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

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

REPLY COMMENTS OF
NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association (NCTA) supports the Commission's affirmation of its current precedent that permits and encourages overlashing of facilities.[1] As the Commission recognized, the industry has a long history of safe and beneficial use of overlashing under well-established Commission policy that allows overlashing, consistent with generally accepted engineering practices, without providing utilities advance notice or seeking their permission. As NCTA explained, this policy "is a critical element of the regulatory foundation on which hundreds of billions of dollars of new investment have been made."[2]

Rather than addressing the question posed in the *Further Notice* regarding codification of this policy, several electric utilities are trying to *reverse* the Commission's overlashing policy and appoint themselves as arbiters for how and when overlashing occurs, including which advanced services may be deployed.[3] The utilities essentially seek a veto over the technology that hangs on the strand – a role that pole owners have pursued in response to each wave of new

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1 *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 at ¶¶ 160-62 (rel. Nov. 29, 2017) (*Further Notice*).

2 Comments of NCTA – The Internet & Television Association (filed Jan. 17, 2018) at 2.

3 *See, e.g.*, Comments of Ameren Services Company, *et al.* (filed Jan. 17, 2018) at 18-23; Comments of Exelon Corporation, *et al.* (filed Jan. 17, 2018) at 5-22; Comments of EEI (filed Jan. 17, 2018) at 3-17.

technology and that the Commission and the courts have consistently rejected.[4] The current effort to confine or delay overlashing is just the latest chapter in this counterproductive and failed strategy.

The utilities try to mask their anticompetitive stance in claims of safety, but these claims are spurious. What the utilities really seek is to shift to attaching parties the costs that they are expected to bear themselves, as owners of the poles, for activities such as building mapping systems, complying with their own state PUC-imposed inspection obligations, and upgrading utility plant. Given the power to allow or deny overlashing, they could hold broadband deployment hostage unless an attacher pays to enhance the utility's systems and/or identify and correct the utility's own pre-existing violations, as a condition to overlash.

For example, some utilities already demand costly load analysis on every pole when overlashed facilities are added to existing, permitted facilities.[5] But these utilities generally do not require this of their telephone joint owners, thus belying any notion that such analyses are somehow necessary to ensure pole safety. Additionally, leading state commissions have determined that such analysis is not necessary. For example, the New York Public Service

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[4] *United States v. AT&T*, No. 74-1698, Plaintiffs' First Statement of Contentions and Proof 207-208, 216 (D.D.C., filed Nov. 1, 1978) (As basis for AT&T Modified Final Judgment, Department of Justice catalogued Bell System resistance to the attachment of independently-owned coaxial cables; restrictions against carrying data or voice; and one-to-a-pole policy); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 462 F.2d 1256 (8th Cir. 1972); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 617 F.2d 1302 (8th Cir. 1980); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 49 R.R.2d 328, 1981-1 Trade Reg. Rep. (CCH) ¶ 63,944 (D.S.D. 1981) (one-to-a-pole policy held to violate Sherman Act); *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 F.C.C.R. 7099 (1991), *aff'd sub nom. Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) (utility required to allow overlashing of fiber in cable system)); *Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98 and 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141 ¶ 73 (2001) (overlashing without pole owner approval policy reaffirmed), *aff'd Southern Co. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002) ("Overlashers are not required to give prior notice to utilities before overlashing."); *NCTA v. Gulf Power*, 534 U.S. 327, 338-39 (2002)(utility required to allow attachment of wireless facilities).

[5] *See, e.g.*, Comments of NCTA at 5-6 (June 15, 2017); Comments of Charter Communications at 36 (June 15, 2017).

Commission found "little concern about ice and wind loading" from overlashing and therefore no need for pole owners to review all overlashing in advance.[6] Rather, it concluded that attaching parties are best suited to "assure that the existing facilities and those overlashed are in compliance with the NESC."[7]

The electric utilities are equally mistaken in claiming that "every state public utility commission addressing overlashing in the last ten years" imposes an advance notice or approval requirement for overlashing.[8] In fact, the most recent state commission to act, the Maine PUC – one of many omitted by the utilities – squarely rejected that approach, concluding that state law "allows joint-use entities to install service drops and overlashes without prior authorization of the pole owner."[9]

Moreover, a prior approval or notice regime is not needed to ensure that overlashing comports with generally accepted engineering standards. As NCTA has explained, overlashers have every incentive to adhere to such standards and ensure that their deployments do not endanger the physical integrity of the supporting poles. Moreover, these standards anticipate that outside plant will change over time and that any occasional defect affecting code compliance can be inspected and fixed in the course of normal operations. Under the National Electrical Safety

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6 *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Case 03-M-0432, Policy Statement on Pole Attachments, Appendix A at 8-10 (New York PSC, Aug. 6, 2004) (NYPSC Decision), available at http://www.utilityregulation.com/content/orders/04NY0432E.pdf. Utilities themselves report to other state commissions that loading studies are not cost justified. *See, e.g.*, *Biennial Inspection, Maintenance, Repair and Replacement Plan for the Period January 1, 2016 – December 31, 2017*, PPL Electric Utilities Corporation, Docket No. M-2009-2094773, at 20-21 (filed Oct. 1, 2014) ("Most of the limited numbers of pole failures are aggravated by weather conditions such as trees being blown into lines, *so the potential risk reduction through a load calculation is insignificant*.").

7 NYPSC Decision, Appendix A at 9.

8 Comments of Ameren Services Company, *et al*. (filed Jan. 17, 2018) at 12.

9 *Amendment to Chapter 880*, Order Amending Rule and Factual and Policy Basis, Docket No. 2017-00247 (Maine PUC, Jan. 12, 2018), available at https://mpuc-cms.maine.gov/CQM.Public.WebUI/Common/CaseMaster.aspx?CaseNumber=2017-00247.

Code (NESC) Rule 214, for example, utilities are required to inspect their outside plant "at such intervals as experience has shown to be necessary," to promptly address defects that "endanger life or property," and to record any other defects affecting code compliance "until the defects are corrected."[10] Under this approach, utilities' own lines can fall into non-compliance, to be later discovered and corrected after the fact.[11] That is why the Commission has adopted rules against charging applicants for the cost to correct such pre-existing utility violations.[12]

In sum, under the Commission's successful policy, cable operators may overlash without advance notice to or approval from the pole owner and have a long history of doing so without incident. The D.C. Circuit explicitly affirmed the Commission's policy and rejected the utilities' earlier and identical calls for advance notice and permission.[13] NCTA appreciates the Commission's continuing adherence to this successful policy.

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[10] National Electrical Safety Code (NESC) Rule 214. State utility commissions and the Rural Utilities Service adopt similar monitoring requirements. For example, the Pennsylvania PUC requires electric utilities to conduct periodic inspection, maintenance, repair and replacement of their facilities, including inspection cycles for poles and overhead distribution lines. 52 Pa. Code Chapter 57, §57.198. The Rural Utilities Service provides similar guidance. Wood Pole Inspection and Maintenance, RUS Bulletin 1730B-121 (United States Department of Agriculture, Rural Utilities Service, 2013), available at https://www.rd.usda.gov/files/UEP_Bulletin_1730B-121.pdf.

[11] *See, e.g., Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd. 11599, 11606-07 ¶ 19 (Cable Serv. Bur. 1999) ("The record indicates a significant number of poles at issue which currently violate NESC loading standards, … some with only KCPL attachments."); *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24615, 24631 ¶ 40 (2003) (approximately 30 percent of poles replaced were to correct existing safety violations); *Florida Cable Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 22 FCC Rcd 1997, ¶ 17 (2007) (noting presence of Gulf Power NESC violations on the poles).

[12] *Kansas City Cable Partners*, 14 FCC Rcd. at 11606-07 ¶ 19 ("Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner's attachment to keep the pole within NESC standards should be borne by Time Warner."); *Knology*, 18 FCC Rcd. at 24627 ¶ 29 (2003) ("It is an unjust and unreasonable term and condition of attachment in violation of [47 U.S.C. § 224], for a utility pole owner to hold an attacher responsible for costs arising from the correction of another attachers' safety violations.").

[13] *Southern Co. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).

Respectfully submitted,

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