

ATTACHMENT A

Supporting Authority Concerning Overlashing

Electric utilities commonly argue that cable operators should be required to obtain a permit from the utility prior to overlashing and pay additional rental charges for overlashed facilities, even though the FCC has repeatedly rejected these same electric utility arguments for important legal and policy reasons in prior rulemakings and complaint cases.

- In 1995, the FCC cautioned pole owners against unreasonably restricting overlashing: “Recently, allegations have been made that utility pole owners may be unreasonably preventing ‘overlashing’ fiber to their existing lines by failing to process a request to overlash fiber within a reasonable time period and/or unreasonably denying the request. 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 the utility pole owners.” *Common Carrier Bureau Cautions Owners of Utility Poles*, FCC Public Notice, 1995 FCC LEXIS 193, at *1 (1995).
- In 1998, in an order implementing the goals of the 1996 Act to “establish a pro-competitive, deregulatory national policy framework designed to accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition,” the Commission reaffirmed its policies promoting overlashing: “We believe overlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition [and helps] provide diversity of services over existing facilities, fostering the availability of telecommunications services to communities, and increasing opportunities for competition in the marketplace.” *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, FCC 98-20, 13 FCC Rcd 6777, 6807 ¶ 62 (1998).
- In 2001, the FCC announced its strongest statement promoting overlashing and clarified that pole owners were forbidden from requiring permits prior to overlashing: “Cable companies have, through overlashing, been able for decades to replace deteriorated cables or expand capacity of existing communications facilities, by tying communications conductors to existing, supportive strands of cable on poles. The 1996 Act was designed to accelerate rapid deployment of telecommunications and other services, and to increase competition among providers of these services. Overlashing existing cables reduces construction disruption and associated expense. . . . We affirm our policy that neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment.” *2001 Pole Order*, 16 FCC Rcd at 12140-41 ¶¶ 73-75.

- The FCC’s 2001 ruling on overlashing was affirmed by the Court of Appeals for the District of Columbia Circuit: “Overlashers are not required to give prior notice to utilities before overlashing. . . . “[T]he overlashing rules show due consideration for the utilities’ statutory rights and financial concerns. The record shows that these matters played a role in the Commission’s decision, but petitioner’s concerns were balanced with the efficiency gains that overlashing brings to the industry.” *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).
- In 2003, the FCC again rejected utility attempts to impose permitting-like requirements on overlashing in pole attachment agreements: “The [proposed pole attachment agreement] challenged by the Cable Operators requires Georgia Power’s written consent to any overlashing, which the utility may take up to 30 days to grant or deny. This new provision is unjust and unreasonable on its face. The Commission has expressly articulated a policy promoting overlashing, and stated that ‘neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment.’ Georgia Power is therefore ordered to negotiate in good faith a reasonable provision consistent with Commission precedent.” *Cable Television Ass’n of Georgia v. Georgia Power Co.*, Order, DA 03-2613, 18 FCC Rcd 16333, 16340-41 ¶ 13 (2003) (internal citations omitted).

Moreover, because overlashed fiber is affixed to other wires and does not increase the amount of space occupied by a pole attachment, the FCC has consistently ruled that additional charges for overlashed fiber are not appropriate.

- “[W]e reject TU Electric’s argument that the amount of the refund due TCI should be decreased by the amount of the regulated pole attachment rate for each additional cable lashed to an existing cable on TU Electric’s poles. The Commission has held that [a utility] can charge only one regulated rate per pole attachment, not per cable. The support strand is attached to the pole at only one point. The number of cables that are strung along that strand does not affect the total usable space required by the pole attachment.” *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Util. Elec. Co.*, Order, DA 93-11, 8 FCC Rcd 373, 374-75 ¶ 16 (1993).
- The FCC has also held that any additional ice, wind and weight load that may be caused by an overlashed fiber should be taken care of through routine make-ready: “We have been presented with no persuasive reason to change the Commission’s policy that encourages overlashing, and we agree with representatives of the cable and telecommunications industries that, to the extent that it does not significantly increase the burden on the pole, overlashing one’s own pole attachment should be permitted without additional charge. To the extent that the overlashing does create an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices. . . . We also do not believe that overlashing is an expansion of the pole owners’ obligation. Overlashing has been in practice for many years. We believe utility pole owners’ concerns are addressed by Section 224’s

assurance that pole owners receive a just and reasonable rate and that pole attachments may be denied for reasons of safety, reliability, and generally applicable engineering purposes.”) *1998 Pole Order*, 13 FCC Rcd at 6807-08 ¶ 64.

- The FCC affirmed its 1998 holding in its *2001 Pole Order* in the face of renewed urgings by the electric utilities: “[Electric Utility] petitioners continue to urge that we allow some factor for increased weight and wind load in cases of overloading. We have reviewed Sections 24 through 26 of the NESC that address loading and structural requirements in detail. Based on our analysis and the record, we continue to believe that an attachment’s ‘burden on the pole’ relates to an assessment of need for make-ready changes to the pole structure, including pole change-out, to meet the strength requirements of the NESC. . . . [P]etitioners present no new or persuasive evidence that the ‘burden on the pole’ due to weight and wind load is an additional factor for consideration in the determination of the amount of space occupied through which some rate increase would be calculated. We affirm our position that the costs of the physical attachments of an attaching entity are normally paid to the pole owner as a condition of attachment, addressing such factors as weight, wind load and safety space. Overloading does not increase the amount of space actually occupied by the attachment.” *2001 Pole Order*, 16 FCC Rcd at 12142-43 in ¶¶ 77-78.
- In 2002, the FCC’s holding in this regard was affirmed in the Southern Company case by the Court of Appeals for the District of Columbia Circuit: “Because overloading by definition involves a physical connection to other wires and not to the pole itself, the Commission concluded that a utility is not entitled to charge overloading parties for pole space. This is a permissible construction of the statute, one that comports with the Commission’s permissible construction of ‘attaching entities.’ The overloading rules allow utilities to charge overloaders ‘make ready’ costs if the overloading wires require enhancing the strength of the pole.” *Southern Co. Servs. v. FCC*, 313 F.3d at 582.
- “Section 3.2 of the Pole Attachment Agreement states that ‘Salsgiver is limited to one attachment per Licensor Pole and one installation per conduit, that attachment or installation is to include no more than one (1) cable....’ Salsgiver contends that, by limiting attachments to one cable per pole, the Agreement unreasonably prohibits Salsgiver from overloading its own attachments. We agree. The Commission has a long-standing policy against unreasonable restrictions on overloading, including restrictions on attachers’ ability to overload their own facilities. The one-cable limitation does appear to ban Salsgiver from overloading its own facilities, and NPTC does not argue otherwise. NPTC also fails to provide any justification for the limitation. Thus, we find this blanket limitation to be unreasonable on its face, and direct NPTC to eliminate this restriction on overloading within 60 days of the release of this order.” *Salsgiver Commc’ns Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, File No. EB-06-MD-004, DA 07-4721, 22 FCC Rcd 20536 at ¶ 17 (Nov. 26, 2007).