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February 12, 2015

VIA E-MAIL
VIA FEDEX

Mr. Michael Engel
Federal Communications Commission
Market Disputes Resolution Division
445 12th Street, S.W.
Washington, DC 20554

Ms. Lisa J. Saks
Federal Communications Commission
Market Disputes Resolution Division
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Ms. Marlene Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, DC 20554

Re: **Proceeding No. 14-267; File No. EB-14-MD-017; *Cox Communications Las Vegas, Inc. v. NV Energy, Inc.*; February 11, 2015 Order**

Dear Mr. Engel, Ms. Saks and Ms. Dortch:

Pursuant to the Commission's February 11, 2015 Order, NV Energy submits its Corrected Response to Cox Communications Las Vegas, Inc.'s Pole Attachment Complaint. Pursuant to the Commission's Order, NV Energy will provide the Division staff with a single hard copy of the Corrected Response via FedEx and will provide an electronic copy to the Commission and all counsel of record via e-mail.

Sincerely,

Joseph D. Leavens

JDL:pc

cc: Ms. Maria T. Browne
Ms. Leslie Gallagher Moylan
Mr. Colin Harlow
Public Utility Commission of Nevada

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

COX COMMUNICATIONS LAS VEGAS, INC., **Complainant,** **v.** **NV ENERGY, INC.,** **Respondent.**	**Proceeding No. 14-267** **File No. EB-14-MD-017**

NV ENERGY, INC.'S CORRECTED RESPONSE TO COX COMMUNICATIONS LAS VEGAS, INC.'S POLE ATTACHMENT COMPLAINT

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February 12, 2015

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Before the
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COX COMMUNICATIONS LAS VEGAS, INC., **Complainant,** **v.** **NV ENERGY, INC.,** **Respondent.**	**Proceeding No. 14-267** **File No. EB-14-MD-017**

NV ENERGY, INC.'S CORRECTED RESPONSE TO
COX COMMUNICATIONS LAS VEGAS, INC.'S POLE ATTACHMENT COMPLAINT

NV Energy, Inc. ("NV Energy") responds to the Pole Attachment Complaint filed by Cox Communications Las Vegas, Inc. ("Cox") as follows:

I. SUMMARY AND INTRODUCTION

NV Energy has neither denied Cox access to, nor the right to overlash on, a single NV Energy pole. NV Energy also has not changed its overlash notification requirements in any way. Further, NV Energy has not asked Cox to pay even one penny to "upgrade" NV Energy's poles or the equipment of any other attacher. Instead, this case is about one simple issue: Cox's unwillingness to abide by NV Energy's requirement that all attachers (and NV Energy itself) comply with NESC Grade B construction standards.

In December of 2012, in an effort to make its pole network safer and more reliable, NV Energy promulgated new pole attachment license application requirements. The change at issue in this proceeding is the requirement that third-party attachments comply with NESC Grade B construction standards. The decision to require compliance with the Grade B standard was borne

out of NV Energy's experience that the previously-applicable construction requirements were insufficient to adequately ensure the safety of the public and the reliability of its pole plant. Specific considerations that catalyzed that decision included (1) NV Energy's determination that it needed to identify and enforce specific engineering standards regarding the structural integrity of its poles; (2) the intermittent and dangerous wind storms that plague NV Energy's service area;[1] and (3) the recurrence of Las Vegas-area third-party attachments failing to meet NESC requirements (or NV Energy's construction standards), overloaded poles, or attachments that otherwise fail to comply with industry-recognized good construction/engineering practices.

Commission Precedent and the Parties' Agreement Support the Grade B Requirement.

In addition to constituting prudent business and a good engineering decision, NV Energy's Grade B construction requirement is also legally supported by Commission precedent. The Commission has recognized unequivocally that "standards vary between companies and across different regions of the country based on the experiences of each utility and on local conditions" and "as a result, each utility has developed its own internal operating standards to

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[1] *See* Annalise Porter, *High Winds Pummel Las Vegas Valley*, Las Vegas Review-Journal, October 28, 2013, *available at* http://www.reviewjournal.com/news/high-winds-pummel-las-vegas-valley (last accessed January 30, 2015) ("Wind gusts of more than 100 mph blew through the Las Vegas Valley and Spring Mountains on Sunday and Monday bringing power outages and wind damage with them…Power outages early Monday morning affected 700 residents near the Fashion Show mall, 650 Indian Springs residents and 70 Goodsprings residents, NV Energy spokesman Mark Severts said. NV Energy confirmed a smaller outage near Flamingo Road and Eastern Avenue affected about 220 people Monday afternoon."); David Toplikar, *Las Vegas Under High Wind Watch Tonight as Storms Slam into Region*, Las Vegas Sun Times, January 20, 2012, *available at* http://www.lasvegassun.com/news/2012/jan/20/las-vegas-under-high-wind-watch-storms-slamming-re/ (last accessed January 30, 2015) ("some gusts could reach as high as 50 mph"); Tedd Florendo, *Summer Storms Roll Through the Las Vegas Valley*, KLAS-TV Las Vegas, July 18, 2006 *available at* http://www.8newsnow.com/story/5167210/summer-storms-roll-through-the-las-vegas-valley (last accessed January 30, 2015) ("Wild storms moved through the valley this week. The fierce winds and powerful lighting toppled trees around the Las Vegas Valley…The fierce winds also took down a pair of trees in North Las Vegas that were standing for decades.").

suit its individual needs and experiences."[2] As such, the Commission has also ruled that pole owners have discretion to require attachers to meet standards beyond those required by the NESC.[3]

Moreover, under the parties' pole attachment agreement, NV Energy is contractually permitted to impose "additional specifications" beyond the NESC "as reasonably required in [NV Energy's] sole judgment as may be required from time to time."[4] While NV Energy's Grade B standards may exceed the mark to which Cox wishes to construct in order to get to market as quickly as possible, the requirement is consistent with the NESC and conforms to NV Energy's rights under the parties' long-standing pole attachment agreement which has been in place since 1997 (almost 18 years).

This Proceeding Is Not About Overlashing.

Cox also attempts to mischaracterize this dispute as centered on overlashing. It does so in order to confuse the real issue: NV Energy's right to implement construction standards it deems appropriate and necessary for the safety and reliability of its pole plant (taking into account its experience and local conditions). Since 2013, Cox has applied to attach to 268 NV Energy poles (99 in 2013 and 169 in 2014).[5] NV Energy has approved Cox's applications to

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[2] *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16070 ¶ 1148 (Aug. 8, 1996) ("Local Competition Order").

[3] *In the Matter of the 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, 5268-69 ¶ 58. ("2011 Order") (utilities "may insist that the work meet utility specifications for safety and reliability including requirements that may exceed NESC standards.")

[4] *See* Exhibit 1, Pole Attachment Contract between Nevada Power Company and Community Cable TV Dated June 1, 1997 ("1997 Agreement") at § 4.1.10.

[5] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 11.

76% (203) of those poles.[6] Although not mentioned in Cox's filings, NV Energy approved attachment licenses on 63% (106 of the 169) of the poles to which Cox sought to attach in 2014.[7] Also noticeably absent from Cox's Complaint is any mention of the fact that in 2014, NV Energy approved 32 poles for Cox attachments, but Cox has yet to move forward with attachments on 21 of those poles.[8]

The fact that the attachments at issue involve overlashing is manifestly irrelevant. Cox freely contracted in the parties' 1997 pole attachment agreement to notify NV Energy prior to overlashing. Over the past 18 years, Cox has never objected to this notification requirement. In fact, it provided the required notice in association with the applications at issue in this proceeding. Cox's complaint is, at its heart, focused on what happened after Cox gave the required notice, when NV Energy informed it that its overlashing to non-compliant poles could not proceed until those poles were upgraded.

NV Energy's Grade B Construction Standard is Not Discriminatory.

Cox's unsubstantiated argument that NV Energy's upgrade policy is discriminatory is based on two erroneous premises: (1) NV Energy does not require that its own construction meet the Grade B standard; and (2) NV Energy does not require CenturyLink to comply with the policy. Cox offers no evidence to support either allegation. On the contrary, NV Energy *does* comply with the Grade B standard for its own new construction, as aforementioned, and NV Energy *has* informed CenturyLink that it, like all other attachers and NV Energy itself, must comply with the Grade B construction standard.[9]

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[6] *See id*.

[7] *See id*.

[8] *See id*. at ¶ 12.

[9] *See id*. at ¶ ¶ 5, 13.

NV Energy upgrades non-compliant poles before adding or upgrading its own overhead facilities, and requires Grade B-compliant poles in its own new business/capital projects. Whenever NV Energy learns of a non-Grade B-compliant pole through the pole attachment application process, it replaces the pole **at no cost to the attacher** and then allows the attaching entity to proceed with the attachment. NV Energy even upgrades non-compliant poles when the attaching entity chooses not to proceed with the proposed attachment. This is all that has been asked of Cox -- to stage its construction in a manner that allows for pole change outs (at NV Energy's expense) ensuring adherence to NESC Grade B construction standards.

NV Energy's Grade B Construction Standard is Not Unjust or Unreasonable.

Also wholly unsupported is Cox's claim that NV Energy's Grade B construction requirement is unjust and unreasonable because it will delay Cox's ability to deploy broadband. In fact, although Cox fails to mention this in its complaint, NV Energy approved Cox's applications to overlash on thirty two additional NV Energy poles during the period at issue in this dispute (August–December 2014). In any event, this Commission should not prioritize the deployment of broadband at the expense of reasonably implemented policies to enhance the safety and reliability of the electric grid. As the Commission has noted, the safety and reliability of pole plant is a pole owner's domain;[10] NV Energy's Grade B requirement is specifically designed to protect it.

[10] *See* Local Competition Order, at ¶ 1147 ("Indeed, utilities typically impose requirements more stringent than those prescribed by the NESC and other industry codes."); *id.* at ¶ 1148 ("Because there is no fixed manner in which to provide electricity, there is no way to develop an exhaustive list of specific safety and reliability standards…each utility has developed its own internal operating standards to suit its individual needs and experiences"); *id.* at ¶ 1149 ("Universally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we.")

NV Energy is not requiring Cox to bear the cost associated with the Grade B upgrades. It is not requiring Cox to comply with any standard that NV Energy does not also apply to its own construction and that of all other third-party attachers. Most important, NV Energy is requiring those upgrades because of legitimate safety and reliability concerns, which NV Energy addresses and documents herein. The Grade B construction requirement is thus reasonable and just. The Commission should dismiss Cox's complaint.

II. JURISDICTION AND PARTIES

1. NV Energy lacks knowledge or information sufficient to admit or deny whether the Commission has jurisdiction over this action because it appears the Public Utility Commission of Nevada ("PUCN") may have jurisdiction over this dispute pursuant to NEV. REV. STAT. § 704.250. At a minimum, it appears the PUCN may have concurrent jurisdiction over this dispute. The PUCN's jurisdiction *may* serve to displace the Commission's jurisdiction; even without a "certification" from the PUCN.[11]

2. NV Energy denies the allegations of this paragraph, as stated. Section 224(b) makes no mention of "non-discriminatory access" (this phrase appears *only* in Section 224(f)), which provides that a "utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles…on a non-discriminatory basis where there is insufficient capacity and for reasons of safety reliability, and generally applicable engineering purposes." This case is about NV Energy's statutory right to deny overlashing where there is "insufficient capacity" (i.e. already overloaded poles) and to implement a "generally applicable engineering" program designed to ensure the *safety* and *reliability* of its pole network.

[11] *See* 47 U.S.C. § 224(c)(7) ("Nothing in this section shall be construed to apply to, or give the commission jurisdiction…in any case where such matters are regulated by a state."); *see also* 47 C.F.R. § 1.1414(a) (explaining that lack of certification merely creates a rebuttable presumption "that the state is not regulating pole attachments").

3. Upon information and belief, NV Energy admits that Cox is a franchised cable operator in southern Nevada. NV Energy lacks knowledge or information sufficient to admit or deny whether Cox offers any competitive video, voice and data services to business and residences in Southern Nevada and therefore denies these allegations.

4. Upon information and belief, NV Energy admits the allegations in this paragraph.

5-6. NV Energy admits the allegations in these paragraphs.

7. NV Energy admits that on June 1, 1997, Nevada Power Company and Cox's predecessor, Community Cable TV, entered into a pole attachment agreement (the "1997 Agreement"). The 1997 Agreement speaks for itself. NV Energy further states that NV Energy, Inc. is not the proper party to this action. NV Energy is a holding company for Nevada Power Company, a party to the 1997 Agreement.

8. NV Energy admits that Cox engaged in executive level discussions in an attempt to resolve this dispute, but lacks knowledge or information sufficient to admit or deny whether Cox engaged in these discussions in good faith, and therefore denies the remaining allegations of this paragraph.

9. NV Energy admits the allegations in this paragraph.

10. NV Energy admits that the state of Nevada has not formally "certified" that it regulates pole attachments. The state of Nevada does, however, regulate the "standards for the maintenance, use and operation of electric poles, wires, cables and appliances of all public utilities within the State," which may have the effect of displacing the Commission's jurisdiction

over certain pole attachment disputes, particularly where, as here, the issues center on the safety and reliability aspects of NV Energy's generally applicable Grade B construction standard.[12]

11. NV Energy admits the allegations in this paragraph.

III. BACKGROUND AND FACTS

12. NV Energy admits that Cox is a franchised cable operator. NV Energy lacks knowledge or information sufficient to admit or deny whether Cox offers the services described in this paragraph and therefore denies the remaining allegations.

13. NV Energy lacks sufficient knowledge or information to admit or deny the allegations of this paragraph and therefore denies same.

14. NV Energy admits that Cox uses the overlashing construction technique to deploy high-capacity fiber over pre-existing cable attachments. NV Energy lacks knowledge or information sufficient to admit or deny the purpose for which the high capacity fiber is deployed and therefore denies the remaining allegations of this paragraph.

The Pole Attachment Agreement and Cox's Initial Attachments

15. The 1997 Agreement speaks for itself. To the extent Cox alleges that the 1997 Agreement sets forth all terms and conditions governing Cox's attachments to NV Energy's poles, NV Energy denies the allegations.

16. NV Energy admits that Section 4 of the 1997 Agreement requires attachments to be made in accordance with the requirements and specifications of the National Electric Safety Code ("NESC") and states that Section 4 of the 1997 Agreement speaks for itself. Section 4 also works in conjunction with Section 4.1.10, which states that NV Energy may impose "additional

[12] NEV. REV. STAT. § 704.250 ("The Commission is authorized and directed to prescribe the standards for the maintenance, use and operation of electric poles, wires, cables and appliances of all public utilities within the State engaged in the business of furnishing electric power, light and energy.").

specifications" beyond the NESC "as reasonably required in [NV Energy]'s sole judgment as may be required from time to time." The Commission has previously deemed such a provision reasonable.[13]

17. NV Energy denies the allegations in the first sentence of this paragraph and states that Section 24 of the NESC speaks for itself. NV Energy denies the allegations in the second sentence of this paragraph and avers that NESC table 242-1 speaks for itself. With regard to the third sentence of this paragraph, NV Energy denies that Grade B construction standards are only required for lines crossing railroad tracks and limited access highways or certain navigable waterways. On the contrary, Grade B construction is required for all NV Energy Distribution poles with communications attachments unless:

a. The pole to which the communication plant is attached is part of a 4 KV system[14]; or

b. The following two conditions are satisfied:

i. The supply voltage will be promptly removed from the communications plant by de-energization or other means, both initially and following subsequent circuit-breaker operations in the event of a contact with the communications plant.[15]

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[13] 2011 Order at ¶ 58 (utilities "may insist that the work meet utility specifications for safety and reliability including requirements that may exceed NESC standards").

[14] *See* Exhibit 3 National Electric Safety Code, 2012, Table 242-1 fn. 6; *see also* Exhibit 4 Declaration of Tania Jarquin ¶ 7. ("The majority of NV Energy's circuits in the Las Vegas valley are 12 KV. Less than 2% (19 circuits out of 1170 circuits) of NV Energy's circuits in the Las Vegas valley are 4 KV. For these few circuits, NV Energy is working towards upgrading these systems to 12 KV as distribution projects arise in those areas. Thus, only 2% of NV Energy's circuits do not require Grade B construction.")

[15] *See* Exhibit 3 National Electric Safety Code, 2012, Table 242-1 fn. 7(a) and (b); *see also* Exhibit 4 Declaration of Tania Jarquin ¶ 9. ("The protective devices on NV Energy distribution circuits cause the lines to be de-energized in the event of a fault. The breaker will try to restore power a few times to see if the fault has cleared, but after a few unsuccessful attempts it will de-energize the circuit. It is possible, however, that the circuit may not be de-energized in cases where the fault is at the end of the line, far away from the circuit breaker. In these cases, the breaker may read a higher load but it will not be enough to trip the breaker. Due to this uncertainty, NV Energy constructs all of its line to meet NESC Grade B construction to provide

ii. The voltage and current impressed on the communications plant in the event of a contact with the supply conductors are not in excess of the safe operating limit of the communications-protective devices.[16]

Moreover, the NESC expressly requires all structures to satisfy the grade of construction required for the highest grade of conductors supported on a pole.[17] Rule 243A clearly states: "The grade of construction shall be that required for the highest grade of conductors supported."[18] Thus, if the attachments in the power space are designed to Grade B construction, then all of the attachments on the pole, including those in the communications space, must meet Grade B construction.[19] Because of NV Energy's Grade B construction requirement, all other occupants of the structure must adhere to this same standard.[20]

18. NV Energy denies the allegations of this paragraph. 122 of the 137 poles Cox places at issue in this proceeding require Grade B construction under the NESC because they support 12KV electric systems or higher.[21] Regardless, whether the NESC requires Grade B construction on these poles is irrelevant.

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a higher level of safety and reliability because the de-energization of the line is not guaranteed. NV Energy must receive confirmation from attaching entities in order to know whether the communications-protective devices can withstand the voltage and current of supply conductors. Without this confirmation, NV Energy cannot know whether the conditions exempt its line from Grade B construction standards and must assume that Grade B construction is required.").

[16] *See* Exhibit 3 National Electric Safety Code, 2012, Table 242-1 fn. 7(b); *see also* Exhibit 4 Declaration of Tania Jarquin ¶ 9 ("NV Energy must receive confirmation from attaching entities in order to know whether the communications-protective devices can withstand the voltage and current of supply conductors. Without this confirmation, NV Energy cannot know whether the conditions exempt its line from Grade B construction standards and must assume that Grade B construction is required.")

[17] *See* Exhibit 5, National Electric Safety Code, 2012, § 243A.

[18] *See id*.

[19] *See id*.

[20] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 10.

[21] *See* Exhibit 4, Declaration of Tania Jarquin ¶ 8.

First, the 1997 Agreement reserves to NV Energy the right to set its own engineering and construction standards, including standards in excess of the NESC. Cox is required to comply with both the NESC standards *and* "any additional specifications of Licensor, as reasonably required in Licensor's sole judgment as may be required from time to time."[22]

Second, the Commission has expressly recognized that utilities have the discretion to implement their own construction and engineering standards:

> In addition to operating under federal, state, and local requirements, a utility normally will have its own operating standards that dictate conditions of access. Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise…Standards vary between companies and across different regions of the country based on the experiences of each utility and on local conditions…the provision of electricity is the result of varied engineering factors that continue to evolve. Because there is no fixed manner in which to provide electricity, there is no way to develop an exhaustive list of specific safety and reliability standards…As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences…[23]

Further, the Commission has held that utilities "may insist that the work meet utility specifications for safety and reliability including requirements that may exceed NESC standards."[24] Moreover, in the event of a dispute between a utility and an attacher, in matters of "safety, reliability or generally applicable engineering purposes…the electric utility may make the final decision on such a matter."[25]

NV Energy's Grade B construction requirement is grounded in real world safety and reliability concerns (not simple hyperbole). In 2012, NV Energy decided to revise its pole attachment application process in order to ensure that the structural integrity of its pole plant was taken into

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[22] *See* Exhibit 1, 1997 Agreement § 4.1.10.

[23] Local Competition Order at ¶ 1148.

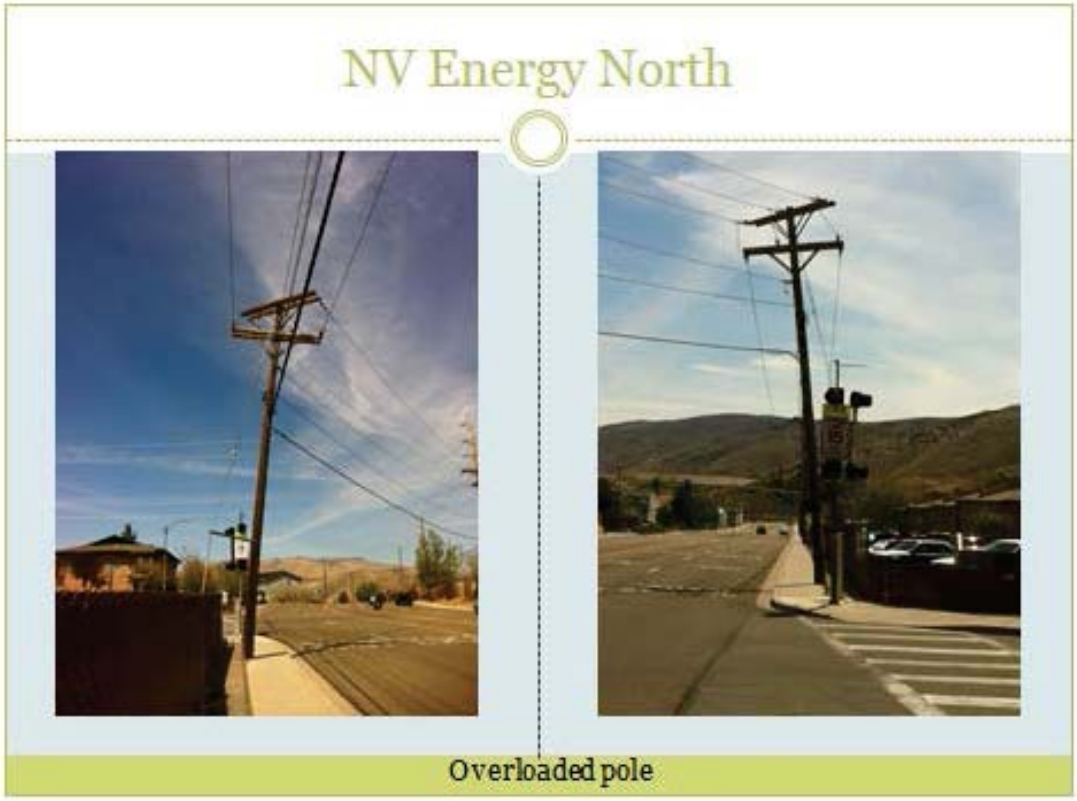
[24] 2011 Order at ¶ 58. ("2011 Order").

[25] *Id.* at ¶ 59.

account when third parties made attachments to its poles. NV Energy's concern arose, in part, out of the discovery of overloading of NV Energy poles by third-party attachers, resulting in pole failures in some instances, as well as NESC violations by third-party attachers.[26]

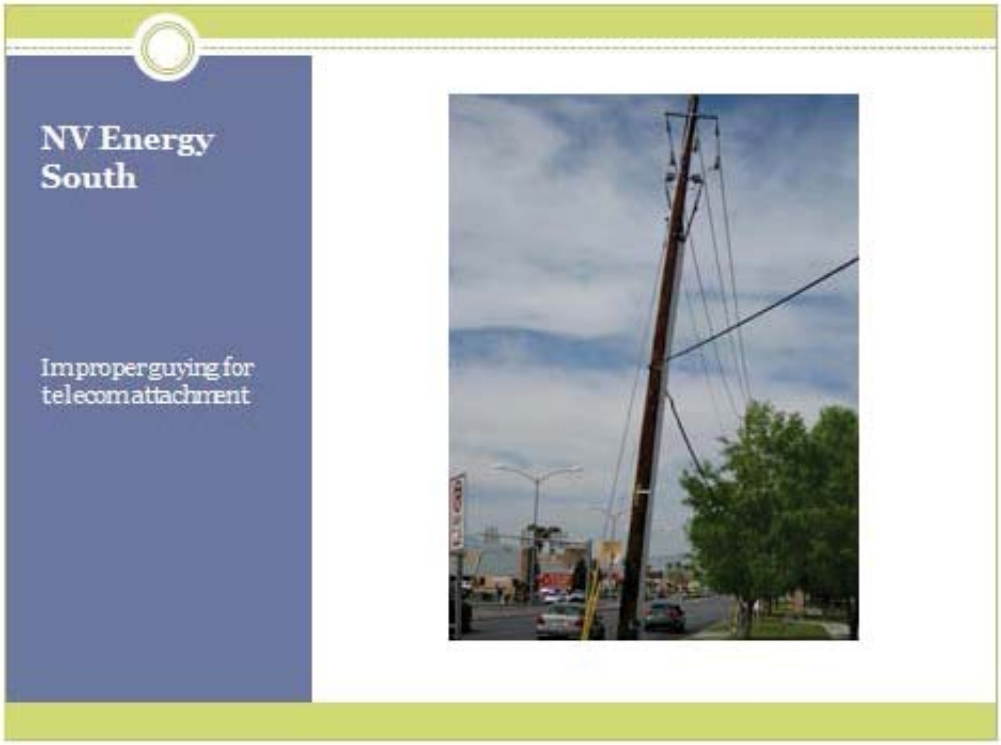
The following images are examples of such loading and NESC violations:

OVERLOADED POLE

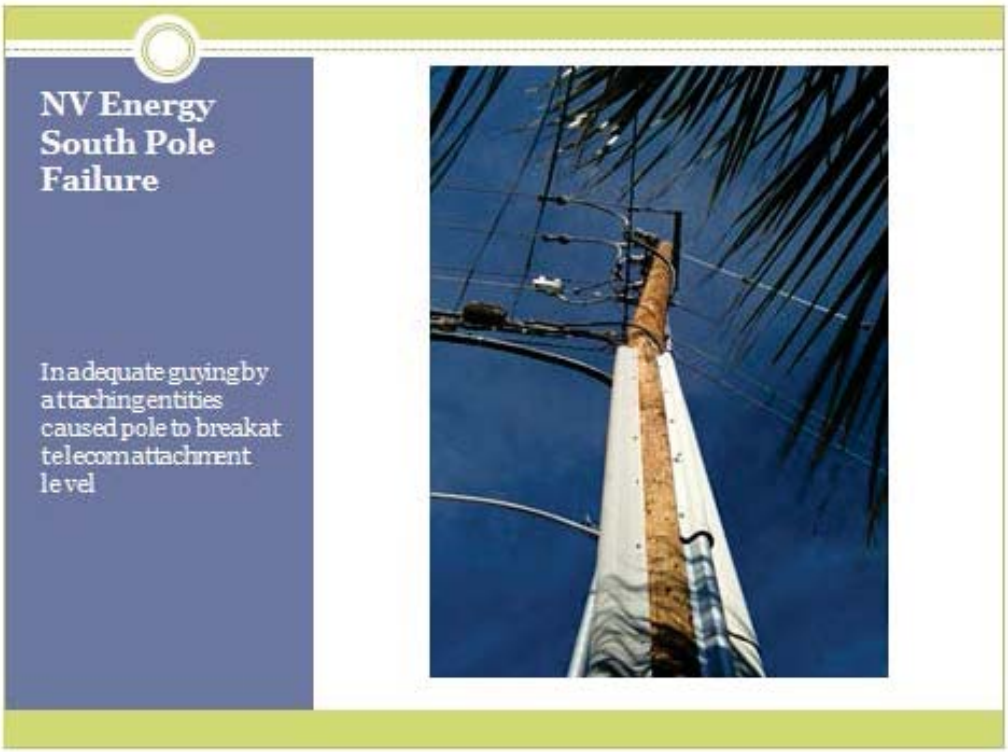


[26] *See* Exhibit 6, June 21, 2013 letter from Colin Harlow to Kristen Weatherby.

IMPROPER GUYING



INADEQUATE GUYING



In addition, many of NV Energy's distribution lines in the urbanized areas of Clark County, Nevada are in close proximity to heavily traveled roadways and highways where a failed pole can cause a significant disruption to traffic and harm the public.[27] Therefore, in 2012, based on this and other factors (e.g., high wind events that have caused pole failures impacting roadways),[28] NV Energy made the decision to construct its lines to the NESC's Grade B construction standard to provide a higher level of reliability and a greater safety margin.[29]

NV Energy provided Cox with notice of the safety and reliability-motivated change to Grade B Construction in December 2012.[30] The notice explicitly stated, "This activity is motivated as much by internal concern regarding system safety and reliability as in response to the most recent FCC Report & Order (11-50)."[31] Cox again was made aware of the motivation for these changes in a June 21, 2013 letter from NV Energy Associate General Counsel Colin Harlow. Mr. Harlow explained that NV Energy's concern regarding safety and reliability stemmed from recurring instances of third-party attachers failing to comply with NESC requirements and from dangerous pole overloading by attaching entities."[32] By failing to deny this statement, Cox implicitly admitted that (a) NV Energy is permitted to institute new construction standards and (b) the failure to construct according to NESC standards justifies NV Energy's decision.

19. NV Energy admits the allegations of this paragraph. Nevertheless, the past practices of Cox or NV Energy are irrelevant to the issue of whether NV Energy may require

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[27] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 4.

[28] *See* footnote 1.

[29] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 4.

[30] *See generally* Exhibit 7, December 10, 2012 Letter from NV Energy to Cox.

[31] *See* Exhibit 7, December 10, 2012 Letter from NV Energy to Cox.

[32] *See* Exhibit 6, June 21, 2013 letter from Colin Harlow to Kristen Weatherby.

Cox to satisfy NESC Grade B construction standards now or in the future. Indeed, the Commission made clear that a utility may alter its existing construction and engineering policies:

> A utility may, however, choose to reduce or eliminate altogether the use of a particular method of attachment used on its poles, including boxing or bracketing, which would alter the range of circumstances in which it is obligated to allow future attachers to use the same techniques.[33]

If a utility can reasonably eliminate an attachment method altogether, it can hardly be deemed unreasonable for a utility to require safer, more reliable construction standards on its own poles and on new attachments to those poles – especially when the attaching entity does not bear the cost of satisfying the new construction standards.[34]

20. NV Energy admits that in December 2012, it exercised its contractual right to require Cox to satisfy Grade B construction standards for attachments. NV Energy further states that the NVE LICENSE APPLICATION REQUIREMENTS ("License Application Requirements"), speaks for itself. NV Energy denies that it was required to obtain consent and agreement from Cox before implementing Grade B construction standards.[35] The same requirements outlined in the License Application Requirements were, and will continue to be, imposed on any and all attachers in NV Energy's service territory.[36]

21. NV Energy admits the allegations of this paragraph and states that NV Energy is not asking Cox, or any other attacher, to do anything NV Energy is not doing itself. Since

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[33] 2011 Order at ¶ 227.

[34] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 8.

[35] *See* Exhibit 1, 1997 Agreement § § 4.1, 4.1.10 (Cox's attachments "shall be erected, installed, placed, maintained and removed in accordance with…any additional specifications of Licensor, as reasonably required in Licensor's sole judgment as may be required from time to time."); 2011 Order 26 FCC Rcd. at 5269, ¶ 58 (utilities "may insist that the work meet utility specifications for safety and reliability including requirements that may exceed NESC standards").

[36] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 10.

imposing the NESC Grade B construction requirement in 2012, NV Energy designs its poles to meet the NESC Grade B construction standard and replaces any existing poles that are found to be non-compliant with NESC Grade B construction at NV Energy's expense.[37] NV Energy does not add or upgrade overhead facilities on poles that are non-compliant with Grade B construction standards until the pole is replaced.[38]

Due to the magnitude of resources required to complete a statewide survey of the more than 200,000 poles in the service territory, NV Energy has not instituted a program to structurally analyze and correct every one of its non-compliant poles.[39] Instead, and consistent with the NESC and generally accepted engineering practices, NV Energy is addressing the non-compliant poles as they are encountered, either through the utility's own new business/capital projects or through third-party attachment applications.[40] Since April 2014, NV Energy has identified 110 poles for replacement through non-pole attachment application processes including budget jobs, maintenance work and/or new business/public works projects. As of January 22, 2015, twenty-five of these poles already have been replaced.[41]

If NV Energy encounters a pole that is currently non-compliant with NESC Grade B construction, whether it is found through the course of an NV Energy project or through a pole attachment application, NV Energy pays the full cost to replace the existing pole with a new pole that is strong enough to accommodate the existing facilities in a manner consistent with the

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[37] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 5.

[38] *See id* at ¶ 5.

[39] *See id* at ¶ 7.

[40] *See id* at ¶ 7; *See generally* NESC Chapter 214.

[41] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 7.

NESC Grade B construction standard.[42] If the new, Grade B-compliant pole happens to be large enough and strong enough to accommodate a proposed attachment, then the attaching entity bears no cost in association with the pole change-out.[43] If the new pole is not strong enough or large enough to accommodate the proposed attachment, then the third party must pay for the marginal cost required to install a larger class pole with sufficient capacity for their proposed attachment.[44] This marginal "cost-causer" approach is consistent with NV Energy's past practices, the prevailing practice in the industry and Commission precedent.[45] NV Energy does not shift the cost of upgrading its pole plant to the applicant.[46] This necessary and prudent hardening, at NV Energy's expense, benefits all attaching entities -- including Cox.[47]

Whenever a non-Grade B-compliant pole is discovered, NV Energy places that pole on a list and the pole is changed out within a reasonable time.[48] However, because in many instances the timeframe for replacement is dependent upon a variety of factors beyond NV Energy's control, including for example, obtaining permits from the City of Las Vegas, the Nevada Department of Transportation, or the Nevada Bureau of Land Management, it is impossible for NV Energy to provide third-party attachers with a specific timeline for pole change-outs. The unpredictability of the pole change-out process and the involvement of third-parties (not under the control of the pole-owner) is precisely why the Commission refused to apply the make-ready

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[42] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 8.

[43] *See id.*

[44] *See id.*

[45] *See id.*; *see also e.g.* Local Competition Order, at ¶ 1161 ("the party or parties seeking to increase capacity will be responsible for all associated costs").

[46] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 8.

[47] *See id.*

[48] *See id.* at ¶ 9.

timelines to pole change-outs.[49] The photographs below depict some of the challenging circumstances NV Energy must balance in changing out poles:

[49] 2011 Order at n.388; ¶ 226.

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22. NV Energy admits that 60 of the 137 poles which Cox places at issue in this proceeding do not meet the strength and loading requirements of the NESC Grade B construction standard.[50] NV Energy learned that these 60 poles fail the Grade B construction standard through nine different Cox attachment applications.[51] NV Energy approved attachment licenses on 106 of the 169 poles to which Cox sought to attach in 2014.[52] NV Energy's Transmission Team is currently reviewing the application for the remaining three poles.[53]

Cox's Attachment Applications

23. NV Energy admits that between August 20, 2014 and November 20, 2014, Cox submitted applications to attach to 137 NV Energy poles. However, Cox's allegations tell only

[50] *See* Exhibit 4, Declaration of Tania Jarquin ¶ 10.

[51] *See id.*

[52] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 11.

[53] *See* Exhibit 4, Declaration of Tania Jarquin ¶ 10.

part of the story. During this same timeframe, Cox applied to attach to 32 additional poles.[54] Cox fails to mention that NV Energy approved all 32 for attachment.[55] Of these 32 poles, Cox has only attached to 11.[56] Cox has not requested NV Energy's final inspection of its attachments on any of these 11.[57] Cox has performed no work on the remaining 21 poles, despite the fact that licenses for these 21 poles were issued between October 1 and December 1, 2014.[58]

24. NV Energy admits that PAR Electrical Contractors, Inc. ("PAR") is a NV Energy-approved contractor. NV Energy lacks knowledge or information sufficient to admit or deny the remaining allegations of this paragraph and therefore denies them.

25. NV Energy lacks knowledge or information sufficient to admit or deny the allegations of the first two sentences of this paragraph and therefore denies them. NV Energy denies Cox's articulation of NV Energy's obligations and the remaining allegations of this paragraph.

26. NV Energy lacks knowledge or information sufficient to admit or deny any allegations based on PAR's loading analyses and therefore denies them. However, NV Energy performs its own loading analysis on all poles which are determined by attaching entities to fail a loading analysis.[59] While overlash loads are typically small compared to a pole's existing load, Cox understates the loads of some of its proposed attachments.[60] For example, Cox's proposed attachment to NV Energy's pole at the Garces Avenue and 6th and 8th Street locations (Cox's

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[54] *See* Exhibit 4, Declaration of Patricia Ortwein ¶ 12.

[55] *See id*.

[56] *See id*.

[57] *See id*.

[58] *See id*.

[59] *See* Exhibit 4, Declaration of Tania Jarquin ¶ 12.

[60] *See id* at ¶ 11.

August 19, 2014 application) added a 4-5% incremental load.[61] Moreover, if a pole already lacks sufficient structural capacity, even adding a negligible additional burden is an unwarranted risk.[62]

27. NV Energy lacks knowledge or information sufficient to admit or deny the allegations of this paragraph and therefore denies them. NV Energy does not analyze whether any proposed attachment would bring a particular pole out of compliance with Grade C construction standards because its policy requires the pole to satisfy the more stringent, safer, and more reliable Grade B standard.[63] The Commission has recognized time and again that utilities have the discretion to set their own engineering and construction standards and that these standards may even exceed those provided by the NESC.[64] In any event, the NESC is a safety

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[61] *See id*.

[62] *See id*.

[63] *See id*. at ¶ 12.

[64] *See* Local Competition Order at ¶ 1147 ("Indeed, utilities typically impose requirements more stringent than those prescribed NESC and other industry codes."); *id.* at ¶ 1148 ("Because there is no fixed manner in which to provide electricity, there is no way to develop an exhaustive list of specific safety and reliability standards…each utility has developed its own internal operating standards to suit its individual needs and experiences"); *id.* at ¶ 1149 ("Universally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we."); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 18049, ¶ 86 (October 26, 1996) ("Thus, utilities may ensure that individuals who work in proximity to electric lines to perform pole attachments and related activities meet utility standards for the performance of such work"); Order and Further Notice of Proposed Rulemaking, *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future;* WC Docket No. 07-245; GN Docket No. 09-51 (FCC 11-50) (May 20, 2010) (stating that "the most routine safeguards" to ensure safety prior to attaching to a pole include "verifying that the new attachment will not interfere with existing facilities, that adequate clearances are maintained, that the pole can safely bear the additional load, and that the attachment meets the appropriate safety requirements of the utility and the NESC."); 2011 Order, at ¶ 25 ("We leave the specific processes for establishing such engineering specifications to individual utilities, so long as they are reasonable and timely."); *id*. at ¶ 58 (utilities "may insist that the work meet utility specifications for safety and reliability, including requirements that may exceed NESC standards."); *id*. at 59 ("if the pole owner is an electric utility, it retains the statutory right to deny

code–not a construction standard–and is widely adopted as a minimum standard, in addition to which electric utilities routinely impose their own, more stringent standards. The NESC itself states:

> The purpose of these rules is the practical safeguarding of persons during installation, operation, or maintenance of electric supply and communication lines and associated equipment. These rules contain the basic provisions that are considered necessary for the safety of employees and the public under specified conditions. This Code is not intended as a design specification or as an instruction manual.[65]

Additionally, the fact that a Cox attachment (or attachment by any other entity for that matter) causes a pole to come out of compliance with the NESC is irrelevant unless NV Energy shifts the cost of pole replacement to Cox. But, as already explained, NV Energy covers the cost of replacing non-compliant poles with compliant poles. Thus, whether this allegation is true or not is irrelevant.

28. NV Energy denies the allegations in the first sentence of this paragraph. It is telling that Cox fails to provide a citation for this allegation. To the contrary, NV Energy *is* allowing Cox to overlash on poles that satisfy Grade B construction standards.[66] NV Energy approved Cox applications for 32 poles that met Grade B construction.[67] To date, Cox has only

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access where there is insufficient capacity or for reasons of safety, reliability, or generally applicable engineering purposes" and "the electric utility may make the final decision on such a matter").

[65] *See* Exhibit 10, National Electric Safety Code, C2-200, Section 1.010 Purpose; *see also* Local Competition Order ¶ 1147 (recognizing that NESC "is not intended as a design specification or an instruction manual" and also recognizing that "utilities typically impose requirements more stringent than those prescribed by NESC and other industry codes.")

[66] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 12.

[67] *See id*. at ¶ 13.

attached to 11 of these 32 poles.[68] Cox has not requested a final inspection from NV Energy on any of these 11.[69]

29. NV Energy denies the allegations of this paragraph. First, when a pole at issue is found to fail Grade B construction standards, it is NV Energy's policy to place the pole on a replacement list and change it out within a reasonable timeframe.[70] This policy applies to all attachers, regardless of the type of proposed attachment or service offered or provided over the attachment (including NV Energy's own construction).[71] Second, NV Energy has committed to change out poles "as soon as possible."[72] However, because in many instances the timeframe for replacement is dependent upon a variety of factors beyond NV Energy's control, including, for example, obtaining permits from the City of Las Vegas, the Nevada Department of Transportation, or the Nevada Bureau of Land Management, it is impossible for NV Energy to provide Cox with a specific timeline for pole change-outs.[73]

The timeline for pole replacement varies by pole location, is not a simple process, and can be effected by external factors beyond NV Energy's control.[74] For example, Cox submitted an attachment application for poles at Garces Ave between 6th and 8th streets.[75] Nine of the poles in the application failed Grade B analysis, so NV Energy initiated project 3000858402 to

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[68] *See id*. at ¶ 12.

[69] *See id*.

[70] *See id*. at ¶ 9.

[71] *See id*. at ¶ 10.

[72] *See* Cox's Declaration of Glenda Mills, Exhibit 5, November 20, 2014 e-mail from Elmer Herndon to Glenda Mills.

[73] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 9.

[74] *See* Exhibit 4 Declaration of Tania Jarquin ¶ 13.

[75] *See id*.

replace these nine poles.[76] The project duration, from start (assignment to NV Energy's design team) to finish (replacement by NV Energy's construction team) is expected to take 87 business days.[77] NV Energy assigned the project to its design team on October 13, 2014 and has a goal of completing the project on February 20, 2015.[78] Construction design, review, and approval took 25 days.[79] Lands approval took 14 days.[80] Government approval took 11 days, and it took 7 days to assemble the work order package.[81] After initiating a project to replace the poles in mid-October, NV Energy had a construction plan ready by mid-December.[82] Because this pole line traveled roadways, NV Energy had to submit a lane block request to a traffic barricade company on December 26, 2014.[83] The traffic barricade company must get approval from the City of Las Vegas and it submitted its plan to the city on December 31, 2014.[84] The traffic barricade company did not receive its approved traffic control plans until January 27, 2015.[85] NV Energy requested a renewal of the traffic control plans the same day because the approved plans expire on January 31, 2015.[86] NV Energy crews attempted to dig pole holes on January 20, 2015 but were shut down by a City of Las Vegas Inspector who claimed that NV Energy needed a city

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[76] *See id.*

[77] *See id.*

[78] *See id.*

[79] *See id.*

[80] *See id.*

[81] *See id.*

[82] *See id.*

[83] *See id.*

[84] *See id.*

[85] *See id.*

[86] *See id.*

permit to perform the work.[87] This is just one example of the many variables that effect pole change-out times.

30. To the extent Cox is alleging that NV Energy refuses to permit Cox to overlash on any pole until all poles are replaced, NV Energy denies that allegation. *See* e.g. response to paragraph 28. NV Energy lacks knowledge or information sufficient to admit or deny the remaining allegations of this paragraph and therefore denies same.

31. NV Energy lacks information or knowledge sufficient to admit or deny whether Cox is aware of any situations in which Cox's attachments at Grade C construction standards have created engineering, safety, or reliability issues, and therefore denies the allegations of this paragraph. Again, however, Cox misses the point. NV Energy, not Cox, has the authority and discretion to set engineering standards on its poles. NV Energy has exercised this discretion and authority in an effort to make its system more reliable and to protect the safety of NV Energy customers and the public at large. Even if, as Cox postulates, no Cox attachment caused any "engineering, safety or reliability issues," NV Energy would still be permitted to require Cox, and every other third-party attacher to its poles, to meet NV Energy's current engineering and construction standards.[88]

32. NV Energy denies the allegations of this paragraph. Cox's allegations are based on pure conjecture and could not be further from the truth. NV Energy has indeed implemented a system-wide program to upgrade its facilities.[89] NV Energy requires any and all new construction to be performed to Grade B construction standards.[90] NV Energy has logically

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[87] *See id*.

[88] *See* footnote 64.

[89] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ ¶ 5-10.

[90] *See id*.

chosen the pole attachment application process as one of many triggers for implementing its upgrade policy.[91] NV Energy also designs its poles to meet the NESC Grade B construction standard,[92] replaces non-compliant poles with Grade B poles before adding or upgrading overhead facilities,[93] and replaces non-compliant poles with Grade B poles in association with its own new business/capital projects.[94] Importantly, NV Energy's upgrade policy applies regardless of whether an applicant ultimately decides to attach to the pole at issue.[95]

33. NV Energy denies the allegations of this paragraph. As an initial matter, CenturyLink and Cox are not similarly situated, in that CenturyLink is a party to a Joint Use Agreement with NV Energy, while Cox is party to a Pole Attachment Contract with NV Energy.

Further, while Cox speculates that CenturyLink is not required to wait for pole upgrades prior to making new attachments, NV Energy is unclear how Cox reached this conclusion. Cox does not cite a single example of CenturyLink attaching to non-Grade B complaint NV Energy poles, and NV Energy is not aware of such a practice by CenturyLink. In addition, pursuant to the joint use agreement between CenturyLink and NV Energy (which predates the 1997 Agreement between the parties by more than thirty years), CenturyLink is required to notify NV Energy of its plan to construct or reconstruct facilities. Regardless, on July 9, 2014, NV Energy notified CenturyLink of its changed pole attachment application requirements and its policy requiring upgrade to Grade B construction standards.[96] As a result, NV Energy expects

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[91] *See id*. at ¶ 7.

[92] *See id*. at ¶ 5.

[93] *See id*.

[94] *See id*. at ¶ 7.

[95] *See id*. at ¶ 6.

[96] *See* Exhibit 9, July 9, 2014 Letter from Patricia Ortwein to Central Telephone Company.

CenturyLink to comply with these standards, and, should NV Energy discover that any NV Energy-owned joint use pole fails the Grade B construction standard it will replace the pole consistent with its policy of upgrading poles to the Grade B standard, regardless of what attaching companies may be impacted.[97]

34. NV Energy lacks knowledge or information sufficient to admit or deny the allegations of this paragraph and therefore denies same.

35. NV Energy lacks knowledge or information sufficient to admit or deny the allegations of this paragraph and therefore denies same.

Executive Level Discussions

36. NV Energy admits the allegations of this paragraph.

37-38. NV Energy admits that executive level meetings were conducted by the parties at the times and places identified in these paragraphs. NV Energy further admits that the individuals identified in these paragraphs were present. NV Energy denies the remaining allegations of these paragraphs.

39. NV Energy admits the allegations of this paragraph. However, noticeably absent from Cox's allegations is Ms. Ortwein's statement in her correspondence that NV Energy would compromise and eliminate the requirement that Cox obtain a Professional Engineering stamp for each pole attachment application. Ms. Ortwein also denied Cox's allegation that NV Energy is not providing equal access to Cox *vis a vis* CenturyLink,[98] and clarified that to the extent there

[97] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 13.

[98] *See* Exhibit 9, June 25, 2014 Letter from Patricia Ortwein to Glenda Mills ("NV Energy has considered the comments and suggestions received from Cox, including Cox's assertions that NV Energy is not providing equal access for Cox to its distribution poles, with the focus on NV Energy's agreement(s) with Century Link.")

was any perceived disparate treatment based on the requirement of a Professional Engineering stamp, the perception would no longer be warranted.[99]

40. NV Energy admits that Michael Bolognini sent a letter to Patricia Ortwein on July 15, 2014. NV Energy denies the remaining allegations of this paragraph.

41. NV Energy admits that Maria Browne sent a letter to Patricia Ortwein on October 8, 2014 and that this paragraph accurately quotes from that letter. NV Energy avers that the letter speaks for itself.

42. NV Energy admits the allegations of this paragraph.

43. NV Energy admits that Cox accurately quotes from Ms. Ortwein's November 20, 2014 e-mail. It is curious that Cox has chosen this particular exchange as an example of NV Energy's alleged refusal to permit overlashing. On the very same day, Elmer Herndon of NV Energy sent a follow-up e-mail to Glenda Mills to determine whether Cox wanted to proceed with licensing of poles that passed analysis. Indeed, it was Cox that was delaying its own attachments, not NV Energy. Mr. Herndon wrote:

> Glenda, I am touching base with you on our conversation last week regarding the applications for Warm Springs-Pollack to Placid and Warm Springs–Placid to Haven. When we spoke you were going to get back with me on the poles that passed analysis and indicate if you want me to proceed with licensing those poles.[100]

Mr. Herndon also explained that "NV Energy is in the process of designing the poles that failed analysis and will replace them **as soon as possible**."[101] (emphasis added).

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[99] *See id.* ("However, the requirement of obtaining a Professional Engineering stamp has been removed, which removes any and all perceived discrepancies in the requirements for Century Link to apply for attachment to NV Energy poles, and the requirements for Cox or any other competitive local exchange carrier to apply for attachment to NV Energy poles.")

[100] *See* Cox's Declaration of Glenda Mills, Exhibit 5, November 20, 2014 e-mail from Elmer Herndon to Glenda Mills.

[101] *See Id*.

44. NV Energy admits the allegations of paragraph 44.

IV. DISCUSSION

A. The Pole Attachment Act

45. NV Energy admits that Section 224(f)(1) of the Act requires utilities to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it" and further admits that section 224(b)(1) of the Act grants the Commission authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." NV Energy denies any remaining allegations in this paragraph.[102]

46. NV Energy admits the allegations in this paragraph and states that, similarly, the Act's preservation of an electric utility's right to "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" was intended to ensure protection of electric distribution networks. As the Commission recently stated, "section 224 entrusts [electric utilities] with the responsible management of facilities that are both essential and potentially hazardous."[103] Further, the Commission has correctly observed that "electric power companies…are typically disinterested parties with only the best interest of the infrastructure at heart."[104]

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[102] *See also* response to paragraph 10.

[103] *See In the Matter of Implementation of Section 224 of the Act A National Broadband Plan for Our Future*, 25 FCC Rcd. 11864, ¶ 67 (2010).

[104] *See id.* at ¶ 68.

47. NV Energy denies the allegations of this paragraph. NV Energy's policy of upgrading any pole found to be non-compliant with Grade B construction standards is not unjust, unreasonable, or discriminatory. To the contrary, NV Energy applies its policy of upgrading non-compliant poles to all attachers and does not complete any new construction on its own facilities without upgrading its poles to Grade B construction standards.[105] Where NV Energy is treating all similar attachers in the same manner, and applies the same requirements to itself, the policies at issue are clearly not discriminatory.[106] Further, NV Energy's Grade B construction requirement is not unjust or unreasonable because, as set forth in paragraph 18, *supra*, NV Energy implemented that requirement to address safety and reliability concerns related to local weather conditions, pole overloading, and NESC violations by third-party attachers.

B. NV Energy's Grade B upgrade policy is reasonable.

48. NV Energy denies the allegations of this paragraph. The NESC is a safety code that provides guidance–it is not the standard for construction on electric supply and communication lines.[107] The Commission has repeatedly noted that utilities are free to impose standards beyond the NESC.[108]

49. NV Energy admits that Part 24 of the NESC establishes various Grades of construction but denies that any of those Grades are the minimum "applicable" standard for the

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[105] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 10.

[106] In the 2011 Order, the Commission stated that a utility may not prohibit an attacher from using boxing, bracketing, or any other attachment technique where the utility, at the time of the request, employs such techniques itself. The converse must equally be true: when a utility requires a certain grade of construction for its own new construction or attachments, it must also be able to require adherence to that standard by third-party attachers.

[107] *See* Exhibit 10, National Electric Safety Code, C2-200, Section 1.010 Purpose; *see also* Local Competition Order at ¶ 1147 (recognizing that NESC "is not intended as a design specification or an instruction manual" and also recognizing that "utilities typically impose requirements more stringent than those prescribed by NESC and other industry codes.")

[108] *See* footnote 64.

poles at issue in this proceeding. NV Energy determines the standard that applies to its poles. NV Energy admits that Part 25 of the NESC establishes the strength and loading requirements for poles and overhead facilities under Grades B and C. NV Energy admits that the 1997 Agreement requires the parties to satisfy NESC standards of construction. However, NV Energy avers that the 1997 Agreement also requires Cox to comply with "any additional specifications of Licensor, as reasonably required in Licensor's sole judgment as may be required from time to time."[109]

50. NV Energy denies the allegations in the first sentence of this paragraph. Cox's allegations erroneously assume that (1) it stands ready and willing to deploy plant the moment its pole attachment application is approved by NV Energy; (2) it has successfully deployed plant on those occasions where attachment applications are approved; and (3) customers are ready and willing to purchase Cox's services the moment plant is deployed. The facts tell a very different story.

The first assumption is belied by the facts. Cox fails to mention the additional 32 poles NV Energy approved for attachment.[110] Of these 32 poles, Cox has only attached to 11.[111] Cox has not requested NV Energy's final inspection of its attachments on any of these 11.[112] Cox has performed no work on the remaining 21 poles, despite the fact that licenses for these 21 poles were issued between October 1 and December 1, 2014.[113] As for the second assumption, Cox has submitted no evidence that it attached plant to the benefit of Cox and its customers when its

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[109] *See* Exhibit 1, 1997 Agreement § 4.1.10.

[110] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 12.

[111] *See id.*

[112] *See id.*

[113] *See id.*

applications were approved. Third, Cox has submitted no evidence that any customer has been denied service (or that a customer has opted for service from another provider) because of NV Energy's failure to timely replace a pole. Instead, Cox offers the speculative and unfounded declarations of its executives explaining that "delaying…deployment…will prevent Cox from delivering services to Las Vegas businesses and residents seeking Cox's services." This allegation is not supported by any fact in the record.

NV Energy admits that Cox accurately quotes from the 2011 Order and states that while the Commission sought to "eliminate unnecessary costs or burdens associated with pole attachments," it also sought to take "into account legitimate concerns of pole owners and other parties that might be affected by additional attachments."[114]

51. NV Energy admits that Cox accurately quotes from the 2011 Order but states that pole change-outs are not subject to the make-ready timelines discussed in the 2011 Order. The Commission expressly noted the difference between make-ready work and pole change outs:

> "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. *See* 1977 Senate Report at 19, *reprinted in* 1978 U.S.C.C.A.N. at 127. A pole change-out is the replacement of a pole to accommodate additional users. *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, Report and Order, 2 FCC Rcd. 4387, 4388, para. 6 n.3 (1987) (*1987 Rate Order*), *recon. denied*, 4 FCC Rcd 468 (1989).[115]

The time frames adopted by the Commission in the 2011 Order apply to make-ready, not pole change-outs.

52. NV Energy admits that Cox uses the overlashing construction technique to deploy high-capacity fiber over pre-existing cable attachments. NV Energy lacks knowledge or information sufficient to admit or deny the purpose for which the high capacity fiber is deployed

[114] 2011 Order at ¶ 6.

[115] 2011 Order at n.388.

and therefore denies the remaining allegations of the first sentence of this paragraph. NV Energy admits that Cox cites accurately to portions of the Consolidated Partial Order on Reconsideration and *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 (1998) ("Reconsideration Order").

53. NV Energy denies the allegations of this paragraph. The parties' predecessors bargained for notice of overlashing in the 1997 Agreement[116] and "the FCC rules do not preclude owners from negotiating with pole users to require notice before overlashing."[117] The parties have adhered to that overlash notification policy since 1997. That policy did not generate a complaint from Cox (or its predecessor) until NV Energy implemented its Grade B policy. This proceeding is about structural capacity (loading), safety, reliability and generally applicable engineering principles, *not* overlashing.

54. NV Energy denies the allegations of the first sentence of this paragraph. NV Energy is expressly permitted by the 1997 Agreement and Commission authority, to implement prospective construction and engineering policies.[118] Cox fails to appreciate the difference between a utility requiring additional approval for overlashing and a utility changing its engineering standards. Still, Cox relies on authority that actually *authorizes* NV Energy to impose Grade B construction standards on new attachments. In paragraph 75 of the

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[116] *See* Exhibit 1, 1997 Agreement § 3.4 ("an application…is required to be submitted by Licensee to Licensor prior to making any attachment to Licensor's Poles"); and § 3.3 (defining "Attachment" as "any facility or equipment owned, leased, or controlled by Licensee which is attached to, or supported by Licensor's Poles…").

[117] *See* Reconsideration Order, ¶ 82 ("We agree that the utility pole owner has a right to know the character of, and the parties responsible for, attachments on its poles, including third party overlashers…We clarify that it would be reasonable for a pole attachment agreement to require notice of third party overlashing.").

[118] *See e.g.* Exhibit 1, 1997 Agreement §§ 4.1, 4.1.10; 2011 Order at ¶ 227.

Consolidated Order on Reconsideration, the same paragraph quoted by Cox, the Commission "clarif[ied] that third party overlashing is subject to the same safety, reliability and engineering constraints that apply to overlashing the host pole attachment."[119] NV Energy's policy regarding Grade B construction applies to all host attachments moving forward.[120] A grandfathered host attachment does not excuse future, proposed attachments from implemented utility policy. Further, it would constitute poor public policy if, as suggested by Cox, the Commission ruled that a utility can never improve upon its safety standards going forward due to the grandfathering of previous attachments.

Cox's allegation that a complete structural analysis is unreasonable is contrary to Commission authority which expressly authorizes utilities to require structural analyses for poles. The Commission has explained that "the specific processes for establishing such engineering specifications" are left "to individual utilities;"[121] consulting electric utilities are entitled to make final determinations in cases of disputes over capacity, safety, reliability, and generally applicable engineering purposes;[122] utilities "may insist that the work meet utility specifications for safety and reliability, including requirements that may exceed NESC standards;"[123] and "the details of specific application criteria and processes" are left to the individual utilities.[124] The Commission, while generally promoting overlashing, recognizes the need for structural capacity (loading) to be evaluated:

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[119] Consol. Order on Recon. at ¶ 75.

[120] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 10.

[121] 2011 Order at ¶ 25.

[122] 2011 Order at ¶ 59.

[123] 2011 Order at ¶ 58.

[124] 2011 Order at ¶ 73; *see also* Order and Further Notice of Proposed Rulemaking, *In the Matter of Implementation of Section 224 of the Act*; A National Broadband Plan for Our Future;

> Time Warner Cable of Kansas City *shall not* overlash its own lines or make new attachments 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 or attachment by Time Warner Cable of Kansas City, until the necessary pole change-out and/or make-ready for that pole is completed.[125]

NV Energy denies the allegations in the second sentence of this paragraph as well. Cox has offered no evidence that NV Energy's policy of upgrading construction to Grade B, a policy motivated by safety and reliability concerns, is preventing Cox from delivering services to contracted customers or other residents or businesses seeking Cox's services. The Commission should not undermine NV Energy's efforts to make its pole network safer and more reliable for the public based on unsupported factual allegations from Cox.

55. NV Energy denies the allegations of the first and second sentences of this paragraph. As previously explained, NV Energy has determined that Grade B construction is required to ensure the safety and reliability of its pole network given local conditions. NV Energy lacks knowledge or information sufficient to admit or deny the allegations in the third sentence of this paragraph and therefore denies same.

NV Energy admits that the average incremental load increase added by Cox's attachments can be less than or approximately 1%. However, this is not always the case. For example, on Cox's Garces and 8th Street application from August 19, 2014, the proposed

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WC Docket No. 07-245; GN Docket No. 09-51 (FCC 11-50) (May 20, 2010) (stating that "the most routine safeguards" to ensure safety prior to attaching to a pole include "verifying that the new attachment will not interfere with existing facilities, that adequate clearances are maintained, that the pole can safely bear the additional load, and that the attachment meets the appropriate safety requirements *of the utility* and the NESC.") (emphasis added).

[125] *In the Matter of Kansas City Power & Light Co. v. Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City*, 14 FCC Rcd. 11599, (1999); *see also In the Matter of Implementation of Section 703(e) of the Telecommunications Act*, 13 FCC Rcd. 6777 (February 6, 1998) ¶ 64 ("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.").

attachment would added 4-5% incremental load.[126] Moreover, if a pole lacks the structural capacity to accommodate another attachment (or is already loaded or over-loaded) adding even a 1% or less additional burden is an unwarranted risk.[127]

Because NV Energy does not perform an analysis of whether a pole satisfies Grade C construction standards,[128] NV Energy lacks knowledge or information sufficient to admit or deny whether Cox's proposed attachments would cause any particular pole to come out of compliance with existing NESC Grade C construction standards, and therefore denies these allegations.

56. NV Energy denies the allegations of this paragraph. NV Energy has not "opted to maintain its plant at Grade C construction." Instead, pursuant to its new Grade B construction requirement, NV Energy designs its poles to meet that standard,[129] replaces non-compliant poles with Grade B poles before adding or upgrading overhead facilities,[130] and replaces non-compliant poles with Grade B poles in association with its own new business/capital projects.[131]

57. NV Energy avers that the allegations of this paragraph are so vague and imprecise that it can neither admit nor deny them, and therefore denies same.

58. NV Energy denies the allegations of this paragraph.

C. NV Energy's Grade B upgrade policy is non-discriminatory.

59. NV Energy admits that CenturyLink is a joint user and pole owner in Nevada but denies that it "is not similarly required to wait until Grade C poles are upgraded before it is permitted to deploy plant." NV Energy denies that its requirement that poles be upgraded to

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[126] *See* Exhibit 4, Declaration of Tania Jarquin ¶ 11.

[127] *See id.*

[128] *See id.* at ¶ 12.

[129] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 5.

[130] *See id* at ¶ 5.

[131] *See id* at ¶ 7.

Grade B prior to new attachments by Cox is unreasonable. NV Energy also denies the allegations of the second sentence of this paragraph because its Grade B standard is not unreasonable and does not put Cox at a competitive disadvantage *vis-à-vis* CenturyLink because that standard is equally applicable to both Cox and CenturyLink.

NV Energy admits that Cox accurately quotes from paragraph 227 of the 2011 Order but avers that the quote is taken out of context. Rather than prohibiting prospective policies, the Commission actually approved such policies on the condition that the utility apply those standards at the time the attaching entity submits its attachment request.[132] The scenario described by the Commission in the 2011 Order (and discussed on p. 15 above) is exactly the scenario here: in December 2012, NV Energy notified attachers of the new policy and has, since that time, applied that standard uniformly and consistently to all cable/communications attachers.[133]

60. NV Energy denies the allegations in the first sentence of this paragraph. NV Energy has implemented a generally applicable, system-wide engineering program to upgrade its distribution poles to Grade B outside of the pole attachment application process.[134] NV Energy applies its Grade B construction policy to new construction.[135] NV Energy also upgrades poles discovered through the pole attachment application process even when the attaching entity ultimately decides not to attach to the pole.[136] For example, Zayo Group, LLC ("Zayo") submitted an application to attach to fourteen (14) NV Energy poles. Ten of these poles did not

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[132] 2011 Order at ¶ 227.

[133] *See generally* Exhibit 7 December 10, 2012 Letter from NV Energy to Cox.

[134] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ ¶ 5-10.

[135] *See id.*

[136] *See id.* at ¶ 6.

meet Grade B construction standards. Zayo ultimately withdrew its application and placed its lines underground. Nevertheless, NV Energy is proceeding with replacement of all ten poles and bearing the entire cost.[137]

Respectfully, Cox completely mischaracterizes the testimony of Mr. Johnny B. Dagenhart, and NV Energy therefore denies that the remainder of paragraph 60 accurately summarizes his declaration. Cox would have the Commission believe that Mr. Dagenhart testified that if NV Energy did not build to Grade B when it first built out its pole network, then NV Energy can never require Grade B construction on future projects. However, Mr. Dagenhart's actual testimony was that a utility cannot require attaching entities to meet Grade B construction if it does not hold itself to the same standard:

> If [a utility] chooses to keep the structures at Grade B, then they need to make arrangements to replace or rehabilitate those structures to regain the required capacity. This should be done regardless of whether or not Fibertech is going to make attachments. In the absence of Fibertech, BG&E should already be doing this.[138]

NV Energy follows the policy endorsed by Mr. Dagenhart. NV Energy holds itself to the same Grade B construction standards it imposes on attachers.[139] Further, whenever a non-compliant pole is discovered, NV Energy places the pole on the replacement list for a change-out, and accomplishes the change-out as soon as possible.

61. With regard to the first sentence of this paragraph, NV Energy denies Cox's articulation of utilities' obligations and therefore denies same. NV Energy denies the remaining allegations of this paragraph to the extent they imply that NV Energy's new policy of *upgrading*

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[137] *See* id. at ¶ 6.

[138] Dagenhart Decl. ¶ 18.

[139] *See* Exhibit 2, Declaration of Patricia Ortwein ¶ 10.

to Grade B construction standards renders non-compliant under the NESC every Grade C pole in NV Energy's pole network.

62. NV Energy denies the allegations of this paragraph.

V. COUNTS

Count 1: Unjust and Unreasonable Terms and Conditions of Attachment

63. NV Energy incorporates by reference as if fully set forth herein paragraphs 1 through 62 of this Response.

64. NV Energy denies the allegations in this paragraph. As set forth above, whether or not a proposed attachment would bring a pole out of compliance with any particular NESC standard is irrelevant. NV Energy has discretion under the parties' 1997 Agreement and Commission precedent to impose those engineering and construction standards it deems appropriate to ensure safety and reliability on its pole network--even if these standards exceed the standards set by the NESC.

65. NV Energy admits the allegations of this paragraph.

66. NV Energy denies the allegations of this paragraph. NV Energy's License Application Requirements are neither unjust nor unreasonable, and Cox has provided no evidence that they have resulted in the loss of any revenue or customer good will by Cox.

Count 2: Discriminatory Denial of Access

67. NV Energy incorporates by reference as if fully set forth herein paragraphs 1 through 66 of this Response.

68. NV Energy denies the allegations of this paragraph. As set forth above, NV Energy has deployed a system-wide program to upgrade its distribution poles to Grade B outside of the pole attachment application process. CenturyLink was notified of and is required to

comply with NV Energy's policy of upgrading poles to Grade B construction standards. There is no evidence that CenturyLink has deployed plant in contravention of NV Energy's policy or to the detriment of Cox. NV Energy has not discriminated against Cox in the application of its Grade B construction policy. Further, NV Energy has neither denied Cox access to any of its poles, nor has it denied Cox the opportunity to overlash on any of its poles. Instead, it has simply required that it have the opportunity to upgrade non-compliant poles to the Grade B standard before Cox attaches.

VI. COX'S REQUESTED RELIEF SHOULD BE DENIED

69. NV Energy respectfully requests that the Commission deny the relief sought in Cox's complaint and:

a. Declare as just, reasonable, and non-discriminatory NV Energy's Grade B construction requirements;

b. Affirm NV Energy's denial of Cox's overlashing to poles not in compliance with the Grade B construction requirement;

c. Grant NV Energy such other relief as the Commission deems just and necessary.

Respectfully submitted this 12th day of February, 2015.

/s/ J. Russell Campbell

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CERTIFICATE OF SERVICE

I hereby certify that on this the 12th day of February 2015, I have served the foregoing **CORRECTED RESPONSE TO POLE ATTACHMENT COMPLAINT** upon the following in the manner indicated below:

VIA ECFS
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