Commission again found that overlashing 'did not disadvantage the utility's ability to ensure the integrity of its poles.'");[6] ACA Comments, 3-4 ("The Commission dismissed

[5] Citing the 1998 Order, ¶ 64.

[6] Citing *Amendment of Commissions Rules and Policies Governing Pole Attachments; Implementation of Section 703(E) of the Telecommunications Act of 1996,* CS Docket Nos. 97-9,

utility arguments that overlashing imposed a dangerous 'unsupervised burden' on poles, requiring prior utility review and approval. The Commission noted that '[o]verlashing has been in practice for many years' without detrimentally impacting pole safety…."). Apparently, neither the Fiber Broadband Association nor the ACA read the entire sections of the Commission's 1998 Order to which they cited:

> 63. Utility pole owners oppose overlashing as an expansion of their obligation to provide for pole attachments and, further, as an unsupervised burden on the poles. Cable operators and telecommunications carriers assert that overlashing is a routine construction practice that has gone on for decades without interference from the pole owners until the utilities began entering competitive businesses. Some telecommunications carriers urge the Commission to bar utility pole owners from prohibiting overlashing.
>
> 64. We have been presented with no persuasive reason to change the Commission's policy that encourages overlashing, and we agree with representatives of the cable and telecommunications industries that, to the extent that it does not significantly increase the burden on the pole, overlashing one's own pole attachment should be permitted without additional charge. To the extent that the overlashing does create an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices. . . . . **We believe utility pole owners' concerns are addressed by Section 224's assurance that pole owners receive a just and reasonable rate and that pole attachments may be denied for reasons of safety, reliability, and generally applicable engineering purposes**.

1998 Order, ¶¶ 63-64 (emphasis added). A full reading of these paragraphs shows that the Commission did not, in fact, find that overlashing does not implicate safety and reliability concerns; rather, the Commission stated that such concerns can be addressed by "Section 224's assurance" that "pole attachments may be denied for reasons of safety, reliability, and generally applicable engineering purposes." 1998 Order, ¶ 64.

97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 74 (2001) ("2001 Reconsideration Order").

The 2001 Reconsideration Order cited by the FBA likewise contains no finding that overlashing is exempt from safety and reliability concerns; rather, it states:

> We did not require the host attaching entity or the third party overlasher to obtain the consent of the utility beyond the consent already acquired for the host attachment although the utility is entitled to notice of the overlashing. We stated that third party overlashing did not disadvantage the utility's ability to ensure the integrity of its poles.

2001 Reconsideration Order, ¶ 74. As explained in the Electric Utilities' initial comments, this portion of the 2001 Reconsideration Order was in the specific context of third-party overlashing, and whether it posed issues greater than first-party overlashing. Electric Utilities' Comments, 7-8. And to the extent the Commission's past precedent does in fact stand for the proposition alleged by the FBA and the ACA, it respectfully runs counter to the informed judgment of all but one state public service commission that has considered the issue in the past ten years. Furthermore, the notion that the Commission has (or could) declare overlashing as "safe" is like the FAA or NTSB declaring that air travel is "safe"—with the proper engineering, construction and operation, yes; without it, not so much.

In addition, the FBA, in the only place in its comments where it even approaches substantively addressing the engineering issues attendant to overlashing, writes: "If the strand and pole loadings are calculated for the maximum weight that the strand can support when initially placed, then the additional weight of overlashed fiber generally has minimal effect due to the margin remaining on most strand." FBA Comments, 9. The problem with FBA's statement is that pole loadings are *not* calculated for maximum weight that the strand can support; instead, they calculate the load as proposed in the application. Moreover, the additional weight imposed by the overlash is the least of the loading concerns—the more significant concerns relate to ice loading and wind loading, which are more specifically impacted by the changed diameter of the bundle (as

opposed to the weight of the bundle). This issue is compounded by the fact that a messenger strand is often overlashed multiple times, on multiple occasions.

Further, at least two commenters in this proceeding other than electric utilities recognized the safety and reliability issues posed by overlashing. First, AT&T, which endorsed a 30-day advance notice requirement, observed:

> Some poles, due to age or environmental factors, and some cables may be unable to reliably support additional equipment. Overlashing just one additional cable on such a pole may cause an overload condition. Consequently, pole loading calculations performed by the prospective attacher must be a requirement.

AT&T Comments, 15. And, unlike CenturyLink (which also recognizes the safety and reliability issues posed by overlashing, but contends they can be addressed through after-the-fact notice and pole loading analyses), AT&T recognizes that pole loading studies must occur *prior to* proposed overlashing. *See* AT&T Comments, 15 (proposing the Commission adopt a requirement of 30 days advance notice of overlashing). Second, NTCA-The Rural Broadband Association, which represents more than 800 independent, community-based telecom companies, states in its comments:

> Prior notice to the pole owner is critical to allow pole owners the opportunity to inspect the poles at issue and determine if they have sufficient capacity to handle overlashed attachments without compromising public safety or the integrity of poles or existing attachments. . . . The Commission's previous determination that such prior notice is not necessary was made, as the FNPRM acknowledges, nearly two decades ago, and prior to the current environment in which keeping up with the consumers' demand for broadband and related services requires an expansion of the necessary communications service facilities at a pace and scope not seen before. In other words, utility owned poles are under and will be under greater stress than ever before and the rush to keep up with consumer demand cannot inadvertently lead to damaged poles/attachments that lead to unnecessary service disruptions.

NTCA-The Rural Broadband Association Comments, 5. The Electric Utilities concur with NTCA—even if past generalizations could serve to ignore the engineering fundamentals attendant

to overlashing, the current demand for broadband and the increasing importance of maintaining electric system integrity require that they be recognized now.

V. ELECTRIC UTILITIES, UNLIKE ILECS, LACK THE ANTI-COMPETITIVE OR DILATORY ANIMUS ASCRIBED TO THEM BY SOME ATTACHING ENTITIES.

Several commenters imply that the electric utilities' insistence on advance notice of overlashing is simply a ruse to undermine overlashers. The FBA alleges that "even though the law is clear, FBA's service provider members often must deal with utilities shirking their regulatory responsibilities," and that "if the overlasher must wait for the utility to respond, then overlashing will remain vulnerable to dilatory tactics by utilities." FBA Comments, 7, 9. The FBA also states "Members note that reviewing attachment requests is often not a high utility priority…." *Id.* at 9. In addition, the ACA states that, in the 1998 Order, the Commission "cited reports that utilities only began interfering with overlashing after they started competing with broadband providers for customers." (ACA Comments, 4).

These commenters must be talking about ILEC pole owners. The Commission has previously recognized that "electric power companies…are typically disinterested parties with only the best interest of the infrastructure at heart." *In the Matter of Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, ¶ 68 (May 20, 2010). This understanding of electric utilities as neutral stewards of the infrastructure is also embodied in 47 U.S.C. § 224(f)(2) where Congress saw fit to give electric utilities the right to deny access for reasons of safety, reliability, and generally applicable engineering purposes, while giving ILECs no such concurrent right.

Further, the ACA's reference to the Commission's 1998 Order and "cited reports that utilities only began interfering with overlashing after they started competing with broadband providers for customers" is wholly out of touch with the current reality (at least for the Electric Utilities). ACA Comments, 3-4. Rather than an actual finding by the Commission regarding anticompetitive animus by electric utilities, ACA is referring to a sentence in the 1998 Order stating that "Cable operators and telecommunications carriers assert that overlashing is a routine construction practice that has gone on for decades without interference from the pole owners until the utilities began entering competitive businesses," and citing to comments by Comcast, NCTA, and the New York Cable Television Association. 1998 Order, ¶ 63, n. 208. Though it is true that around the time of the 1998 Order, people assumed electric utilities would be entering the competitive telecommunications market headfirst, the notion of electric utilities as legitimate and ubiquitous broadband competitors never materialized. Perhaps more to the point, there has not been a single decision of the Commission in a complaint proceeding (and to the Electric Utilities' knowledge, not a single complaint even alleging) that an electric utility's overlashing notification requirement was rooted in anti-competitive motive.

Existing attachers, on the other hand, actually *do* have an anticompetitive motive when it comes to overlashing. The Commission has previously issued an order declining to extend mandatory access obligations to competitors' strand, and incumbents have taken full advantage of that precedent. 2001 Reconsideration Order, ¶ 81.[7] Verizon is quick to point out that in order "for

[7] The Commission stated in the 2001 Reconsideration Order:

> MCI urges us to classify cable operators and telecommunications carriers with pole attachments as utilities and therefore require them to act as a utility for a third party overlashing. The Pole Attachment Act does not define utility to include attachers. Section 224(f) of the Pole Attachment Act obligates a utility to provide a cable television system or any telecommunications carrier with nondiscriminatory access for purposes of a pole attachment. Neither a cable system attacher nor a

a third party to overlash an existing attacher's pole attachment" it must have "the existing attacher's consent." Verizon Comments, 18; *see also* FBA Comments, n. 33 ("A third-party overlasher would still need the consent of the host attacher before overlashing."). The practical effect of this requirement has been that overlashing is a tool only available to incumbents. It is somewhat ironic that ILECs, which *do* have an anti-competitive motive, are not required to provide access to their strand for third-party overlashing, while electric utilities, which have no such anti-competitive motive, would be shut out from even receiving notice of overlashing if the attaching entities have their way.

VI. A STRAND MOUNTED WIRELESS ANTENNA IS NOT AN "OVERLASHING" AND SHOULD NOT BE TREATED AS SUCH.

Several commenters have filed comments regarding strand mounted wireless equipment in response to the Commission's FNPRM inquiry regarding overlashing, despite the fact that the adopted version of the FNPRM does not reference or request comments on this topic. *See, e.g.*, Crown Castle Comments, 2-6; CenturyLink Comments, 7-10; Comments of XCEL Energy Services, Inc., 8-10; Joint Comments of CenterPoint Energy Houston Electric, LLC and Dominion Energy, 10; Comments of the Edison Electric Institute, 16; Comments of CPS Energy, 9. Though the draft FNPRM initially circulated by the Commission included a reference to strand-mounted antennas, the Commission correctly excluded strand-mounted antennas from the adopted FNPRM's discussion of overlashing. Mounting wireless antennas and associated radios and

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> telecommunications attacher has an obligation to act as a host and share its pole attachment with a third party overlasher.

2001 Reconsideration Order, ¶ 81.

ancillary equipment on the strand is quantitatively and qualitatively different than affixing additional fiber to the existing strand, and should be treated as such from a regulatory perspective.

Of all the commenters that addressed the issue, the only commenter that advocated in favor of treating strand mounted wireless equipment like overlashing was Crown Castle. All other commenters in this proceeding were unanimous in their view that strand mounted wireless equipment is different than traditional overlashing and should not be treated the same as overlashing from an engineering or regulatory perspective. *See, e.g.*, CenturyLink Comments, 7 ("the codified rules should not consider RF-transmitting antennas, routers, radios, electronic cross-connect equipment, batteries, power supplies, and other non-incidental devices added to existing lines to be an overlash exempt from the pole attachment process"); Comments of XCEL Energy Services, Inc., 8 ("the Commission should expressly exclude strand-mounted wireless communication facilities from the scope of any rule that it may adopt on overlashing"); Joint Comments of CenterPoint Energy Houston Electric, LLC and Dominion Energy, 10 ("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 propose."); Comments of the Edison Electric Institute, 16 ("Commission precedent on overlashing is clear and leaves no room for interpretation—overlashing is only the attachment of wire strands, and does not include the attachment of communications facilities."); Comments of CPS Energy, 9 ("While the Commission has long supported the ability of carriers to overlash additional fiber cables onto existing communications lines…the installation of mid-span wireless facilities raises fundamentally different operational issues and considerations that the Commission has not yet addressed").

Crown Castle requests that "the Commission reaffirm its existing position that strand-mounted small cell antennas are permissible under the existing FCC overlashing rules." (Crown

Castle Comments, 3). Crown Castle cites to no Commission precedent for the proposition that "strand-mounted small cell antennas are permissible under the existing FCC overlashing rules" and the Electric Utilities do not believe any such precedent exists. The mounting of wireless equipment, including antennas and radios, directly on the strand is relatively new. The Electric Utilities first became aware of this practice in 2017. By way of contrast, the bulk of the Commission's prior statements on overlashing were in the 1995-2001 timeframe. Furthermore, under the Commission's existing precedent, overlashing is performed by "tying communication conductors to existing, supportive strands of cable on poles." 2001 Reconsideration Order, ¶ 73; *see also* 1998 Telecom Order, ¶ 59 (describing overlashing as the process "whereby a service provider physically ties its wiring to other wiring already secured to the pole").

Strand mounted wireless equipment is significantly different from overlashing, and must be subject to the standard application process. The equipment deployed on the strand, including wireless antennas and radios, are significantly larger in terms of width, height and depth than a single, or even multiple, fiber strands. *See* EEI Comments, Exh. 2, containing photographs of strand mounted wireless equipment. Based on the definitions of strand-mounted wireless antenna sought and obtained by the wireless industry in various pieces of state-level small cell legislation during 2017, the Electric Utilities understand the standard dimensions of this equipment to be 24" in length, 15" in width and 12" in height, with an exterior antenna of 11" (in other words, 2.5 cubic feet with an 11" antenna). *See, e.g.,* Fla. Stat. § 337.401(7)(b)(9) (defining a strand-mounted wireless facility as a "small wireless facility having dimensions no larger than 24 inches in length, 15 inches in width, and 12 inches in height and an exterior antenna, if any, no longer than 11 inches"); Ind. Code § 8-1-32.3-7.5 (defining strand-mounted wireless facility by identical dimensions).

This greater profile means that strand mounted wireless equipment is a much greater load on the pole from both a wind and ice loading perspective than standard fiber overlashing. The larger size of strand mounted wireless equipment as compared to overlashed fiber also means that it is more likely to cause clearance violations—including clearance to power, clearance to communications, and clearance to ground—than overlashed fiber, and thus to require additional make-ready. Further, strand mounted wireless equipment emits radio frequency that represents a potential danger to the public and contractors or employees working on electric utilities' poles. It is imperative that electric utilities have sufficient opportunity to review proposed strand mounted wireless equipment before it is deployed in order to conduct the pre-engineering necessary to ensure that the equipment can be deployed safely, or whether make-ready is necessary. Communications companies should not be able to avoid the application process by taking already cumbersome equipment that is ordinarily attached to the pole and instead mounting it on a strand between poles. But the Commission should address the issue of strand-mounted wireless equipment, if at all, through a separate proceeding, as advocated by Dominion and CenterPoint Energy. *See* Comments of CenterPoint Energy and Dominion Energy, 10.

CONCLUSION

The Electric Utilities value the opportunity to comment on these critical issues and commend the Commission for its interest in adopting a rule that would clarify the respective rights of pole owners and attachers with respect to overlashing. The divergent views of the stakeholders, as revealed in the initial comments, only furthers the need for clarification. The Electric Utilities respectfully request that the Commission (1) clarify that pole owners may require advance notice of overlashing, and (2) disavow any prior precedent to the contrary. The Electric Utilities further

adopt and incorporate their initial comments on this subject, including their proposed rules regarding overlashing. Comments of Electric Utilities, 26-27.

The Electric Utilities look forward to engaging further with the Commission on these important issues.

Respectfully submitted this 16th day of February, 2018.

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