PUBLIC VERSION

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

REPLY TO RESPONSE TO POLE ATTACHMENT COMPLAINT

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: February 20, 2015

PUBLIC VERSION

TABLE OF CONTENTS

I. SUMMARY AND INTRODUCTION 1

A. Cox Should Be Permitted To Overlash Its Facilities Where Doing So Would Not Cause A Pole To Come Out Of Compliance With NESC Compliant Grade C Construction 5

1. Allowing Cox to overlash in compliance with the NESC is consistent with Commission precedent and generally accepted engineering standards. 6

2. NVE may not impose standards that exceeed the NESC except in a reasonable and nondiscriminatory manner. 9

B. NVE Has Not Identified Legitimate Safety Or Reliability Issues That Necessitate Grade B Construction. 11

1. NVE's purported reasons for adopting its Grade B policy are specious and unsupported. 11

2. NVE's decision to identify and upgrade to Grade B as non-compliant poles are encountered rather than pursuant to a carefully designed plan targeting critical or vulnerable pole locations belies NVE's alleged safety and reliability concerns. 15

C. NVE's Grade B Policy Discriminatorily Impacts Cox and Third Party Attachers, Other Than CenturyLink 18

II. JURISDICTION AND PARTIES 20

III. BACKGROUND AND FACTS 21

IV. DISCUSSION 37

A. The Pole Attachment Act 37

B. It is Unreasonable for NVE to Deny Cox's Proposed Overlashing Where Such Overlashing Would not Bring Poles Out of Compliance with Currently Applicable NESC Grade C Construction Standards 37

C. NVE's Refusal to Allow Cox 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 39

V. COUNTS 40

VI. RELIEF REQUESTED 41

PUBLIC VERSION

REPLY TO RESPONSE TO POLE ATTACHMENT COMPLAINT

Cox Communications Las Vegas, Inc. ("Cox") respectfully submits this Reply to the Response to Pole Attachment Complaint ("Response" or "Resp.") filed by Nevada Power Company, Inc. d/b/a NV Energy ("NVE").

I. SUMMARY AND INTRODUCTION

It is undisputed by NVE that the overlashing proposed by Cox in its 11 applications would not cause any of NVE's poles to fall out of compliance with the strength and loading requirements of National Electrical Safety Code (NESC). The NESC, a thorough and comprehensive set of safety rules governing the installation, maintenance and operation of overhead and underground electric supply and communications lines, prescribes Grade C construction standards for both electric supply and communications conductors, except in limited circumstances not applicable to Cox's applications. NVE admits that Cox has been building to NESC prescribed construction standards for 40 years and does not cite a single incidence of such construction leading to a safety or reliability event. Yet NVE has adopted a new Grade B policy, which it seeks to apply on as "as encountered" basis in a manner that would delay Cox's deployment of competitive broadband services until after poles are replaced. NVE does not offer any credible evidence to support its assertion that its new Grade B construction policy is "grounded in real world safety and reliability concerns (not mere hyperbole)." Accordingly, Cox should be allowed to overlash fiber to its cable facilities attached to NVE poles as long as it can do so consistent with construction standards prescribed by the NESC.

NVE does not dispute the benefits afforded by the overlashing construction technique or that the Commission has a longstanding policy against unreasonable restrictions on overlashing. Instead, NVE proffers that whether its recently adopted Grade B policy disparately impacts Cox's overlashing is "manifestly irrelevant" because overlashing must comply with the same safety, reliability and engineering standards governing the host attachment – standards that NVE asserts fall entirely within its discretion. In fact, the Commission's rulings do not give utilities unbridled discretion to adopt standards exceeding the NESC without regard to the impact on attachments. While the Commission has stated that utilities may choose to exceed the standards set forth in the NESC, it has also stated that utilities may do so only to the extent necessary to address legitimate safety or reliability concerns and then, only in a manner that is non-discriminatory and reasonably tailored to meet such concerns. NVE's Grade B policy fails on both accounts.

First, NVE has failed to establish that upgraded Grade B construction is necessary to ensure the safety or reliability of its pole plant. The tendered justifications for NVE's recent Grade B policy, including the alleged failure of third party attachments to meet governing NESC standards and intermittent high winds, are specious and wholly unsupported. If attachers truly are failing to comply with governing NESC requirements (which prescribe Grade C construction standards in most instances), then the most responsible, orderly and reasonable way to assure the continued safety and reliability of pole lines is to require compliance with the NESC. Tellingly, NVE's Response fails to identify a single safety or reliability issue caused by Cox's having *complied* with the NESC for the last 40 years in accordance with NVE's prior specifications. And, while NVE's Response refers to wind storms that "plague" its service area, it only points to one power outage in the last 10 years that resulted from a high wind event and does not assert,

much less show, that the outages resulted from NESC compliant construction or could have been prevented by Grade B construction. In fact, a newspaper article upon which NVE relies suggests that wind events result in downed trees (which are far more likely to bring down power lines) and not in downed poles. Nor does NVE allege that high wind events are any more frequent or severe today than they have been historically, thereby begging the question of how the winds factored into NVE's policy change at all.

Perhaps most revealing, while NVE admits that a substantial percentage of its 200,000 poles currently fail Grade B (close to 50 percent if Cox's applications are used as a measure), NVE does not believe the problem is urgent or dire enough to warrant the expense of a system wide inspection. Instead, NVE has opted to implement Grade B construction as non-compliant poles are encountered, either through third party applications or NVE's new business capital projects. The 60 poles in Cox's overlash applications confirmed by NVE as not meeting Grade B, even when added to the 110 poles identified by NVE outside of the third party application process, concern far less than one percent of the poles owned and controlled by NVE. Indeed, NVE's "as encountered" approach – which has resulted in 25 poles (.01 percent of its plant) being replaced in a 9 month time span – belies NVE's assertions that its new policy is necessary to address exigent safety and reliability concerns.

Second, even if NVE's upgrade to Grade B construction could be shown to be necessary to address actual safety and reliability problems, NVE's decision to apply the new Grade B policy to poles "as they are encountered" is unreasonable and discriminatory, and must not be countenanced by the Commission. NVE's reliance upon NESC Rule 214, which allows utilities to address NESC non-compliance in the ordinary course, to justify its as-encountered approach is

misplaced and misleading. Rule 214 does not apply where, as here, a utility is seeking to exceed the NESC requirements. Moreover, Rule 214 would permit Cox's overlashing to proceed in advance of addressing the purported non-compliance, as long as the overlashing would not endanger life or property, something that NVE has not alleged, much less supported, in its Response. NVE admits that "overlash loads are typically small compared to the loads that already exist on a pole." Indeed, Cox's proposed overlashing will effectuate, on average, a one percent increase to the existing load and in the worst case, a 4-5 percent increase, to the existing load. As shown in the PAR Electric loading studies included by Cox with its Complaint, some of NVE's existing non-compliant poles have loads (prior to Cox's proposed overlashing) that exceed Grade B construction standards by more than 100%. And one regulatory body has instructed utilities to stand down where overlashing does not incrementally increase loads by more than 20% for existing strand tensions (such as Cox's) that do not exceed 1,750 pounds.

If safety and reliability concerns exist that truly warrant immediate implementation of Grade B construction, then NVE should invest the necessary resources to inspect its entire system and devise a plan to ensure that the most vulnerable poles (e.g., those near tall trees or that are more heavily loaded) or critical poles in NVE's footprint (e.g., those on main feeder routes or serving critical infrastructure) are prioritized. In Florida, for example, where utilities were asked to upgrade plant beyond NESC compliant Grade C construction to address widespread hurricane related outages, storm hardening plans were adopted to prioritize plant upgrades based on power grid demands (including service to critical community infrastructure) and attachers were included in, not penalized by, such plans.

Cox is equally vested in the integrity of the pole plant to which its facilities are attached and in ensuring that NVE's power system, upon which Cox and its customers depends, is reliable. At the same time, Cox is seeking to deploy high capacity fiber to deliver advanced communications services to Las Vegas residents and businesses. It is doing so in competition with CenturyLink, a company that is not similarly constrained by NVE's policies. For these reasons as well as those set forth in the Complaint, Cox's request relief should be granted.

A. Cox Should Be Permitted To Overlash Its Facilities Where Doing So Would Not Cause A Pole To Come Out Of Compliance With NESC Compliant Grade C Construction

NVE admits that half the poles on Cox's applications do not currently meet Grade B construction and that Cox's proposed overlashing, which on average increases the overall pole loading by no more than 1 percent, would not bring the poles out of compliance with existing NESC compliant Grade C construction. At the same time, NVE does not allege or produce a single piece of evidence that Cox's, or any other third party attacher's, constructing to NESC Grade C standards over the last 40 years has resulted in a single safety or reliability incident. Moreover, in choosing to implement its new Grade B policy only as poles are encountered, NVE has chosen to focus on a minute percentage of its 200,000 poles per year (less than 1 percent), belying any urgent life threatening situation that would require remediation prior to working on the poles. Yet, NVE argues that it is entirely reasonable to delay Cox's delivery of competitive advanced services to Las Vegas residents and businesses until such time as any non-Grade B compliant pole is replaced, a time period that NVE asserts cannot be quantified with any precision. NVE's position is not reasonable, restricts overlashing in contravention of established Commission precedent, and must not be countenanced.

1. Allowing Cox to overlash in compliance with the NESC is consistent with Commission precedent and generally accepted engineering standards.

For more than 20 years, the Commission has supported overlashing as an effective and pro-competitive means for expeditious deployment of advanced services. As long ago as 1995, the Commission cautioned utilities against unreasonably restricting overlashing, and anticipated that utilities might do so by raising unsubstantiated safety or reliability concerns.[1] Several years later, the Commission noted its continued support of its "policy that encourages overlashing," and stated: "[T]o the extent that it does not significantly increase the burden on the pole, overlashing one's own pole attachment should be permitted without additional charge."[2]

NVE argues that Cox freely agreed to NVE's overlashing application process and that it has never objected to its notification requirements as though this somehow prevents Cox from addressing the unfair impact of NVE's Grade B policy on Cox's overlashing today.[3] Putting aside the FCC's sign and sue rule (which recognizes that pole attachment agreements are often contracts of adhesion), Cox's willingness to conduct loading studies and work with NVE to ensure that its overlashing complied with the NESC should not be viewed as a concession. If anything, it further distances Cox from NVE's vague allegations of third party non-compliance

---

[1] *See Common Carrier Bureau Cautions Owners of Utility Poles*, Public Notice, DA 95-35, 1995 FCC LEXIS 193 (CCB Jan. 11, 1995) ("While legitimate safety issues may justify certain precautions relating to fiber upgrades, we are concerned that there could be serious anticompetitive effects from preventing cable operators from adding fiber to their systems. Without prejudging any pending or future matters concerning cable pole attachments, we hereby affirm our commitment to ensuring that the growth and development of cable television facilities is not hindered by unreasonable conduct on the part of utility pole owners.").

[2] *In re 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, CS Docket No. 97-151, 13 FCC Rcd 6777 ¶ 64 (1998).

[3] Resp. ¶ 18.

with the NESC. Moreover, it is not uncommon in the industry for attaching entities to overlash their facilities without being required to reapply. Cox's pole application process with CenturyLink, for example, does not require Cox to do further loading calculations when it proposes to overlash.[4] Similarly, Boulder City Power does not require Cox to perform further loading calculations when it proposes to overlash.[5] Such agreements recognize that third party attachers are equally concerned with safety and pole plant integrity as pole owners.

Additionally, some state regulatory bodies, most notably the New York Public Service Commission, allow attachers to overlash without pole owner consent so long as the incremental load addition falls within certain parameters. In its 2004 Policy Statement on Pole Attachments, the State of New York Public Service Commission established that "[a] predetermined, limited amount of overlashing, that is not a substantial increase to the existing facilities, shall be allowed," because, "[t]ypically, a fiber cable overlashed to an existing coaxial cable facility with a common trunk and feeder cable configuration adds very little to the existing facility's overall weight and bundle diameter."[6] More specifically, an attaching entity may overlash if it does not exceed thresholds set out in the Policy Statement: "An Attacher, whose facility has a pre-existing NESC calculated span tension of no more than 1,750 lbs., shall be allowed to overlash a pre-determined maximum load of not more than 20% to the existing communications facility.

---

[4] Attachment B, Declaration of Tammy Treadway in Support of Reply to Response to Pole Attachment Complaint dated February 20, 2015 ("Treadway Reply Decl.") ¶ 4.
[5] *Id.*
[6] *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Policy Statement on Pole Attachments, Case 03-M-0432, 2004 N.Y. PUC LEXIS 306 (Aug. 6, 2004). The New York Commission's Policy Statement went on to state that "[a]n analysis shall be conducted by the primary Attacher whose facilities are being overlashed. That analysis shall assure that the primary facilities and those overlashed are in compliance with the NESC." *Id.*

Existing facilities with an NESC calculated span tension of less than 1,000 lbs. shall be allowed a pre-determined overlash of up to 40% of such pre-existing facilities."[7]

As demonstrated in Cox's Complaint and admitted by NVE in its Response, the average incremental load increase of the proposed overlashing is just 1 percent,[8] and only 4-5 percent in the worst case, as identified by NVE.[9] In contrast, some NVE poles identified in Cox's commissioned loading studies already exceed Grade B by more than 100 percent. As set forth above, New York would allow up to a 20 percent incremental load increase where, as here, the span tensions do not exceed 1,750 lbs. Accordingly, even a 5 percent additional load proven to comply with NESC Grade C construction does not warrant delaying Cox's overlash until after the pole is upgraded to Grade B construction. Consistent with NVE's admission that "overlash loads are typically small compared to a pole's existing load,"[10] experts agree that the impact of overlashing on loading is *de minimis*.[11]

---

[7] *Id. See also* 30-07 Vt. Code R. §3.708(I)(1) ("No additional application or payment is required for an Attaching Entity to overlash more of its facilities to its existing attached facilities, unless it necessitates additional costs such as guying or additional pole strength, occupies additional attachment space on the pole, or provides a different utility service than the existing facilities.").
[8] Compl. ¶ 26.
[9] Response ¶ 26.
[10] *Id.*
[11] "In my experience third party attachments do not significantly increase the load on poles, and overlashing has only a very small incremental effect on the already attached strand and cable assembly. Rather, power lines, hardware for attaching lines to poles and power apparatus such as transformers, fused switches, lightning arrester assemblies, outdoor lights and many other power company attachments usually account for most of the wind load on a pole . . . . Thus, overlashing will not in the large majority of cases bring a pole out of compliance." Direct Testimony of Michael T. Harrelson on Behalf of the Florida Cable Telecommunications Association, Inc., *In re Review of 2007 Electric Infrastructure Storm Hardening Plan Filed Pursuant to Rule 25-6.0342, F.A.C., Submitted by Progress Energy Florida, Inc.*, FL PSC Docket No. 070298-EI at 16 (filed Sept. 7, 2007), *available at* http://www.floridapsc.com/library/FILINGS/07/08149-07/08149-07.pdf.

Moreover, NESC Rule 214, upon which NVE relies to justify its "as encountered" approach, does not require that all non-compliance be corrected immediately upon discovery or even before additional work is performed on the pole. As expressed by Allen Clapp, the author of the preeminent handbook interpreting the NESC,

> Whether the correction work can be scheduled at a convenient time or must be performed as soon as practical depends upon the nature of the noncompliant conditions. Similarly, whether new work can be performed before correction of a noncompliant condition depends upon the type of noncompliance and the nature of the new work.[12]

Thus, under this rule, it is entirely appropriate to permit Cox's NESC compliant overlashing in advance of NVE's Grade B upgrade. Once a new pole is installed, Cox will transfer its overlashed facilities to the new structures.

2. <u>NVE may not impose standards that exceed the NESC except in a reasonable and nondiscriminatory manner.</u>

NVE defends its Grade B policy by citing to the Commission's statements that utilities may, in certain circumstances, impose standards that exceed the NESC.[13] However, the Commission's recognition of the need, in some cases, for utilities to impose higher standards to meet legitimate safety or reliability concerns, are not tantamount to statements that utilities may unilaterally adopt standards that disparately impact third party attachments or roadblock overlashing. In fact, in the 2011 order in which it stated that a utility "may insist that [attaching entities' contractors'] work meet utility specifications for safety and reliability, including

[12] NESC Handbook, Appendix F at 756 (Allen L. Clapp ed., 7th ed.).
[13] Response at ¶ 54 (citing *In re Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245; GN Docket No. 09-51, 26 FCC Rcd 5240 ¶ 58 (2011)).

requirements that may exceed NESC standards," the Commission prefaced that very statement with the phrase, "[c]onsistent with the nondiscrimination requirement in section 224(f)(1)."[14] Similarly, in other instances where the Commission has acknowledged the potential legitimacy of utility standards that exceed the NESC, it has made clear that such requirements must be necessary to meet legitimate safety and reliability concerns.[15]

This makes sense given the wide number of entities that rely upon the NESC as the standard bearer for safety and reliability. Indeed, at 100 years old, the NESC has long been recognized as a thorough and comprehensive set of safety rules for the installation, maintenance and operation of overhead and underground electric supply and communications lines. It has been adopted by state legislatures, public service commissions, and other regulators, and it forms the basis of the rules and practices for power and communication utilities alike.[16] As explained in the NESC Handbook, where utilities adopt construction specifications beyond the rules provided in the NESC, such construction specifications are for "*reasons other than safety*" – i.e., the rules set forth in the NESC are alone sufficient to "effect reasonable and adequate safety in the

---

[14] *Id.*

[15] *See, e.g., In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket Nos. 96-98; 95-185, 11 FCC Rcd 15499 ¶ 1158 (1996) ("we reject the contention of some utilities that they are the primary arbiters of such [capacity, safety, reliability, or engineering] concerns, or that their determinations should be presumed reasonable…. ."). *See also* Attachment A, "Supporting Authority Concerning Overlashing."

[16] *See, e.g.*, N.H. CODE ADMIN. R. ANN. PUC 1303.07(a) ("All attachments shall be installed in accordance with the National Electrical Safety Code, 2007 edition, …."); 30-007 VT. CODE R. § 3.701(C) (stating that "nothing in this Rule [governing pole attachments] shall be construed to supersede, overrule, or replace any applicable safety code (including the National Electrical Safety Code [NESC])"; N.C. GEN. STAT. § 62-350(a) ("In granting a [pole attachment] request under this section, a municipality or membership corporation shall require the requesting entity to comply with applicable safety requirements, including the National Electrical Safety Code….").

construction, operation, and maintenance of electric supply and communications facilities."[17] As set forth below, NVE has not demonstrated why its new Grade B policy is necessary to address any legitimate safety or reliability issues.

B. NVE Has Not Identified Legitimate Safety Or Reliability Issues That Necessitate Grade B Construction.

NVE's Response relies heavily upon Commission statements that utilities may exceed the requirements of the NESC where doing so is necessary to meet safety and reliability concerns. And yet, while NVE states more than 20 times in its Response that its decision to apply Grade B construction standards is to ensure the *safety* and *reliability* of its pole network, NVE fails to produce a single example of NESC compliant construction or overlashing that has given rise to a safety or reliability problem warranting Grade B construction. Indeed, notwithstanding its protestations to the contrary, a closer look at NVE's assertions and pictures reveals that, in fact, NVE's statements are nothing more than hyperbole.

1. NVE's purported reasons for adopting its Grade B policy are specious and unsupported.

NVE alleges that the "catalyst" underlying its decision to move to Grade B construction included non-NESC compliant practices of third party attachers, "intermittent and dangerous wind storms," and "a need to identify and enforce specific engineering regarding the structural integrity of its poles."[18] However, its Response and supporting declarations are entirely devoid of facts connecting NVE's ostensible need to exceed NESC construction standards to NESC

[17] NESC Handbook at 5 (Allen L. Clapp ed., 7th ed.) (emphasis added). "In essence, the rules of the NESC give the basic requirements of construction that are necessary for safety. If the responsible party wishes to exceed these requirements for any reason, he may do so for his own purpose, *but need not do so for safety purposes.*" *Id.*

[18] Resp. 4.

compliant third party construction or to weather related events. (That some attachers may be constructing without regard to the NESC's requirements is an entirely different issue.)

For example, NVE includes three images of what it describes to be "examples of such [third-party attacher] loading and NESC violations."[19] In fact, only one of these images purportedly depicts an overloaded pole, but even that image begs the question whether, if NESC loading requirements had been met, the attachments would have raised any problems at all. Moreover, neither the Complaint nor the supporting declaration indicate whether Cox's facilities are on the pole or had anything to do with the alleged NESC loading violation (nor was Cox able to investigate the allegations because the pole number and location are not provided). The other two images purport to present inadequate guying techniques that resulted in pole problems but, once more, these images beg the question: if guying had been performed consistent with the NESC, would the poles still have been problematic? Again, with respect to those two images, NVE does not attribute the NESC violations to Cox. Indeed, the only violations attributed to Cox in the entire Response are included in Ms. Jarquin's affidavit and concern Cox's down guy wires being attached to one eyed (as opposed to three eyed) anchors. Even if this did violate the NESC (it does not – the NESC only requires that Cox be attached to an open eye), NVE offers absolutely no basis on which to link this practice to the need for Grade B construction.

In contrast to the inapt and alarmist images included in NVE's Response, the PAR loading studies included with Cox's Complaint include pictures of each of the 137 the poles with Cox facilities attached to which Cox is seeking to overlash.[20] Notably, none of the images included in

[19] Compl. ¶ 18; Jarquin Decl. ¶ 5 (citing Exhibit A).
[20] Complaint at Attachment D, Declaration of Glenda Mills, at Exh. 3.

the PAR loading calculations shows any problems comparable to the unrelated images presented in the Response. If anything, the Response suggests that certain attachers other than Cox have been engaging in non-NESC compliant construction on NVE poles and that such non-compliant construction needs to be addressed.[21] Indeed, in further investigating the allegations raised by NVE in the Response, Cox identified several examples of other attachers constructing plant on NVE poles without regard to NESC loading requirements.[22] If certain attachers are failing to comply with the NESC, the obvious solution is to ramp up efforts to enforce the NESC, not adopt standards that exceed the NESC.

Similarly, while NVE purports to justify its new Grade B policy with references to "intermittent" and "high wind events that have caused pole failures impacting roadways,"[23] NVE's citations to three online news stories about events occurring in 2006, 2012 and 2013 (in a footnote[24]) do not come close to supporting its assertion. First, only one of the stories mentions power outages that occurred during a single weather event in the last ten years. In states such as Florida, where documented weather related power outages were far more frequent and severe, the costs and benefits of exceeding NESC Grade C construction were thoroughly debated by utilities, attachers, regulators and consumer groups. Certain of the Florida utilities resisted being required to exceed NESC standards.[25] And, in a docket opened to consider whether Florida Public Utility

[21] Resp. ¶ 18.
[22] Attachment C, Declaration of Gary Auvil dated February 20, 2015 ("Auvil Reply Decl.") ¶¶ 4, 5.
[23] Response at 4, and 16, ¶ 18.
[24] Resp. at fn. 1.
[25] *See, e.g.*, Progress Energy, Storm Hardening Plan 2007-2009, Exhibit JC-1T to Direct Testimony of Jason Cutliffe, Progress Energy Florida, Inc., *In re Review of 2007 Electric Infrastructure Storm Hardening Plan Filed Pursuant to Rule 25-6.0342, F.A.C.*, Submitted by

Company should replace poles to meet construction standards exceeding the NESC, Florida's consumer advocate described the resulting accelerated pole replacement policy as "unreasonable and uneconomical."[26]

Second, as implied by the third article referenced by NVE, high winds are far more likely to topple trees than poles. Trees in turn can snap overhead electrical lines, regardless of the strength of the pole. This phenomenon was addressed extensively by Mr. Michael T. Harrelson in testimony presented to the Florida Public Service Commission in connection with dockets opened to consider the costs and benefits of hardening utility plant to address hurricanes. Mr. Harrelson explained that "the common causes of hurricane related pole failures are falling trees, flying tree

---

Progress Energy Florida, Inc., FL PSC Docket No. 070298-EI at 4 (filed Aug. 24, 2007), available at http://www.psc.state.fl.us/library/filings/07/07583-07/07583-07.pdf ("PEF has extensive service experience with Grade C and Grade B construction standards as defined by the NESC. That experience, which includes the 2004 and 2005 hurricane seasons and other severe weather events, indicates that properly constructed and maintained distributions lines meeting all provisions of the NESC perform satisfactorily and provide a prudent and responsible balance between cost and performance."); Direct Testimony of Mickey Gunter on Behalf of Progress Energy Florida, Inc., *In re Review of 2007 Electric Infrastructure Storm Hardening Plan Filed Pursuant to Rule 25-6.0342, F.A.C.*, Submitted by Progress Energy Florida, Inc., FL PSC Docket No. 070298-EI at 7 (filed Aug. 24, 2007), available at http://www.psc.state.fl.us/library/filings/07/07584-07/07584-07.pdf. ("I have over 38 years of distribution engineering experience and have worked many storms related to high winds such as tornadoes, hurricanes, etc. Based on my experience, I don't recall ever having seen any hard data or evidence to suggest that distribution poles fail due to high winds only …. Instead, my experience, as well as those of utilities from around the country, shows that distribution poles and facilities generally fail in high wind conditions due to trees, tree limbs, and flying debris.").

[26] Direct Testimony of Patricia W. Merchant, CPA expert on behalf of the Citizens of the State of Florida, *Review of 2007 Electric Infrastructure Storm Hardening Plan*, FL PSC Docket No. 070300-EI, at 7:24-8:5 ("the Company's storm hardening proposal regarding an accelerated pole replacement program is unreasonable and uneconomical. Accelerated pole replacement is not necessary to comply with the Commission's rule or orders. Furthermore, accelerated pole replacement denies the rate payer the benefit of using the existing poles that have no integrity concerns or other construction requirements to be retired prior to the expiration of the useful lives. . . . .").

limbs and building debris, soft soil made worse by heavy rains, weak guy failure, rotten pole failure, and finally wind force on poles, lines and attachments."[27]

Finally, NVE's half-hearted attempt to justify its policy as necessary to prevent traffic problems is simply not credible. Nearly every investor owned utility has plan located near heavily travelled roadways. NVE has not supplied any evidence that it has focused any of its upgrade efforts on pole located in "close proximity to heavily traveled roadways and highways."[28] Indeed, NVE could have implemented a plan to identify and upgrade poles located in areas that were more likely to give rise to true safety or reliability concerns – such as poles located near heavily travelled roadways or on main feeder routes, or in areas surrounded by tall trees, or serving critical infrastructure facilities such as hospitals – but it did not. It chose instead to identify Grade C poles "as encountered" primarily through the third-party application process.

2. <u>NVE's decision to identify and upgrade to Grade B as non-compliant poles are encountered rather than pursuant to a carefully designed plan targeting critical or vulnerable pole locations belies NVE's alleged safety and reliability concerns.</u>

NVE concedes that half of the poles in Cox's applications do not meet the strength and loading requirements of the Grade B construction standards without regard to Cox's proposed overlashing.[29] NVE also states that it did not begin requiring Grade B construction until

---

[27] Direct Testimony of Michael T. Harrelson on Behalf of the Florida Cable Telecommunications Association, Inc., *In re Review of 2007 Electric Infrastructure Storm Hardening Plan Filed Pursuant to Rule 25-6.0342, F.A.C., Submitted by Progress Energy Florida, Inc.*, FL PSC Docket No. 070298-EI at 16 (filed Sept. 7, 2007), *available at* http://www.floridapsc.com/library/FILINGS/07/08149-07/08149-07.pdf.

[28] Resp. ¶ 18.

[29] Resp. ¶ 22.

December 2012,[30] and thus it is reasonable to deduce that a comparable percentage of NVE's 200,000 poles do not currently meet Grade B. Nevertheless, rather than surveying the poles in its footprint to determine which poles fail Grade B and by how much, or identifying specific areas within its footprint that might be particularly vulnerable because, for example, they are located near tall trees or near heavily trafficked roadways or comprise main feeder routes or serve critical infrastructure, NVE chose instead to implement its new construction standard as the poles "are encountered" either through the third party application process or in connection with NVE's new business/capital projects.[31] In so doing, NVE appears to have relegated this supposedly necessary endeavor to the very bottom of its priorities.

Consider the numbers: NVE admits that since 2013, Cox has applied to attach to only 268 NVE poles (99 in 2013 and 169 in 2014). Thus, annually, Cox's applications concern less than **.01** percent of NVE's poles. NVE asserts that in the last nine months it has replaced 25 poles in connection with its upgrade policy.[32] At this rate, by the turn of the century (2100), NVE will have upgraded nearly 3,000 poles (or 1.5% of its entire system). Clearly, there is no urgency to NVE's Grade B upgrade plans.

In defense of its "as encountered" approach, NVE relies upon NESC Rule 214, which allows utilities to forego system wide inspections for certain types of NESC non-compliance and instead to identify and correct such non-compliance in the ordinary course of work performed on

[30] Ortwein Dec. at ¶ 5 ("Since imposing the NESC Grade B construction requirements in 2012, NV Energy designs it poles to meet the NESC Grade B construction standard…").
[31] Resp. ¶ 21.
[32] Resp. ¶ 21.

the poles.[33] First, NVE's reliance upon Rule 214 to implement its Grade B policy is both ironic, because NVE is relying on an NESC inspection standard to justify imposing standards that exceed the NESC, and telling, because, as set forth above, it belies NVE's assertions that Grade C compliant construction is necessary to address real world safety and reliability concerns. Where real weather related loading concerns have been deemed to exist, utilities have adopted system wide plans to prioritize feeder routes and lines serving critical infrastructure to ensure that power outages were least likely to occur where it mattered most.[34] And, if NVE truly were concerned, as it states, about downed poles causing problems in urbanized areas of Clark County that are in close proximity to heavily travelled roadways and highways, it could have limited its inspection to that area and engaged in an upgrade plan that addressed the most heavily loaded poles or poles located near tall trees, which are more likely to become an issue in high wind storms.

Second, to the extent Rule 214 does apply, NVE has no basis for delaying Cox's overlash until after the poles are upgraded. Rule 214 subparts (4) and (5) instruct utilities concerning the scheduling of compliance work on lines in service – only non-compliance that "would reasonably be expected to endanger life or property" shall be "promptly corrected;" other non-compliance can be recorded and "designated for correction." In response to "two recurring questions" posed about whether new work can be performed before correction of a non-compliant condition, an Appendix F was added to the NESC Handbook stating, "whether new work can be performed before correction of a noncompliant condition depends upon the type of noncompliance and the

[33] *Id.*
[34] *See, e.g.*, Storm Hardening Reports by Florida's Municipal and Cooperative Electric Utilities pursuant to Rule 25-6.0343, F.A.C.

nature of the new work."[35] In this instance, the non-compliance identified by NVE is not a violation of the NESC – in fact, "in no instance would CCI-LV's proposed overlashing cause any of the poles included on CCI-LV's applications to come out of compliance with the strength and loading requirements for either Grade C or Grade B construction standards."[36]

C. NVE's Grade B Policy Discriminatorily Impacts Cox and Third Party Attachers, Other Than CenturyLink

The Response clarifies that NVE initially did not seek to apply its new Grade B policy either to CenturyLink (its joint user), or to itself. Specifically, NVE states that it did not notify CenturyLink of its new Grade B policy, implemented in December 2012, until July 2014.[37] Interestingly, this corresponds to the point in time shortly after Cox began complaining to NVE about NVE's discriminatory Grade B policy.[38] And, NVE states that, outside of the attachment process, since April 2014, it has identified 110 poles in connection with its own work that require replacement.[39] Curiously, NVE's statement does not account for the nearly one and a half years after NVE's policy was adopted in December 2012 and the time that NVE first identified non-Grade B compliant poles outside the third party application process.

---

[35] NESC Handbook at 225 (discussion of Rule 214) & Appendix F at 756 (Allen L. Clapp ed., 7th ed.).
[36] Compl. ¶ 26; Resp. ¶ 26. NVE attempts to argue that Rule 243 requires all facilities on a pole to be built to Grade B if Grade B is required. However, Rule 243 is referring to the requirements imposed by Rule 242. As set forth in Table 242.1, Grade B construction is only required over railroad tracks and limited access highways and navigable waterways, or if open electrical supply facilities exist on the poles. Supply cables are not considered to be "open conductors" as long as they are (1) effectively grounded or (2) are shielded and designed to operate on a multi-grounded system at 22 KV or less. *See* NESC Rules 242, 241.A. and 230.C.
[37] Resp. ¶ 33.
[38] Complaint at Attachment A, Declaration of Michael Bolognini at Exh. 2.
[39] Resp. ¶ 21.

In fact, the Response clarifies that CenturyLink is not required to submit applications for overlashing and instead may overlash upon notification to NVE. Cox's independent research confirms that CenturyLink is not conducting loading analyses prior to overlashing and is not overlashing in compliance with Grade B (or in some cases Grade C) standards.[40] Needless to say, this puts Cox at a distinct disadvantage vis a vis CenturyLink, Cox' primary competitor in Las Vegas, and has resulted in lost business.[41]

Clearly NVE is applying its Grade B Policy in a way that unreasonably and discriminatorily impacts Cox's efforts to deploy high capacity fiber and deliver competitive advanced services to Las Vegas residents and businesses in contravention of this Commission's long standing prescription against unreasonable overlashing restrictions.

For these reasons, the Commission should promptly reject NVE's arguments, grant Cox's Complaint, and order NVE to allow Cox to proceed with its overlashing as long as it can do so consistent with NESC construction requirements.

* * * * *

In the following, Cox will respond to specific points raised in NVE's Response on a paragraph-by-paragraph basis. To avoid repetition, Cox will refer back to the foregoing and common answers where appropriate.

[40] Auvil Reply Decl. ¶ 4 & Exh. 1.
[41] Attachment D, Declaration of Michael Bolognini dated February 20, 2015 ("Bolognini Reply Decl.") ¶¶ 4, 5.

II. JURISDICTION AND PARTIES

1. The Commission, not the Public Utility Commission of Nevada ("PUCN"), has jurisdiction over Cox's claims. NVE has not made any argument as to the PUCN would have jurisdiction over this dispute.

2. NVE does not deny that it is required to provide Cox with non-discriminatory access to its poles.

3. No further response required at this time.

4. No further response required at this time.

5. No further response required at this time.

6. No further response required at this time.

7. On February 4, 2015, Cox filed a Consent Motion for Substitution of Parties to substitute Nevada Power Company, Inc. d/b/a NV Energy in the place and stead of Respondent NV Energy, Inc., which motion was granted in a February 11, 2015 order. The Consent Motion noted that the parties agree that all of the allegations in the Pole Attachment Complaint alleged conduct and concerned poles owned by Nevada Power Company, Inc. and therefore a substitution of the parties is sufficient.

8. No further response required at this time.

9. No further response required at this time.

10. The Commission, not the PUCN, has jurisdiction over Cox's claims. NVE has not made any argument as to the PUCN would have jurisdiction over this dispute.

11. No further response required at this time.

III. BACKGROUND AND FACTS

12. No further response required at this time.

13. No further response required at this time.

14. No further response required at this time.

The Pole Attachment Agreement and NVE's Initial Attachments

15. No further response required at this time.

16. As NVE points out, Section 4.1.10 of the 1997 Agreement states that any additional specifications adopted by NVE (in this instance, the new Grade B construction policy) must be "as *reasonably* required." NVE's policy is not reasonable. Similarly, while the Commission has stated that utilities may choose to exceed the standards set forth in the NESC, they may do so only to the extent necessary to address legitimate safety or reliability concerns and then, only in a manner that is non-discriminatory and reasonably tailored to meet those concerns. As the Commission stated in its Local Competition Order: "we reject the contention of some utilities that they are the primary arbiters of such [capacity, safety, reliability, or engineering] concerns, or that their determinations should be presumed reasonable…. [S]ection 224(f)(1) in particular reflects Congress' intention that utilities must be prepared to accommodate requests for attachments by telecommunications carriers and cable operators." *Local Competition Order*, ¶ 1158. As set forth herein, NVE's Grade B policy is not reasonable or non-discriminatory, because: a) NVE has failed to establish that upgraded Grade B construction is necessary to ensure the safety or reliability of its pole plant; and b) even if NVE's upgrade to Grade B construction could be shown to be necessary to address actual safety and reliability problems, NVE's decision

to apply the new Grade B policy initially only to Cox's overlash applications and later only to poles "as they are encountered" is unreasonable and discriminatory.

17. NVE's "response" is not responsive to Cox's allegation. Cox's allegation is as to the grade of construction required by the NESC, not by NVE's new policy. Moreover, NVE's quote of the language of NESC Rule 243A is misleading. NVE attempts to argue that Rule 243 requires all facilities on a pole to be built to Grade B if it says so. Rule 243A's requirement that "the grade of construction shall be that required for the highest grade of conductors supported" refers back to the grade of construction required by Rule 242 as shown in Table 242-1 – not a different grade of construction required by NVE. As set forth in Table 242.1, Grade B construction is only required over railroad tracks and limited access highways and navigable waterways, or if open electrical supply facilities exist on the poles. NVE does not assert that its facilities are open electrical supply conductors. Supply cables are not considered to be "open conductors" if they are: (1) supported on or cabled together with an effectively grounded bare messenger or neutral that is (a) effectively grounded or (b) shielded and designed to operate on a multi-grounded system at 22 KV or less; or (2) covered with a continuous auxiliary semiconducting shield in combination with suitable metallic drainage and supported on and cabled together with an effectively grounded bare messenger; or (3) insulated, not shielded if not over 5 kV phase to phase or 2.9 kV phase to ground, supported on a cable together with an effectively grounded bare messenger or neutral. See NESC Rules 242, 241.A. and 230.C.

Ms. Jarquin's declaration references National Electric Safety Code, 2012, Table 242-1 fn. 7(b). (Resp., Exh. 4 ¶ 9.) Note 7 is an exception to required Grade B construction – not a rule. NVE has not asserted that its supply cables on the poles in question are open and, thus, note 7(b)

never comes into play. Even if the supply cables were open, there are two problems with NVE's position. First, even then, Grade C is permitted so long as the criteria in 7(b) are met. Per Ms. Jarquin's declaration, whether the criteria may be met is merely "uncertain." The better approach would be to seek certainty. Second, if this were true, NVE would have a much more significant issue of non-compliance to address and would have to do so immediately, not per NESC Rule 214, as such issues are encountered.

18. *See* Reply ¶¶ 16, 17. NVE's allegations that the Grade B requirement "is grounded in real world safety and reliability concerns (not simple hyperbole)" and that such "concern arose, in part, out of the discovery of overloading of [NVE] poles by third-party attachers, resulting in pole failures in some instances, as well as NESC violations by third-party attachers" (Resp. ¶ 18) are wholly unsupported. NVE includes three images of what it describes to be "examples of such [third-party attacher] loading and NESC violations." (Compl. ¶ 18; Jarquin Decl. ¶ 5 (citing Exhibit A).) In fact, only one of these images purportedly depicts an overloaded pole, but even that image begs the question whether, if NESC loading requirements had been met, the pole would have raised any problems at all. Moreover, neither the Complaint nor the supporting declaration indicate whether Cox's facilities are on the pole or had anything to do with the alleged NESC loading violation (nor was Cox able to investigate the allegations because the pole number and location are not provided). The other two images purport to present inadequate guying techniques that resulted in pole problems but, once more, these images beg the question: if guying had been performed consistent with the NESC, would the poles still have been problematic? Again, with respect to those two images, NVE does not attribute the NESC violations to Cox. Indeed, the only violations attributed to Cox in the entire Response are included in Ms. Jarquin's

affidavit and concern Cox's down guy wires being attached to one eyed (as opposed to three eyed) anchors. This is an NVE – not an NESC – requirement imposed to reduce the number of guys. Even if this did violate the NESC (it does not), NVE offers absolutely no basis on which to link this practice to the need for Grade B construction.

In contrast to the inapt and alarmist images included in NVE's response, the PAR loading studies included with Cox's Complaint include pictures of each of the 137 the poles with Cox facilities attached to which Cox is seeking to overlash. (Complaint at Attachment D, Declaration of Glenda Mills at Exh. 3.) Notably, none of the images included in the PAR loading calculations shows any problems comparable to the unrelated images presented in the Response. If anything, the Response suggests that certain attachers other than Cox have been engaging in non-NESC compliant construction on NVE poles and that such non-compliant construction needs to be addressed. (Resp. ¶ 18.) Indeed, in further investigating the allegations raised by NVE in the Response, Cox identified several examples of other attachers attaching and overlashing without regard to NESC loading requirements. (Auvil Reply Decl. ¶¶ 4, 5.)

NVE cites three online news stories in a footnote only as support for its concern over "intermittent and dangerous wind storms that plague [NVE's] service area" and "high wind events that have caused pole failures impacting roadways." (Resp. at fn. 1.) First, only one of the stories mentions power outages that occurred during a single weather event in the last ten years. In states such as Florida, where documented weather related power outages were far more frequent and severe, the costs and benefits of exceeding NESC Grade C construction were thoroughly debated by utilities, attachers, regulators and consumer groups. Certain of the Florida utilities resisted

being required to exceed NESC standards.[42] And, in one docket opened to consider whether Florida Public Utility Company should replace poles to meet construction standards exceeding the NESC, Florida's consumer advocate described the accelerated pole replacement policy as "unreasonable and uneconomical."[43] Second, as implied by the third article referenced by NVE, high winds are far more likely to topple trees than poles. Trees in turn can snap overhead electrical lines, regardless of the strength of the pole. This phenomenon was addressed extensively by Mr. Michael T. Harrelson in testimony presented to the Florida Public Service Commission in connection with dockets opened to consider the costs and benefits of hardening utility plant to address hurricanes.[44]

Finally, NVE further asserts that it based its new policy in part upon the fact the "many of NVE'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." (Resp. ¶ 18.) NVE's half-hearted attempt to justify its policy as necessary to prevent traffic problems, is simply not credible. NVE has not supplied any evidence

---

[42] *See* supra n. 22.

[43] Direct Testimony of Patricia W. Merchant, CPA expert on behalf of the Citizens of the State of Florida, *Review of 2007 Electric Infrastructure Storm Hardening Plan*, FL PSC Docket No. 070300-EI, at 7:24-8:5 ("the Company's storm hardening proposal regarding an accelerated pole replacement program is unreasonable and uneconomical. Accelerated pole replacement is not necessary to comply with the Commission's rule or orders. Furthermore, accelerated pole replacement denies the rate payer the benefit of using the existing poles that have no integrity concerns or other construction requirements to be retired prior to the expiration of the useful lives. . . . .").

[44] Direct Testimony of Michael T. Harrelson on Behalf of the Florida Cable Telecommunications Association, Inc., *In re Review of 2007 Electric Infrastructure Storm Hardening Plan Filed Pursuant to Rule 25-6.0342, F.A.C., Submitted by Progress Energy Florida, Inc.*, FL PSC Docket No. 070298-EI at 16 (filed Sept. 7, 2007), *available at* http://www.floridapsc.com/library/FILINGS/07/08149-07/08149-07.pdf.

that of such pole failures nor has fit focused any upgrade efforts on its supposed safety concerns over its distribution lines in "close proximity to heavily traveled roadways and highways." (Resp. ¶ 18.) NVE could have implemented a plan to identify and address poles located in areas that were more likely to give rise to true safety or reliability concerns – such as poles located near heavily travelled roadways or on main feeder routes, or in areas surrounded by tall trees, or serving critical infrastructure facilities such as hospitals – but it did not. It chose instead to identify Grade C poles "as encountered" throughout its service territory and primarily through the third-party application process.

Moreover, the fact that NVE expressed safety motives in support of its new Grade B policy in a 2013 letter to Cox (again, without any concrete examples) does not make the statement true or any less unsupported than it is in the Response. NVE's assertion that, "[b]y failing to deny this statement, Cox implicitly admitted that (a) [NVE] is permitted to institute new construction standards and (b) the failure to construct according to NESC standards justifies [NVE's] decision" (Resp. ¶ 18) is absurd. Even if there were any further information in the letter on which to evaluate NVE's statements (there was not), the letter was not a legal pleading to which Cox was obligated to respond with an admission or denial. NVE *still* has not substantiated the statement. NVE admits that Cox has been building to NESC prescribed construction standards for 40 years per NVE's prior specifications (Resp. ¶ 19) and does not deny that no NESC compliant Cox attachment has ever caused a safety, reliability or engineering issue (Resp. ¶ 31). Tellingly, NVE's Response does not cite a single instance in which Cox's or other attachers' NESC-compliant construction – overlashing or otherwise – has compromised the safety or reliability of NVE's pole plant.

19. NVE admits that Cox has been building to NESC prescribed construction standards for 40 years per NVE's prior specifications. *See also* Reply ¶¶ 16, 18. Utilities do not have unbridled discretion to impose standards that exceed the NESC. Such standards must be reasonable and non-discriminatory. Moreover, it is not entirely clear that Cox will not incur additional expense as a result of NVE's Grade B policy. *See* Reply ¶ 21.

20. Terms and conditions of pole attachment agreements must be just and reasonable. 47 U.S.C. § 224. It is not reasonable for NVE to impose standards that exceed the NESC in a manner that disparately impacts attachers without including attachers in the decision process. NVE claims that the new Grade B policy "outlined in the License Application Requirements were, and will continue to be, imposed on any and all attachers in NV Energy's service territory." (Resp. ¶ 20.) NVE initially did not apply its new Grade B policy to CenturyLink(its joint user), or to itself. NVE states that, outside of the attachment process, since April 2014, it has identified 110 poles that require replacement (Resp. ¶ 21), which does not account for the nearly one and a half years after NVE's policy was adopted in December 2012. NVE's policy was initially designed to address non-compliant poles through the attachment process only and only expanded to address poles "as encountered" after Cox began complaining to NVE about NVE's discriminatory Grade B policy.[45] NVE admits that it did not inform CenturyLink of its new Grade B policy until July 2014. (Resp. ¶ 33.) Cox's independent research confirms that CenturyLink is not conducting loading analyses prior to overlashing and is not overlashing in compliance with Grade B (or in many cases Grade C) standards. (Auvil Reply Decl. ¶ 4 & Exh. 1.)

[45] Complaint at Attachment A, Declaration of Michael Bolognini at Exh. 2.

21. *See* Reply ¶ 20. NVE admits that the purported safety and reliability concerns do not warrant "the magnitude of resources required to complete a statewide survey of the more than 200,000 poles in the services territory" and that it "has not instituted a program to structurally analyze and correct every one of its non-compliant poles." (Resp. ¶ 21.) Instead, NVE only plans to address its non-compliant poles as they are "encountered." (*Id.*) NVE's "as encountered" approach for implementing the new Grade B construction standard is not a reasonable means of addressing safety and reliability concerns that purportedly warrant exceeding the NESC. NVE admits that nearly half of the poles in Cox's applications do not meet the strength and loading requirements of the Grade B construction standards (Resp. ¶ 22), which suggests that NVE's entire system also includes a comparable percentage of non-Grade B-compliant poles. However, outside of the pole attachment application process, NVE states that it has only identified 110 poles (again, well less than 1% of its total system) that require replacement and that, in nearly a year's time, only 25 of those poles have actually been replaced. (*Id.*) Moreover, NVE states that those 110 poles have been identified "since April 2014" (*id.*), which does not account for the nearly one and a half years after NVE's policy was adopted in December 2012. NVE's policy was initially designed to address non-compliant poles through the third party attachment process only and subsequently expanded to address poles "as encountered" after Cox complained. NVE also states that it did not inform CenturyLink of its new Grade B policy until July 2014 (Resp. ¶ 33). In any event, addressing non-compliant poles "as they come up" belies NVE's assertions that corrections must be made before Cox can overlash. NVE states that it only replaced 25 poles between April 2014 and January 22, 2015 – a rate of less than 35 poles per year. At this rate, less than 1.5% of NVE's plant will be addressed by the turn of the century.

In defense of its "as encountered" approach, NVE relies upon NESC Rule 214, which allows utilities to forego system wide inspections for certain types of NESC non-compliance and instead to identify and correct such non-compliance in the ordinary course of work performed on the poles. (Resp. ¶ 21.) First, NVE's reliance upon Rule 214 to implement its Grade B policy is misplaced. NVE is relying on an NESC inspection standard to justify imposing standards that exceed the NESC. It also belies NVE's assertions that Grade C compliant construction is necessary to address real world safety and reliability concerns. Where real concerns have been deemed to exist, utilities have adopted system wide plans to prioritize feeder routes and lines serving critical infrastructure to ensure that power outages are least likely to occur where it matters most.[46] NVE's purported concerns about downed poles causing problems in urbanized areas of Clark County that are in close proximity to heavily travelled roadways and highways are not supported by studies or efforts to identify particular poles or areas that warranted prioritization.

To the extent Rule 214 does apply, NVE has no basis for delaying Cox's overlash until after the poles are upgraded. Rule 214 subparts (4) and (5) instruct utilities concerning the scheduling of compliance work on lines in service – only non-compliance that "would reasonably be expected to endanger life or property shall be "promptly corrected;" other non-compliance can be recorded and "designated for correction." In response to "two recurring questions" about whether new work can be performed before correction of a non-compliant condition, an Appendix F was added to the NESC Handbook to address "whether new work can be performed before

[46] *See, e.g.*, Storm Hardening Reports by Florida's Municipal and Cooperative Electric Utilities pursuant to Rule 25-6.0343, F.A.C.

correction of a noncompliant condition depends upon the type of noncompliance and the nature of the new work." NESC Handbook at 225 (discussion of Rule 214) & Appendix F at 756 (Allen L. Clapp ed., 7th ed.). In this instance, the non-compliance identified by NVE is not a violation of the NESC – in fact, "in no instance would CCI-LV's proposed overlashing cause any of the poles included on CCI-LV's applications to come out of compliance with the strength and loading requirements for either Grade C or Grade B construction standards." (Compl. ¶ 26; Resp. ¶ 26.)[47]

NVE further states that "it is impossible for NV Energy to provide third-party attachers with a specific timeline for pole change-outs." (Resp. ¶ 21.) However, NVE fails to identify anything other than hypothetical examples of "factors beyond [NVE's] control, including for example, obtaining permits from the City of Las Vegas, the Nevada Department of Transportation, or the Nevada Board of Land Management." (*Id*.) NVE does not provide examples related to Cox's specific applications at issue in this proceeding. NVE inserts four pictures (again, unsupported by any declaration) that NVE claims "depict some of the challenging circumstances [NVE] must balance in changing out poles." (*Id*.) The pictures do not include a caption or otherwise describe the pole location, the identity of the attaching entities, the date the picture was taken, or explain the circumstances of the so-called "challenging circumstances" represented. NVE cannot, without more, selectively include photos of worst case scenarios as representative examples of its pole change out process as support for its lack of time estimates.

[47] NVE attempts to argue that Rule 243 requires all facilities on a pole to be built to Grade B if Grade B is required. However, Rule 243 is referring to the requirements imposed by Rule 242. As set forth in Table 242.1, Grade B construction is only required over railroad tracks and limited access highways and navigable waterways, or if open electrical supply facilities exist on the poles. Supply cables are not considered to be "open conductors" as long as they are (1) effectively grounded or (2) are shielded and designed to operate on a multi-grounded system at 22 KV or less. *See* NESC Rules 242, 241.A. and 230.C.

22. NVE admits that nearly half of the poles at issue in this proceeding do not currently meet Grade B. The Par Electric Loading Analyses initially identified 68 poles as failing Grade B. (Complaint at Attachment D, Declaration of Glenda Mills, at Exh. 3.)

23. NVE notes that, with respect to one application (not at issue in this proceeding) on which it approved all 32 poles for which Cox applied, Cox has attached to only 11 of those approved poles (Resp. ¶ 23), implying that Cox's deployment needs are somehow less urgent than it asserts. In fact, Cox requires all poles in a given pole line to be approved in order for it to effectively deploy its facilities. (Auvil Reply Decl. ¶ 7.) If several poles in a line are scheduled for replacement, it makes no sense for Cox to overlash to nearby poles.

24. NVE admits that Par Electric, the entity commissioned by Cox to perform the loading calculations, is an NVE approved contractor. Notably, Cox – and not NVE – pays for the loading studies on which NVE is basing its decision to upgrade. (Auvil Reply Decl. ¶ 6.)

25. NVE has not provided any meaningful support for its bare denial of Cox's assertion that NVE has an independent obligation to remedy Grade C non-compliant poles immediately.

26. While NVE admits that "overlash loads are typically small compared to a pole's existing load," it argues that Cox "understates the loads of some of its proposed attachments." (Resp. ¶ 26.) In support, NVE focuses on a single pole (out of the 137 poles in Cox's applications) that would add a 4-5% incremental load. First, NVE misses the point that the *average* incremental load increases added by Cox's proposed overlashing on the applications is less than 1% (i.e., there may be some poles with more than 1% incremental load increase, while many are far less than 1%). Moreover, NVE admits that nearly half of the poles in Cox's

applications do not meet the strength and loading requirements of the Grade B construction standards (Resp. ¶ 22) *even without Cox's proposed overlashing*, which suggests that its entire system includes a high percentage of non-Grade B-compliant poles. It is not credible for NVE to claim that "even adding a negligible additional burden" with overlashing that would not bring a pole out of *existing* Grade C compliance is an "unwarranted risk" (Resp. ¶ 26), when the real risk (if any) is that NVE is only addressing 1% of the poles in its system, approximately half of which presumably also do not meet Grade B construction, and when many of its poles currently exceed the Grade B load criteria by significantly more than 1%.

Indeed, other regulatory bodies and pole owners would agree with NVE that "overlash loads are typically small compared to a pole's existing load." It is not uncommon in the industry for attaching entities to overlash their facilities without being required to reapply for pole owner approval or, in some instances, to perform all-new loading calculations. CenturyLink, for example, does not require Cox to do further loading calculations when it proposes to overlash. (Treadway Reply Decl. ¶ 4.) Boulder City Power does not require Cox to do further loading calculations when it proposes to overlash. (*Id.*)

Furthermore, some states, most notably New York, allow attachers to overlash without pole owner permission so long as the incremental load addition falls within certain parameters. In its 2004 Policy Statement on Pole Attachments, the State of New York Public Service Commission established that "[a] predetermined, limited amount of overlashing, that is not a substantial increase to the existing facilities, shall be allowed," because, "[t]ypically, a fiber cable overlashed to an existing coaxial cable facility with a common trunk and feeder cable

configuration adds very little to the existing facility's overall weight and bundle diameter."[48] More specifically, an attaching entity may overlash if it does not exceed thresholds set out in the Policy Statement: "An Attacher, whose facility has a pre-existing NESC calculated span tension of no more than 1,750 lbs., shall be allowed to overlash a pre-determined maximum load of not more than 20% to the existing communications facility. Existing facilities with an NESC calculated span tension of less than 1,000 lbs. shall be allowed a pre-determined overlash of up to 40% of such pre-existing facilities."[49]

As demonstrated in Cox's pleadings in this matter, the incremental load increase of the proposed overlashing is just 1%[50] -- only 4-5% in the worst case as NVE' states. (Resp. ¶ 26.)

27. While the Commission has stated that utilities may impose standards that exceed the NESC,[51] it has imposed limits on such standards. In the 2011 order in which it stated that a utility "may insist that [attaching entities' contractors'] work meet utility specifications for safety and reliability, including requirements that may exceed NESC standards," the Commission prefaced that very statement with the phrase, "[c]onsistent with the nondiscrimination

---

[48] *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Policy Statement on Pole Attachments, Case 03-M-0432, 2004 N.Y. PUC LEXIS 306 (Aug. 6, 2004). The New York Commission's Policy Statement went on to state that "[a]n analysis shall be conducted by the primary Attacher whose facilities are being overlashed. That analysis shall assure that the primary facilities and those overlashed are in compliance with the NESC." *Id.*

[49] *Id. See also* 30-07 Vt. Code R. §3.708(I)(1) ("No additional application or payment is required for an Attaching Entity to overlash more of its facilities to its existing attached facilities, unless it necessitates additional costs such as guying or additional pole strength, occupies additional attachment space on the pole, or provides a different utility service than the existing facilities.").

[50] Compl. ¶ 26.

[51] *See, e.g., In re Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245; GN Docket No. 09-51, 26 FCC Rcd 5240 ¶ 58 (2011).

requirement in section 224(f)(1)."[52] It has also stated that restrictions on overlashing must be "reasonable." The Commission might allow standards that exceed the NESC, but those standards must also be reasonable. In its Local Competition Order, the Commission stated: "we reject the contention of some utilities that they are the primary arbiters of such [capacity, safety, reliability, or engineering] concerns, or that their determinations should be presumed reasonable…. [S]ection 224(f)(1) in particular reflects Congress' intention that utilities must be prepared to accommodate requests for attachments by telecommunications carriers and cable operators."[53]

The NESC has long been recognized as a thorough and comprehensive set of safety rules for the installation, maintenance and operation of overhead and underground electric supply and communications lines. Indeed, the NESC is one of the most widely adopted safety codes – it has been adopted by state legislatures, public service commissions, and other regulators, and it forms the basis of the rules and practices for power and communication utilities alike. As explained in the NESC Handbook, where utilities adopt construction specifications beyond the rules provided in the NESC, such construction specifications are for "*reasons other than safety*" – i.e., the rules set forth in the NESC are alone sufficient to "effect reasonable and adequate safety in the construction, operation, and maintenance of electric supply and communications facilities."[54] As

---

[52] *Id.*

[53] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket Nos. 96-98; 95-185, 11 FCC Rcd 15499 ¶ 1158 (1996).

[54] NESC Handbook at 5 (Allen L. Clapp ed., 7th ed.) (emphasis added). "In essence, the rules of the NESC give the basic requirements of construction that are necessary for safety. If the responsible party wishes to exceed these requirements for any reason, he may do so for his own purpose, *but need not do so for safety purposes.*" *Id.*

set forth herein, NVE has not demonstrated why its new Grade B policy is necessary to address any legitimate safety or reliability issue. *See also* Reply ¶¶ 16, 18.

28. NVE does not deny that it will not allow Cox's proposed overlashing on poles that fail Grade B, but meet NESC compliant Grade C, construction standards. *See also* Reply ¶ 23.

29. NVE's response is misleading. It denies the allegation that "NVE will not commit to a timeframe for upgrading the failing poles" – but it states that it cannot commit to a timeframe because of the unpredictable nature of the pole replacement process. As such, its response is actually an admission. In any event, regardless of NVE's singular example of a timeline (which projects completion of an upgrade of 9 poles approximately 6 months from the date of Cox's application), it is unreasonable for NVE to delay Cox's deployment at all where Cox can overlash its facilities consistent with NESC compliant Grade C construction. Cox must be permitted to build competitively with CenturyLink where there is no legitimate safety or reliability risk and Cox's overlash would not take a pole out of existing, NESC compliant Grade C construction. *See also* Reply ¶ 21.

30. *See* Reply ¶¶ 23, 28.

31. NVE is conspicuously vague in its response that it "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." (Resp. ¶ 31.) Clearly, the point of Cox's allegation is that Cox's attachments at Grade C *have not* created engineering, safety, or reliability issues. NVE does not deny this fact. *See also* Reply ¶¶ 16, 18.

32. NVE claims that it has "implemented a system-wide program to upgrade its facilities" (Resp. ¶ 32), but NVE's own admissions and statements in the Response reveal that there is nothing "system-wide" about NVE's new policy of requiring Grade B construction. *See also* Reply ¶ 21.

33. NVE does not deny that CenturyLink is overlashing facilities attached to NVE poles without notice and using Grade C construction standards; instead, it says it is "not aware of such a practice by CenturyLink." (Reply ¶ 33.) In fact, based upon conversations between Tammy Treadway, Manager - Construction Services with Cox, and Donnie Peat with CenturyLink, the Joint Use Agreement between NVE and CenturyLink does not require CenturyLink to conduct loading studies in connection with its attachment or overlashing projects. Rather, Mr. Peat explained that, under the Joint Use Agreement, each company (NVE and CenturyLink) assures itself that the pole will support the weight of its facilities. Moreover, CenturyLink is not required to follow the same application process as Cox for overlashing. (Treadway Reply Decl. ¶ 5.)

Moreover, the fact that NVE did not notify CenturyLink of its new policy until July 9, 2014 (Reply ¶ 33) – more than one and a half years after the policy was adopted and imposed on Cox, demonstrates that NVE does not impose the same requirements on CenturyLink, Cox's direct competitor (Compl. Att. B, Auvil Decl. ¶ 9; Compl. Att. A, Bolognini Decl. ¶¶ 18, 19) that it imposes on Cox. Further demonstrating that NVE does not hold CenturyLink to the same standard as Cox is the fact that CenturyLink has very recently overlashed on NVE poles without complying with Grade B, and in once case Grade C, construction standards. (Auvil Reply Decl. ¶¶ 4, 5.)

34. No further response required at this time.

35. No further response required at this time.

Executive Level Discussions

36. No further response required at this time.

37. No further response required at this time.

38. No further response required at this time.

39. No further response required at this time.

40. No further response required at this time.

41. No further response required at this time.

42. No further response required at this time.

43. *See* Reply ¶ 23.

44. No further response required at this time.

IV. DISCUSSION

A. The Pole Attachment Act

45. No further response required at this time.

46. Cox is equally vested in the integrity of the pole plant to which its facilities are attached and in ensuring that NVE's power system, upon which Cox and its customers depends, is reliable.

47. *See* Reply ¶¶ 16, 18, 21.

B. It is Unreasonable for NVE to Deny Cox's Proposed Overlashing Where Such Overlashing Would not Bring Poles Out of Compliance with Currently Applicable NESC Grade C Construction Standards

48. *See* Reply ¶ 16.

49. *See* Reply ¶ 16.

50. *See* Reply ¶ 23.

51. NVE does not dispute that the Commission, in its 2011 Order, recognized the need for timely access to poles and the benefit of using time-saving construction techniques. Instead, NVE simply states that the Commission did not adopt timeframes for pole replacements. NVE's response misses the point. Cox does not seek to impose timeframes on NVE for pole replacements where, as here, pole replacements are not necessary in advance of requested overlashing where such overlashing can be done consistent with governing NESC Grade C construction standards.

52. No further response required at this time.

53. *See* Reply ¶¶ 18, 26.

54. *See* Reply ¶¶ 16, 18, 21, 26, 27. Notably, in the case from which NVE quotes, *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 Rcs. 11599 (1999), the proposed overlashing was required to be done consistent with the NESC. Similarly, that is what Cox is asking for here.

55. *See* Reply ¶ 26.

56. *See* Reply ¶ 21.

57. Contrary to NVE's Response, Cox's allegation in the Complaint at ¶ 57 is sufficiently clear and precise. Where NVE's own poles fail NVE's alleged Grade B construction standard, NVE, and not third party attachers, should be responsible for the costs of remedying such non-compliance. NVE states that it does not intend to charge Cox for the pole replacement provided that the new pole "happens to large enough and strong enough to accommodate a proposed attachment." (Resp. at ¶ 21). However, NVE does not rule out the possibility that Cox

or other third parties will be assessed costs in connection with the upgrade. Moreover, NVE currently relies upon the loading analysis paid for by third parties such as Cox to identify the poles that fail Grade B (rather than expending its own resources to inspect its pant). And then, NVE requires third parties such as Cox to incur the substantial cost of delay in delivering services to potential customers until such time as the pole is replaced. Instead, NVE should expend the resources necessary to identify poles currently failing Grade B outside of the attachment process and devise a plan reasonably aimed at addressing its alleged safety and reliability concerns – such as by targeting more vulnerable areas within its footprint (e.g., areas surrounded by tall trees that are likely to take down power lines, or that are located near heavily travelled roadways and highways). Additionally, NVE should be required to identify those routes in advance so that attachers can plan their work accordingly. This has worked in states such as Florida where state regulators have overseen storm hardening efforts. *See* Reply ¶ 21.

58. No further response required at this time.

C. NVE's Refusal to Allow Cox 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. *See* Reply ¶ 33.

60. *See* Reply ¶ 21.

61. *See* Reply ¶ 21.

62. No further response required at this time.

V. Counts

Count I: Unjust and Unreasonable Terms and Conditions of Attachment

63. Cox incorporates by reference as if fully set forth herein paragraphs 1 through 62 of this Reply.

64. *See* Reply ¶¶ 16, 18.

65. No further response required at this time.

66. Cox cannot compete effectively with CenturyLink if it is required to wait numerous months, and likely years, before it can deploy broadband to future customers. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

Count II: Discriminatory Denial of Access

67. Cox incorporates by reference as if fully set forth herein paragraphs 1 through 62 of this Reply.

68. *See* Reply ¶¶ 21, 33.

VI. RELIEF REQUESTED

Cox respectfully requests an order from the Commission:

a. Ordering that NVE may not apply its unjust, unreasonable and discriminatory Grade B construction requirements to Cox's new plant construction, either new attachments or overlashing;

b. Order that Cox may proceed with its planned overlashing;

c. Awarding Cox such other relief as the Commission deems just, reasonable and proper.

Respectfully submitted,

Cox Communications Las Vegas, Inc.

/s/ Maria Browne
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)
mariabrowne@dwt.com
lesliemoylan@dwt.com

Date submitted: February 20, 2015

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2015, 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 12th 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)

/s/ Maria T. Browne
Maria T. Browne