

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

COX COMMUNICATIONS LAS VEGAS, INC.,

*Complainant,*

v.

NV ENERGY, INC.

*Respondent.*

File No.

**POLE ATTACHMENT COMPLAINT**

Cox Communications Las Vegas, Inc. (“CCI-LV”) respectfully submits this Pole Attachment Complaint for discriminatory denial of access and unjust and unreasonable terms and conditions of pole attachment against NV Energy, Inc. (“NVE” or “Pole Owner”) pursuant to Subpart J of the Federal Communications Commission (“Commission”) Rules, 47 C.F.R. §§ 1.1401 *et seq.*

**I. SUMMARY AND INTRODUCTION**

CCI-LV uses the overlash construction technique – a technique lauded by the Commission as efficient and essential to broadband deployment – to provide advanced services to Nevada residents. The Commission has stated that pole owners may not require attachers to go through the permitting process prior to overlashing. Nevertheless, prior to allowing CCI-LV to overlash its own existing facilities attached to NVE poles, NVE requires a complete loading analysis of Cox’s proposed overlashing and, where deemed necessary by NVE, the performance of make-

ready work, including pole replacements, even when CCI-LV's proposed overlash would not bring the pole out of compliance with governing specifications. In fact, NVE has refused to allow CCI-LV to overlash facilities attached to 68 of 137 poles identified in recent CCI-LV applications, even though CCI-LV's proposed overlash would not bring these poles out of compliance with the current grade of construction, B or C. NVE's refusal to permit CCI-LV to overlash its existing plant when it can do so consistent with currently applicable, NESC compliant Grade C construction standards violates federal laws governing pole attachments.

NVE's application of Grade B construction standards in a way that delays CCI-LV's proposed overlashing is unjust and unreasonable because: (1) it prevents CCI-LV from overlashing and delivering services to its customers promptly (approximately half of the poles to which CCI-LV seeks to overlash currently fail Grade B and according to NVE must be replaced prior to overlashing); (2) NVE will not provide timeframes for pole replacements and there is a question as to whether the City will allow pole replacements in some instances; (3) Grade B upgrades are not required for safety; and (4) much of NVE's current plant is engineered to Grade C constructions standards and NVE has not engaged in a system-wide effort to replace Grade C poles with Grade B engineered poles.

NVE's application of Grade B construction standards to CCI-LV's proposed overlashing is also discriminatory. CenturyLink, CCI-LV's direct competitor, is not held to the same standard – it overlashes as long as its own analysis shows that the pole can withstand the additional weight. Moreover, NVE's decision to upgrade poles to Grade B poles only when new facilities are added to the pole or existing facilities are overlashed discriminatorily impacts attachers. NVE has not undertaken to replace poles otherwise.

To be clear, CCI-LV is more than willing to ensure that its attachments do not bring the pole out of compliance with uniform and reasonable specifications. It is also willing to pay to make the pole ready in circumstances where its attachment or overlash would cause a pole to become non-compliant. Nor is CCI-LV seeking to attach to poles that currently fail NESC separation or loading requirements – these should be replaced immediately by CCI-LV as they currently fail governing safety standards.

Accordingly, through this Complaint, CCI-LV seeks a determination by the Commission that NVE may not apply its unjust, unreasonable and discriminatory Grade B construction standards to CCI-LV's new plant construction, and an order allowing CCI-LV to proceed with its planned overlashing. Finally, CCI-LV requests the Commission order any other damages necessary to compensate CCI-LV for losses incurred as a result of NVE's denial of access and unreasonable practices.

## **II. JURISDICTION AND PARTIES**

1. The Commission has jurisdiction over this action under the provisions of the Communications Act of 1934, as amended, including, but not limited to, Section 224 thereof, 47 U.S.C. § 224 (hereinafter "Section 224").

2. Pursuant to Section 224(b), the Commission is charged with ensuring that pole owning utilities provide telecommunications carriers with non-discriminatory access to distribution poles pursuant to just and reasonable terms and conditions.

3. Complainant CCI-LV is a franchised cable operator offering competitive video, voice and data service to businesses and residences in Southern Nevada.

4. CCI-LV has a general office address of 1700 Vegas Drive, Las Vegas, Nevada 89106.

5. Respondent NVE is an investor-owned electric utility in the business of providing electric transmission and distribution services. NVE is a wholly-owned subsidiary of Berkshire Hathaway Energy. NVE has a general business address of P.O. Box 98910, Las Vegas, Nevada 89151-0001 and its corporate headquarters are located at 6226 West Sahara Avenue, Las Vegas, Nevada 89146.

6. NVE owns or controls poles in the State of Nevada that are used for wire communication.

7. CCI-LV and NVE, through their predecessor entities, entered into a Pole Attachment Contract dated June 1, 1997 pursuant to which CCI-LV would attach to NVE owned and controlled poles (“1997 Agreement”) in Nevada.<sup>1</sup>

8. CCI-LV engaged in good faith in executive level discussions with NVE in an attempt to resolve the pole attachment dispute.<sup>2</sup>

9. CCI-LV alleges, upon information and belief, that NVE is not owned by any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

10. The State of Nevada, including its political subdivisions, agencies and instrumentalities, does not regulate pole attachments in the manner established by Section 224, which would preempt the jurisdiction of this Commission over pole attachments in Nevada.<sup>3</sup>

11. Attached to this Complaint is a certificate of service certifying that NVE and the Nevada Public Utilities Commission were served with copies of the Complaint.

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<sup>1</sup> Attachment A, Declaration of Michael Bolognini dated December 18, 2014 (“Bolognini Decl.”) ¶ 6 & Exh. 1.

<sup>2</sup> See Bolognini Decl. ¶ 10.

<sup>3</sup> See *Corrected List of States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 07-245, Public Notice, DA 08-653 (rel. Mar. 21, 2008).

### III. BACKGROUND AND FACTS

12. CCI-LV is a franchised cable operator offering a variety of advanced digital video, high-speed Internet and telephone services over its cable network.<sup>4</sup>

13. CCI-LV requires access to utility owned and controlled poles, conduits and rights-of-way to construct and deploy its cable network plant, and to provide competitive services to its customers.<sup>5</sup>

14. CCI-LV uses the overlashing construction technique, whereby fiber or coaxial cables (typically of .750" diameter .164#/ft) are lashed to its pre-existing cable attachments, to deploy high-capacity fiber for delivery of competitive cable, voice and advanced services to residential and business class customers promptly and efficiently.<sup>6</sup>

#### The Pole Attachment Agreement and NVE's Initial Attachments

15. The 1997 Agreement sets forth the terms and conditions governing CCI-LV's attachment to NVE poles.

16. Section 4 of the 1997 Agreement sets forth the requirements and specifications governing CCI-LV's attachments to NVE poles.<sup>7</sup> It requires compliance with the National Electric Safety Code ("NESC").

17. Section 24 of the NESC is used to determine the required Grade of Construction for structures and supported components. Table 242-1 sets forth the Grades of Construction for

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<sup>4</sup> Bolognini Decl. ¶ 4.

<sup>5</sup> Bolognini Decl. ¶ 5.

<sup>6</sup> Attachment B, Declaration of Gary Auvil dated December 17, 2014 ("Auvil Decl.") ¶ 4.

<sup>7</sup> Bolognini Decl. Exh. 1.

conductors and cables. Grade B construction standards are only required for lines crossing railroad tracks and limited access highways, and certain navigable waterways.<sup>8</sup>

18. None of the 137 poles for which CCI-LV has applied to overlash require Grade B construction under the NESC.<sup>9</sup>

19. CCI-LV has been making attachments in the communications space on NVE poles with the assent of NVE based on the Grade C grade of construction standard for forty years.<sup>10</sup>

20. In December 2012, NVE sought to unilaterally impose on CCI-LV new pole attachment and engineering standards and application requirements in a document entitled “Exhibit F – NVE LICENSE APPLICATION REQUIREMENTS” (“2012 License Application Requirements”).<sup>11</sup> NVE informed CCI-LV that the 2012 License Application Requirements were being imposed pursuant to Section 4.1.10 of the 1997 Agreement, which states that pole attachments are subject to “[a]ny additional specifications of Licensor, as reasonably required in Licensor’s sole judgment as may be required from time to time.”<sup>12</sup>

21. The 2012 License Application Requirements sought to impose, among other things, new construction specifications commencing March 31, 2013. The 2012 License

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<sup>8</sup> Auvil Decl. ¶ 8.

<sup>9</sup> Auvil Decl. ¶ 8.

<sup>10</sup> Attachment C, Declaration of Bob Sheridan dated December 17, 2014 (“Sheridan Decl.”)

¶ 4.

<sup>11</sup> Attachment D, Declaration of Glenda Mills dated December 17, 2014 (“Mills Decl.”) ¶ 4 & Exh. 1. While NVE also sought to require a Professional Engineer stamp on all engineering drawings, it subsequently withdrew this requirement after objections by Cox representatives that such a requirement was unnecessary, particularly in light of the fact that Cox already uses NVE’s approved contractor, PAR Electrical Contractors, Inc., to perform the loading calculations.

<sup>12</sup> Mills Decl. ¶ 4 & Exh. 1.

Application Requirements require attachments to comply with the more stringent NESC Grade B construction standard.<sup>13</sup>

22. Approximately half of the 137 poles to which CCI-LV applied to overlash (detailed below) do not currently meet the strength and loading requirements using NESC Grade B construction standards.<sup>14</sup>

NVE's Overlashing Applications

23. Beginning August 20, 2014 and through November 20, 2014, CCI-LV submitted applications to NVE to overlash its previously permitted facilities attached to 137 NVE poles.<sup>15</sup>

24. CCI-LV hired PAR Electrical Contractors, Inc. ("PAR"), NVE's approved contractor, to conduct a loading analysis of each of the 137 poles included in CCI-LV's Applications (the "Loading Analyses").<sup>16</sup> PAR applied the NESC strength and loading requirements for Grades B and C construction standards using O-Calc Pro, Structural Analysis Software for Utility Poles, licensed by Osmose Utilities Services, Inc.<sup>17</sup>

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<sup>13</sup> Mills Decl. Exh. 1 (Exhibit F, NVE License Application Requirements, page F-1).

<sup>14</sup> Mills Decl. ¶ 7.

<sup>15</sup> Mills Decl. ¶ 5 & Exh. 2. CCI-LV submitted applications on the following dates: August 19, 2014 (Ramirez Group, 531 7<sup>th</sup> Street, Garces & 8<sup>th</sup>); September 12, 2014 (Western Mailing, 530 E. Pamalyn, Pamalyn & Bermuda); September 16, 2014 (VZW DOT Koval & Flamingo 144ct, Koval & Flamingo); September 16, 2014 (CLV Derfelt SR CTR, 3343 W Washington, Washington & Rancho); October 29, 2014 (RRP96, 9112 Washington, Yale & Iowa, part 2); October 29, 2014 (RRP96, 9112 Washington, Washington & Decatur); October 14, 2014 (Cox, NFAA 10, Warm Springs, Pollock to Placid, Part 1 of 2); October 14, 2014 (Cox, NFAA 10, Warm Springs, Placid to Haven, Part 2); November 5, 2014 (3295 Fremont, Fremont/Sahara); November 5, 2014 (Marisa USA Inc., 3745 Losee Rd, Losee & Colton); November 5, 2014 (3660 Cinder Lane, Cinder Lane & Highland Dr); November 20, 2014 (COX, Nellis & Tropicana); November 19, 2014 (COX, United Health Care- 540 N Nellis Blvd, Nellis & Stewart); November 19, 2014 (Goodwill Industries, 2509 E Lake Mead Blvd, Lake Mead & Eastern).

<sup>16</sup> Auvil Decl. ¶ 14; Mills Decl. ¶ 6 & Exh. 3.

<sup>17</sup> Mills Decl. ¶ 6.

25. The Loading Analyses revealed that 68 of the 137 poles (approximately half) included in CCI-LV's Applications currently fail the strength and loading requirements for Grade B construction standards, prior to CCI-LV overlashing facilities attached to these poles.<sup>18</sup> Eleven of the poles failed NESC required strength and loading requirements for Grade C construction standards.<sup>19</sup> Pursuant to the NESC, NVE has an independent obligation to remedy those poles immediately.<sup>20</sup>

26. The Loading Analyses shows that the average incremental load increase added by CCI-LV's proposed overlashing on the applications is less than 1 percent.<sup>21</sup> Moreover, in no instance would CCI-LV's proposed overlashing cause any of the poles included on CCI-LV's application to come out of compliance with the strength and loading requirements for either Grade C or Grade B construction standards. In other words, CCI-LV could overlash all of its plant attached to NVE poles in its applications without causing the poles to come out of compliance with existing NESC Grade C or Grade B construction standards, yet NVE would hold up work almost all of the applications until approximately half the poles are replaced.<sup>22</sup>

27. CCI-LV's proposed overlashing would not bring NVE poles out of compliance with currently applied, NESC-compliant Grade C construction standards.<sup>23</sup>

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<sup>18</sup> Mills Decl. ¶ 7.

<sup>19</sup> Mills Decl. ¶ 7.

<sup>20</sup> See Attachment E, *Fibertech v. BGE*, File No. EB-14-MD-006, Declaration of Johnny B. Dagenhart, P.E., dated June 23, 2014 ("Dagenhart Decl.") ¶ 18.

<sup>21</sup> Auvil Decl. ¶ 7; Mills Decl. ¶ 8.

<sup>22</sup> Mills Decl. ¶ 8. According to Par Electric's Loading Analyses as confirmed by NVE, 11 poles failed Grade C loading prior to the proposed overlash, Mills Decl. ¶ 7, and thus should be remediated by NVE immediately. Dagenhart Decl. ¶ 18. However, CCI-SW's proposed overlash would not *cause* the non-compliance.

<sup>23</sup> Mills Decl. ¶ 8.

28. NVE will not allow CCI-LV's proposed overlashing until *after* NVE replaces any poles that fail Grade B construction standards, with or without CCI-LV's proposed overlashing. Approximately half of the 137 NVE poles applied for do not currently meet Grade B construction standards (prior to overlashing).<sup>24</sup>

29. NVE will not commit to a timeframe for upgrading the failing poles.<sup>25</sup>

30. Delaying CCI-LV's deployment until after the poles are replaced will prevent CCI-LV from delivering services to Las Vegas businesses and residents seeking CCI-LV's services, including pending customers to be served by facilities attached to the poles at issue.<sup>26</sup>

31. CCI-LV is not aware of any situations in which CCI-LV's attachments at Grade C construction standards have created engineering, safety or reliability issues.<sup>27</sup>

32. There is no indication that NVE has deployed a system-wide program to upgrade its distribution poles to Grade B outside of the pole attachment application process.<sup>28</sup> Instead, it appears that NVE has chosen to use the pole attachment application process to implement its Grade B upgrades.<sup>29</sup> It also appears the NVE does not upgrade the pole when it adds its own facilities to the pole.<sup>30</sup>

33. CenturyLink, a joint user and pole owner in Nevada, is not similarly required to wait until Grade C poles are upgraded before it is permitted to deploy plant on NVE's poles.<sup>31</sup>

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<sup>24</sup> Mills Decl. ¶ 10 & Exh. 3; Auvil Decl. ¶ 6.

<sup>25</sup> Sheridan Decl. ¶ 5; Mills Decl. ¶ 11.

<sup>26</sup> Bolognini Decl. ¶ 7.

<sup>27</sup> Bolognini Decl. ¶ 8.

<sup>28</sup> Bolognini Decl. ¶ 9.

<sup>29</sup> Bolognini Decl. ¶ 9.

<sup>30</sup> Bolognini Decl. ¶ 9.

<sup>31</sup> Auvil Decl. ¶ 9. Bolognini Decl. ¶ 18.

34. CenturyLink is one of CCI-LV's primary competitors for residential and business class customers.<sup>32</sup>

35. CCI-LV is thus at a distinct competitive disadvantage *vis a vis* one of its primary competitors for residential and business class customers.<sup>33</sup>

#### Executive Level Discussions

36. CCI-LV and NVE have engaged in several executive level discussions and exchanged written positions regarding the issues set forth in this Complaint.

37. On September 10, 2013, an executive level meeting was conducted at NVE's West Sahara headquarters to discuss NVE's position that CCI-LV may not overlash its facilities until after NVE replaces any poles that fail Grade B construction standards, notwithstanding that CCI-LV did not cause the Grade B compliance issues. The meeting was attended by Frank Gonzalez (VP Transmission & Distribution, Larry Luna (Director Distribution Design), Tony Sanchez (Sr. VP Government Affairs) and Colin Harlow (Assistant General Counsel) on behalf of NVE, and Michael Bognini (Market Vice President – Las Vegas), Kristen Weathersby (VP/Chief Litigation Officer), Kami Dempsey (Executive Field Director Public Affairs), Gary Auvil (Director of Residential & Commercial Construction – Las Vegas), Brian Rudolph (VP OSP & Construction SWR), and Bob Sheridan (Executive Field Director Network Operations & Network Service – Las Vegas) on behalf of CCI-LV.<sup>34</sup>

38. On January 28, 2014, an executive level meeting was conducted at NVE's West Sahara headquarters to discuss NVE's position that CCI-LV may not overlash its facilities until after NVE replaces any poles that fail Grade B construction standards, notwithstanding that CCI-

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<sup>32</sup> Bognini Decl. ¶ 19.

<sup>33</sup> Bognini Decl. ¶ 19.

<sup>34</sup> Bognini Decl. ¶ 11.

LV did not cause the Grade B compliance issues. The meeting was attended by Frank Gonzalez (VP Transmission & Distribution, Larry Luna (Director Distribution Design), Patricia Ortwein (Manager, Rule 9 Contract and Joint Use Administration), Herb Goforth (Executive, Delivery Operations) and Colin Harlow (Assistant General Counsel) on behalf of NVE, and Michael Bolognini (Market Vice President – Las Vegas), Kristen Weathersby (VP/Chief Litigation Officer, via conference call), Kami Dempsey (Executive Field Director Public Affairs), Gary Auvil (Director of Residential & Commercial Construction – Las Vegas), Brian Rudolph (VP OSP & Construction SWR), and Bob Sheridan (Executive Field Director Network Operations & Network Service – Las Vegas) on behalf of CCI-LV.<sup>35</sup>

39. On June 25, 2014, Patricia Ortwein (NVE’s “Manager, Rule 9 Contract and Joint Use Administration”) sent a letter to Glenda Mills (CCI-LV’s Manager, Construction Services), acknowledging the parties’ “several opportunities to meet . . . to discuss ways in which [NVE] and [CCI-LV] can move the pole attachment application process forward and still meet each company’s goals and expectations” and reaffirming NVE’s Grade B construction standard requirements set forth in the 2012 License Application Requirements.<sup>36</sup>

40. In response, on July 15, 2014, Michael Bolognini (CCI-LV’s Market Vice President – Las Vegas) sent a letter to Ms. Ortwein, detailing CCI-LV’s objections to NVE’s new, unilaterally imposed Grade B construction standard.<sup>37</sup>

41. CCI-LV’s position was reiterated in an October 8, 2014 letter from Maria Browne (outside counsel to CCI-LV) to Ms. Ortwein, which specifically detailed CCI-LV’s legal position that “NVE’s refusal to allow CCI-LV to overlash its facilities until NVE’s currently Grade C

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<sup>35</sup> Bolognini Decl. ¶ 12.

<sup>36</sup> Mills Decl. ¶ 9 & Exh. 4; Bolognini Decl. ¶ 13.

<sup>37</sup> Bolognini Decl. ¶ 14 & Exh. 2.

compliant poles are upgraded to Grade B is unjust and unreasonable and constitutes a discriminatory denial of access, and thus violates [ ] federal laws and regulations.”<sup>38</sup>

42. On October 21, 2014, Colin Harlow (NVE Assistant General Counsel) responded to Ms. Browne with a letter asserting that NVE “has every right to require pole upgrades to meet [NESC] Grade B construction standards prior to overloading” by CCI-LV.<sup>39</sup>

43. On November 20, 2014 Ms. Ortwein sent an email to Ms. Mills stating that NVE “will not allow attachments to our facilities where the pole has failed analysis.”<sup>40</sup>

44. As of the date of this Complaint, the parties have been unable to resolve the dispute detailed herein.<sup>41</sup>

#### **IV. DISCUSSION**

##### **A. The Pole Attachment Act**

45. The Pole Attachment Act requires NVE to provide nondiscriminatory access to its poles, conduits, and rights-of-way upon just and reasonable rates, terms, and conditions. *See* 47 U.S.C. § 224(b)(1); 47 C.F.R. § 1.1401.

46. The non-discriminatory access obligation is intended “to ensure that deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.”<sup>42</sup>

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<sup>38</sup> Bolognini Decl. ¶ 15 & Exh. 3.

<sup>39</sup> Bolognini Decl. ¶ 16 & Exh. 4.

<sup>40</sup> Mills Decl. ¶ 10 & Exh. 5.

<sup>41</sup> Bolognini Decl. ¶ 17.

<sup>42</sup> *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, First Report and Order, 13 FCC Red 6777 ¶ 2 (1998).

47. NVE's refusal to allow CCI-LV to overlash its facilities until NVE's currently Grade C compliant poles are upgraded to Grade B is unjust and unreasonable and constitutes a discriminatory denial of access, and thus violates these federal laws and regulations.

**B. It is Unreasonable for NVE to Deny CCI-LV's Proposed Overlapping Where Such Overlapping Would Not Bring Poles Out of Compliance with Currently Applicable NESC Grade C Construction Standards**

48. The NESC is the industry-accepted safety standard for overhead and underground electric utility and communications utility installations.

49. Part 24 establishes the applicable Grades of Construction and Part 25 of the NESC establishes strength and loading requirements for poles and overhead facilities if Grade B or Grade C construction is required. NVE's Agreement incorporates the NESC's strength and loading requirements.

50. NVE's decision to upgrade its plant to Grade B construction standards through the pole attachment application process – precisely when third party attachers are seeking to deploy facilities – is guaranteed to inhibit the same broadband expansion that the FCC, as directed by Congress, is seeking to promote. Indeed, in amending its pole attachment rules in 2011, the FCC sought to address “prolonged, unpredictable, and costly” processes employed by utilities and to ensure that access to poles is not “more burdensome or expensive than necessary.”<sup>43</sup>

51. The FCC took several steps “to improve access to utility poles,” including the adoption of time frames, the use of utility approved contractors, and a requirement that utilities

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<sup>43</sup> *Implementation of Section 224 of the Act: A National Broadband Plan for our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 ¶ 6 (2011) (“April 2011 Order”).

allow attachers to use the same time-saving construction techniques previously employed by the utility.<sup>44</sup>

52. CCI-LV uses the overlashing construction technique to deploy high-capacity fiber for delivery of competitive, cable, voice and advanced services to residential and business class customers promptly and efficiently. The FCC has recognized time and again that overlashing is a competitive and cost-effective way to deploy cable plant.<sup>45</sup>

53. As such, the FCC prohibits pole owners from requiring additional approval for overlashing beyond that which was required for the initial attachment.<sup>46</sup>

54. In this case, NVE not only unreasonably seeks to require additional approval for overlashing beyond that which was obtained for initial attachments— including a complete

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<sup>44</sup> *Id.* at ¶ 19.

<sup>45</sup> See Consolidated Partial Order on Reconsideration, *Amendment of Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, ¶ 73 (2001) *aff'd Southern Company Serv., Inc. v. FCC*, 313 F.3d 574,582 (D.C. Cir. 2002) (“Consol. Order on Recon.”) (“Cable companies have, through overlashing, been able for decades to replace deteriorated cables or expand capacity of existing communications facilities, by tying communications conductors to existing, supportive strands of cable on poles. The 1996 Act was designed to accelerate rapid deployment of telecommunications and other services, and to increase competition among providers of these services. Overlashing existing cables reduces construction disruption and associated expense.”); *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, ¶ 62 (1998) (“We believe overlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition [and helps] provide diversity of services over existing facilities, fostering the availability of telecommunications services to communities, and increasing opportunities for competition in the marketplace.”).

<sup>46</sup> Consol. Order on Recon. at ¶75 (“neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment”); see also *Cable Television Ass’n of Ga. v. Ga. Power Co.*, 18 FCC Rcd. 16,333, ¶ 13 (2003) (rejecting a pole attachment agreement provision that required the utility’s “written consent to overlashing, which the utility may take up to 30 days to grant or deny” as “unjust and unreasonable on its face” and ordering the pole owner “to negotiate in good faith a reasonable provision consistent with FCC precedent.”).

structural analysis report for each distribution pole in an application – NVE would also delay CCI-LV’s overlashing until *after* NVE replaces any poles that fail Grade B construction standards, with or without CCI-LV’s proposed overlashing. NVE’s insistence on this unreasonable practice is preventing CCI-LV from delivering services to contracted customers and other Las Vegas residents and businesses seeking CCI-LV’s services.

55. Grade B construction is not necessary to ensure the safety of NVE distribution poles. Per NESC Table 242-1, Grade C construction is both acceptable and safe. As shown in the Loading Analyses, while the majority of NVE poles currently fail Grade B loading requirements, they do meet NESC-compliant Grade C requirements. Significantly, based on the analyses on the 137 poles conducted by PAR, the average incremental load increase of less than 1% added by CCI-LV’s proposed overlashing would not cause any of the poles on CCI-LV’s application to come out of compliance with Grade C construction standards. In other words, CCI-LV could overlash all of its plant attached to NVE poles in its Applications without causing the poles to come out of compliance with existing NESC Grade C construction standards.

56. Given that NVE has opted to maintain its plant at Grade C construction, its refusal to allow CCI-LV to overlash its attached facilities consistent with Grade C construction standards is entirely unjust and unreasonable in violation of FCC rules.

57. Where a pole already is out of compliance with governing standards prior to CCI-LV overlashing its facilities, it is NVE’s responsibility, as the pole owner, to bring the pole into compliance.<sup>47</sup>

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<sup>47</sup> See, e.g., 47 U.S.C. § 224(i); 47 C.F.R. § 1.1416(b) (“[A] party with a preexisting attachment to pole . . . shall not be required to bear any costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment . . . sought by another party.”); *Implementation of the Local Competition Provisions in*

58. Regardless of whether NVE acknowledges its responsibility to pay for the upgrade, the refusal to allow overlashing until the pole is replaced is itself unjust and unreasonable.

**C. NVE's Refusal to Allow CCI-LV to Overlash Its Existing Facilities Where It Could Do So Consistent With Currently Applied Grade C Strength And Loading Requirements Also Constitutes a Discriminatory Denial of Access to NVE Poles in Violation of Federal Law**

59. CenturyLink, a joint user and pole owner in Nevada, is not similarly required to wait until Grade C poles are upgraded before it is permitted to deploy plant. As a result of NVE's unreasonable requirement that poles be upgraded to Grade B construction prior to CCI-LV's overlashing, CCI-LV is at a distinct competitive disadvantage *vis a vis* one of its primary competitors for residential and business class customers.<sup>48</sup> The Commission has clearly stated that "even a policy that is equally applied prospectively is discriminatory in the sense that it disadvantages new attachers."<sup>49</sup>

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*the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 ¶ 1212 (1996) ("Local Competition Order") ("A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost. This will discourage parties from postponing necessary repairs in an effort to avoid the associated costs."), *on recon.*, 14 FCC Rcd 18049 (1999) ("Local Competition Recon. Order"); *see also Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615 ¶ 37 (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."); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 ¶ 19 (Cable Serv. Bureau 1999) ("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."); *Southern Co. v. FCC*, 293 F.3d 1338, 1352 (11th Cir. 2002) (requiring utilities to bear a proportionate share of the costs associated with modernizing their plants pursuant to an attacher's request for a modification).

<sup>48</sup> Bolognini Decl. ¶ 19.

<sup>49</sup> April 2011 Order at ¶ 227.

60. There is no indication that NVE has deployed a system wide program to upgrade its distribution poles to Grade B outside of the application process, and thus, this practice discriminatorily impacts attaching entities. As recently opined by Mr. Johnny B. Dagenhart, a nationally recognized expert in the application and interpretation of the NESC, in a case involving similar facts and pending before the FCC, a utility pole owner may not claim that it is building to Grade B unless it not only constructs initially to Grade B, but also *maintains* poles at the Grade B strength and loading requirements and itself immediately *rehabilitates* poles that fall below Grade B.<sup>50</sup>

61. Thus, when a pole falls out of compliance with the utility's chosen grade of construction, the pole must be rehabilitated immediately; otherwise, the utility is not in compliance with the NESC.<sup>51</sup> The utility cannot wait until an attacher seeks to deploy facilities to replace the poles.

62. NVE's insistence that its poles be upgraded through replacement to Grade B during the attachment application process, as well as the associated delay and possibility that the poles may not be approved for replacement by the City, disparately denies access to new attachers as compared to pole owners and joint users with "superior" rights and is precisely the type of discriminatory access that the FCC sought to prohibit.

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<sup>50</sup> Dagenhart Decl. ¶¶ 11-18.

<sup>51</sup> *Id.* ¶ 15.

## V. COUNTS

### **Count I: Unjust and Unreasonable Terms and Conditions of Attachment**

63. CCI-LV incorporates by reference as if fully set forth herein paragraphs 1 through 58 of this Complaint.

64. NVE's denial of CCI-LV's proposed overlashing where such overlashing would not bring poles out of compliance with currently applicable NESC Grade C Construction Standards is unjust and unreasonable in contravention of 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 *et seq.*

65. The Commission has the authority and the duty to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. § 224(b)(1).

66. As a result of NVE's unjust and unreasonable imposition of the 2012 License Application Requirements, CCI-LV is suffering and will continue to suffer substantial harm to its business in the form of lost revenue and substantial loss of customer good will.

### **Count 2: Discriminatory Denial of Access**

67. CCI-LV incorporates by reference as if fully set forth herein paragraphs 1 through 58 of this Complaint.

68. NVE's refusal to allow CCI-LV to overlash its existing facilities where it could do so consistent with currently applied Grade C strength and loading requirements, and where there is no indication that NVE has deployed a system wide program to upgrade its distribution poles to Grade B outside of the application process and where CCI-LV's primary competitor, CenturyLink, is not similarly required to wait until Grade C poles are upgraded before it is

permitted to deploy plant, constitutes a discriminatory denial of access to NVE poles in contravention of federal law requiring utilities to “ensure that telecommunications carriers . . . have non-discriminatory access to utility poles, ducts, conduits, and rights-of-way.” See 47 C.F.R. § 1.1401.

**VI. RELIEF REQUESTED**

CCI-LV respectfully requests an order from the Commission:

- a. Ordering that NVE may not apply its unjust, unreasonable and discriminatory Grade B construction requirements to CCI-LV’s new plant construction, either new attachments or overlashing;
- b. Order that CCI-LV may proceed with its planned overlashing;
- c. Awarding CCI-LV such other relief as the Commission deems just, reasonable and proper.

Respectfully submitted,

**Cox Communications Las Vegas, Inc.**



By its Attorneys  
Maria T. Browne  
Leslie G. Moylan  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, N.W., Suite 800  
Washington, D.C. 20006  
202-973-4281 (Direct Phone)  
202-973-4481 (Direct Fax)  
202-973-4200 (Main Phone)  
202-973-4499 (Main Fax)  
mariabrowne@dwt.com  
lesliemoylan@dwt.com

Date submitted: December 18, 2014

## CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2014, I caused a copy of the foregoing Complaint, exhibits and declarations in support thereof, to be served on the following (service method indicated):

Marlene J. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12<sup>th</sup> Street, LV  
Room TW-A325  
Washington, DC 20554  
(via ECFS)

Colin R. Harlow, Esq.  
Assistant General Counsel  
NV Energy  
6226 W. Sahara Avenue, MS #3A  
Las Vegas, Nevada 89146 (overnight courier and email)

Public Utilities Commission of Nevada  
1150 E. William Street  
Carson City, NV 89701-3109  
(by U.S. mail)

  
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Maria T. Browne