

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51

**REPORT AND ORDER AND ORDER ON RECONSIDERATION**

**Adopted: April 7, 2011**

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By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn, and Baker  
issuing separate statements.

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## I. INTRODUCTION

1. In this Report and Order and Order on Reconsideration (Order), we comprehensively revise our pole attachment rules to improve the efficiency and reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks, in order to accelerate broadband buildout.<sup>1</sup> The Order is designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation.

2. Congress directed the Commission to “encourage the deployment . . . of advanced telecommunications capability to all Americans” by removing barriers to infrastructure investment.<sup>2</sup> Congress has expressed its desire to ensure that consumers in all regions of the country have access to advanced telecommunications and information services at rates that are just, reasonable and affordable.<sup>3</sup> In 2009, Congress directed the Commission to develop a National Broadband Plan that would ensure that every American has access to broadband services.<sup>4</sup>

3. In its efforts to identify barriers to affordable telecommunications and broadband services, the Commission has recognized that lack of reliable, timely, and affordable access to physical infrastructure—particularly utility poles—is often a significant barrier to deploying wireline and wireless services. There are several reasons for this. First, the process and timeline for negotiating access to poles

<sup>1</sup> *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864 (2010) (*2010 Order* or *Further Notice*).

<sup>2</sup> 47 U.S.C. § 1302(b) (section 706). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996) (1996 Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (BDIA), is now codified in Title 47, Chapter 12 of the United States Code. See 47 U.S.C. §§ 1301 *et seq.*

<sup>3</sup> 47 U.S.C. § 254 (b)(1)–(3).

<sup>4</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(2) (2009) (ARRA).

varies across the various utility companies that own this key infrastructure. The absence of fixed timelines and the potential for delay creates uncertainty that deters investment. Second, if a pole owner does not comply with applicable requirements, the party requesting access may have limited remedies; because of time constraints, cost, or the need to maintain a working relationship with the pole owner, it may not wish to pursue the enforcement process. Third, the wide disparity in pole rental rates distorts service providers' decisions regarding deployment and offering of advanced services. For example, providers that pay lower pole rates may be deterred from offering services, such as high-capacity links to wireless towers, that could fall into a separate regulatory category and therefore risk having a higher pole rental fee apply to the provider's entire network.

4. In section 224 of the Communications Act of 1934, as amended (Act), Congress directed the Commission to "regulate the rates, terms, and conditions of pole attachments to provide that such rates, terms, and conditions are just and reasonable, and . . . adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."<sup>5</sup> When Congress granted the Commission authority to regulate pole attachments, it recognized the unique economic characteristics that shape relationships between pole owners and attachers. Congress concluded that "[o]wing to a variety of factors, including environmental or zoning restrictions" and the very significant costs of erecting a separate pole network or entrenching cable underground, "there is often no practical alternative [for network deployment] except to utilize available space on existing poles."<sup>6</sup> Congress recognized further that there is a "local monopoly in ownership or control of poles," observing that, as found by a Commission staff report, "'public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents . . . in the form of unreasonably high pole attachment rates.'"<sup>7</sup> Given the benefits of pole attachments to minimize "unnecessary and costly duplication of plant for all pole users," Congress granted the Commission authority to ensure that pole attachments are provided on just and reasonable rates, terms, and conditions.<sup>8</sup>

5. In implementing section 224, the Commission historically relied primarily on private negotiations among pole owners and attachers and, when necessary, case-specific adjudication by the Commission, to ensure just and reasonable rates, terms, and conditions, rather than adopting comprehensive access rules. But the Commission's experience during the past 15 years has revealed the need to establish a more detailed framework to govern the rates, terms and conditions for pole attachments. The National Broadband Plan found that the cost of deploying a broadband network depends significantly on the costs that service providers incur to access poles and other infrastructure.<sup>9</sup> Specifically, the Plan found that the rate structure is so arcane that there has been near-constant litigation about the regulatory classification of pole attachers, and also found that the establishment of timelines has expedited the make-ready process considerably in states where timelines have been implemented.<sup>10</sup> Accordingly, the Commission in the May 2010 *Pole Attachment Order and Further Notice* sought comment on a proposed timeline and other concerns regarding pole access. The *2010 Order* has

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<sup>5</sup> 47 U.S.C. § 224(b)(1).

<sup>6</sup> S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977) (1977 Senate Report), *reprinted in* 1978 U.S.C.C.A.N. 109.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; *see* 47 U.S.C. § 224(b)(1), (2).

<sup>9</sup> OMNIBUS BROADBAND INITIATIVE, FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 109 (2010), *available at* <http://download.broadband.gov/plan/national-broadband-plan.pdf> (NATIONAL BROADBAND PLAN or PLAN). The Commission also found that make-ready work can be a significant source of cost and delay in building broadband networks. *Id.* at 111.

<sup>10</sup> PLAN at 110–11.

generated a substantial record from numerous commenters, and since that time the Commission and its staff have engaged stakeholders and state commission representatives in workshops and other forums.<sup>11</sup>

6. The record in this proceeding demonstrates that the current framework often results in negotiation processes that may be so prolonged, unpredictable, and costly that they impose unreasonable costs on attachers and may create inefficiencies by deterring market entry.<sup>12</sup> We are also persuaded by evidence in the record that widely disparate pole rental rates distort infrastructure investment decisions and in turn could negatively affect the availability of advanced services and broadband, contrary to the policy goals of the Act. Obtaining access to poles and other infrastructure is critical to deployment of telecommunications and broadband services.<sup>13</sup> Therefore, to the extent that access to poles is more burdensome or expensive than necessary, it creates a significant obstacle to making service available and affordable. At the same time, we recognize that pole owners are entitled to fair compensation for their property, and have a desire to minimize disruption to themselves and existing attachers. The record also suggests that inefficiently low rates for pole attachments could deter pole owners from deploying new poles or upgrading their poles. Thus, in this Order, we seek to eliminate unnecessary costs or burdens associated with pole attachments, while taking into account legitimate concerns of pole owners and other parties that might be affected by additional attachments.

7. We also recognize and build on the work of our state partners. In section 224, Congress recognized the important role of states in ensuring that utilities provide access to poles, ducts, conduits and rights-of-way in a manner consistent with the statute. Under the “reverse preemption” provision in section 224, states may certify that they regulate rates, terms, and conditions for pole attachments in their respective states; the Commission retains jurisdiction over pole attachments only in states that do not so certify.<sup>14</sup> As a result, state experience with regulation of pole attachments provides an invaluable opportunity for the Commission to observe what works and what does not work to achieve policy goals. State efforts to date on establishing fair access rules—including timelines—have been particularly instructive as the Commission attempts to balance the needs of communications companies to deploy vital network facilities with the needs of utility pole owners, including the need to protect safety of life and the reliability of their own critically important networks.

8. Based on the record received in response to the *Further Notice*, we now adopt rules establishing a specific timeline for access, improvements to our enforcement process, a revised formula

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<sup>11</sup> See *infra* para. 18.

<sup>12</sup> See, e.g., Letter from Brian Regan, Director, Government Relations, PCIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 1 (filed Mar. 18, 2011) (arguing that the misallocation of resources results in inefficiency in the market; conversely, with improved regulatory certainty, “an estimated 2,500 to 5,000 additional wireless attachments may be deployed annually”).

<sup>13</sup> See Letter from Brian Regan, Director, Government Relations, PCIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 1 (filed Mar. 31, 2011) (stating that the number of Distributed Antenna Systems (“DAS”) nodes in operation could double to 20,000 by the end of 2012 and estimating a total of 150,000 by 2017; cumulative capital expenditures by DAS providers could double by the end of 2012, with an estimated total of over \$15 billion by 2017); see also Letter from Brian M. Josef, Assistant Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 1 (filed Mar. 17, 2011) (“[T]he Commission has recognized that ‘the deployment of facilities without unreasonable delay is vital to promote public safety, including the availability of wireless 911, throughout the nation’ and that commercial and public safety communications ‘depend on the presence of sufficient wireless towers.’”) (citations omitted).

<sup>14</sup> 47 U.S.C. § 224(b), (c). The statute also exempts poles owned by municipalities, cooperatives, and non-utilities. 47 U.S.C. § 224(a)(1). Twenty states and the District of Columbia have certified that they directly regulate utility-owned infrastructure in their regions. See App. C; *States That Have Certified That They Regulate Pole Attachments*, Public Notice, WC Docket No. 10-101, 25 FCC Rcd 5541, 5541–42 (WCB 2010).

for the telecommunications access rate, and a process to ensure just and reasonable rates, terms and conditions for pole attachments by incumbent LECs. In particular, this Order takes the following actions:

- **Timeline.** The Order establishes a four-stage timeline for attachment to poles, with a maximum timeframe of up to 148 days for completion of all four stages: survey (45 days), estimate (14 days), attacher acceptance (14 days), and make-ready (60-75 days). The Order applies this timeline to requests for attachment in the communications space on a pole—for both wireline and wireless attachments. As a remedy in cases where the survey or make-ready work is not completed on time, attachers are permitted to engage utility-approved independent contractors to do the work. This self-effectuating remedy—based on a successful model that has been working in the State of New York for several years—is balanced by limitations on the number of poles per month that may be subject to the timeline, and the ability of the utility to temporarily stop the clock for legitimately exceptional circumstances. We adopt a modified timeline for wireless attachments above the communications space, for which we provide a total of up to 178 days and a complaint remedy. We also adopt longer timelines for requests to attach to a large number of poles (more than 300 poles or 0.5 percent of a utility’s total poles within a state, whichever is less), for which we provide an additional 15 days for survey and 45 days for make-ready, for a total of up to 208 days for attachments in the communications space and 238 days for wireless attachments above the communications space.
- **Attachments.** We also conclude that if an electric utility rejects a request for attachment of any piece of equipment, it must explain the reasons for such rejection—and how such reasons relate to capacity, safety, reliability, or engineering concerns<sup>15</sup>—in a way that is specific with regard to both the type of facility and the type of pole. We further conclude that section 224 allows attachers to access the space above what has traditionally been referred to as “communications space” on a pole, but only using workers that are qualified to work above the communications space.<sup>16</sup>
- **Rates.** The Order reinterprets the telecommunications rate formula for pole attachments consistent with the existing statutory framework, thereby reducing the disparity between current telecommunications and cable rates. Specifically, different interpretations of the term “cost” in section 224(e) yield a range of rates from the existing fully allocated cost approach at the high end to a rate closer to incremental cost at the low end. Balancing the Commission’s broadband goals with the interest in continued pole investment, we adopt a definition of cost that yields a new “just and reasonable” telecommunications rate. This new telecom rate generally will recover the same portion of pole costs as the current cable rate. The Order also confirms that wireless providers are entitled to the same rate under the statute as other telecommunications carriers.
- **Incumbent LEC Attachments.** Historically, incumbent LECs owned roughly as many poles as electric utilities, and were able to ensure just and reasonable rates, terms, and conditions for pole attachments by negotiating “joint use” agreements. Given evidence in the record about current market conditions, however, we identify a need for targeted Commission oversight to ensure just and reasonable rates, terms, and conditions that might not otherwise result from negotiations standing alone. Revisiting our prior interpretation of the statute, we allow incumbent LECs to file pole attachment complaints if they believe a particular rate, term or condition is unjust or unreasonable, and provide guidance regarding the Commission’s approach to evaluating those complaints and what the appropriate rate may be (whether the new telecommunications rate or another rate).

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<sup>15</sup> See 47 U.S.C. § 224(f)(2).

<sup>16</sup> 47 U.S.C. § 224.

- **Enforcement.** The Order adopts several measures to encourage negotiated resolution of pole attachment disputes, including a requirement that the complainant engage or attempt to engage the other party in good faith “executive-level discussions” prior to the filing of a complaint at the Commission. The Order declines to amend the “sign and sue” rule, which allows an attacher to challenge the lawfulness of terms in an executed pole attachment agreement where the attacher claims it was coerced to accept those terms in order to gain access. The Order also declines to adopt rules for compensatory damage awards at this time. The Order also removes the cap on penalties for unauthorized attachments and clarifies that Oregon’s approach to penalties for unauthorized attachments (which includes per-pole penalties, notice requirements, and a “joint use forum” for resolving disputes) is a reasonable model for contract terms in pole attachment agreements. Further, this Order encourages pre-planning and coordination among pole owners and attachers to the greatest extent, and as early in the process, as possible. To encourage such pre-planning and coordination, any enforcement proceedings will include consideration of such communication between the parties.
- **Reconsideration Issues.** The Order resolves multiple petitions for reconsideration and addresses various points regarding the nondiscriminatory use of attachment techniques. Among other things, we clarify that a utility’s use of an attachment technique in the electric space does not obligate it to allow the same technique in the communications space; and that there is not “insufficient capacity” simply because a utility must rearrange its electric facilities to accommodate an attachment.
- **Proposals Not Adopted.** The Order declines to adopt proposed requirements regarding the collection and availability of information about the location and availability of poles, as well as proposed rules regarding a schedule of charges, phased payment for make-ready work, and the designation of a single managing utility for jointly owned poles. However, we clarify and emphasize that we do expect joint owners to coordinate and cooperate with each other and with requesting attachers in order to meet their independent obligations to successfully implement the timeline for pole attachments that we adopt today.

## II. BACKGROUND

9. In 1978, Congress added section 224 to the Communications Act of 1934, as amended (Communications Act or Act) thereby directing the Commission to ensure that the rates, terms, and conditions for pole attachments by cable television systems are just and reasonable.<sup>17</sup> Section 224 provides that the Commission will regulate pole attachments except where such matters are regulated by a state.<sup>18</sup> Section 224 also withholds from the Commission jurisdiction to regulate attachments where the utility is a railroad, cooperatively organized, or owned by a government entity.<sup>19</sup>

10. The Telecommunications Act of 1996 (1996 Act)<sup>20</sup> expanded the definition of pole attachments to include attachments by providers of telecommunications service,<sup>21</sup> and granted both cable systems and telecommunications carriers<sup>22</sup> an affirmative right of nondiscriminatory access to any pole,

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<sup>17</sup> Pole Attachment Act of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978).

<sup>18</sup> 47 U.S.C. § 224(c); *see* App. C (listing the states that have certified that they regulate pole attachments).

<sup>19</sup> 47 U.S.C. § 224(a)(1).

<sup>20</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

<sup>21</sup> 47 U.S.C. § 224(a)(4).

<sup>22</sup> For purposes of section 224, Congress excluded incumbent LECs from the definition of “telecommunications carriers.” 47 U.S.C. § 224(a)(5).

duct, conduit, or right-of-way owned or controlled by a utility.<sup>23</sup> However, the 1996 Act permits utilities to deny access where there is insufficient capacity and for reasons of safety, reliability or generally applicable engineering purposes.<sup>24</sup> Besides establishing a right of access, the 1996 Act set forth section 224(e) — a rate methodology for “attachments used by telecommunications carriers to provide telecommunications services” — in addition to the existing methodology in section 224(d) for attachments “used by a cable television system solely to provide cable service.”<sup>25</sup>

11. The Commission implemented the new section 224 access requirements in the *Local Competition Order*.<sup>26</sup> At that time, the Commission concluded that it would determine the reasonableness of a particular condition of access on a case-by-case basis.<sup>27</sup> Finding that no single set of rules could take into account all attachment issues, the Commission specifically declined to adopt the National Electric Safety Code (NESC) in lieu of access rules.<sup>28</sup> The Commission also recognized that utilities typically develop individual standards and incorporate them into pole attachment agreements, and that, in some cases, federal, state, or local laws also impose relevant restrictions.<sup>29</sup> The *Local Competition Order* acknowledged concerns that utilities might deny access unreasonably, but, rather than adopt a set of substantive engineering standards, the Commission decided that procedures for requiring utilities to justify the conditions they placed on access would best safeguard attachers’ rights.<sup>30</sup> The Commission did adopt five rules of general applicability and several broad policy guidelines in the *Local Competition*

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<sup>23</sup> 47 U.S.C. § 224(f)(1). As a general matter, all references to poles in this Order refer to attachments to utility poles and do not include other components of the statutory definition of “pole attachments,” including ducts, conduits and rights-of-way, unless otherwise indicated. 47 U.S.C. § 224(a)(4).

<sup>24</sup> 47 U.S.C. § 224(f)(2); see *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Report and Order, 11 FCC Rcd 15499, 16080–81, paras. 1175–77 (1996) (*Local Competition Order*) (subsequent history omitted) (extending the provisions of section 224(f)(2) to other utilities).

<sup>25</sup> See 47 U.S.C. § 224(d) (describing the “cable rate formula”), (e) (describing the “telecom rate formula”).

<sup>26</sup> *Local Competition Order*, 11 FCC Rcd at 15499.

<sup>27</sup> *Id.* at 16067–68, para. 1143.

<sup>28</sup> *Id.* at 16068–69, paras. 1145–46 (finding that the NESC’s depth of detail and allowance for variables make it unworkable for setting access standards).

<sup>29</sup> *Id.* at 16068–69, paras. 1147–48 (finding that the Federal Energy Regulatory Commission (FERC) and the Occupational Safety and Health Administration (OSHA) regulations, and utility internal operating standards reflect regional and local conditions as well individual needs and experiences of the utility).

<sup>30</sup> *Id.* at 16058–107, paras. 1119–240 (Part XI.B. “Access to Rights of Way”).

*Order*.<sup>31</sup> The Commission also stated that it would monitor the effect of the case-specific approach, and would propose specific rules at a later date if conditions warranted.<sup>32</sup>

12. In the *1998 Implementation Order*, the Commission adopted rules implementing the 1996 Act's new pole attachment rate formula for telecommunications carriers.<sup>33</sup> The Commission also concluded that cable television systems offering both cable and Internet access service should continue to pay the cable rate.<sup>34</sup> The Commission further held that wireless carriers had a statutory right of nondiscriminatory access to poles.<sup>35</sup> Although the latter two determinations were challenged, both were ultimately upheld by the Supreme Court.<sup>36</sup> In particular, the Court held that section 224 gives the Commission broad authority to adopt just and reasonable rates.<sup>37</sup> The Court also deferred to the Commission's conclusion that wireless carriers are entitled by section 224 to attach facilities to poles.<sup>38</sup>

13. On November 20, 2007, the Commission issued the *Pole Attachment Notice*<sup>39</sup> in recognition of the importance of pole attachments to the deployment of communications networks, in part in response to petitions for rulemaking from USTelecom and Fibertech Networks.<sup>40</sup> USTelecom argued

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<sup>31</sup> *Id.* at 16071–74, paras. 1151–58. The five specific rules are: (1) a utility may rely on industry codes, such as the NESC, to prescribe standards with respect to capacity, safety, reliability and general engineering principles; (2) a utility will still be subject to any federal requirements, such as those imposed by FERC or OSHA, which might affect pole attachments; (3) state and local requirements will be given deference if not in direct conflict with Commission rules; (4) rates, terms and conditions of access must be uniformly applied to all attachers on a nondiscriminatory basis; and (5) a utility may not favor itself over other parties with respect to the provision of telecommunications or video services. See *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245; RM-11293; RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, 20198–99, para. 9 (2007) (*Pole Attachment Notice* or *NPRM*) (noting the Commission's establishment of access rules in the *Local Competition Order* and determination to revisit them if needed).

<sup>32</sup> See *Local Competition Order*, 11 FCC Rcd at 16068, para. 1143 (“We will not enumerate a comprehensive regime of specific rules, but instead establish a few rules supplemented by certain guidelines and presumptions that we believe will facilitate the negotiation and mutual performance of fair, pro-competitive access agreements. We will monitor the effect of this approach and propose more specific rules at a later date if reasonably necessary to facilitate access and the development of competition in telecommunications and cable services.”).

<sup>33</sup> *Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777 (1998) (*1998 Implementation Order*), *aff'd in part, rev'd in part*, *Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000) (*Gulf Power v. FCC*), *rev'd*, *Nat'l Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327 (2002) (*Gulf Power*).

<sup>34</sup> See *1998 Implementation Order*, 13 FCC Rcd at 6796, para. 34.

<sup>35</sup> See *id.* at 6797–99, paras. 36–42 (applying the definitions of “telecommunications carriers,” “telecommunications services,” and relevant provisions of section 224 to wireless carriers).

<sup>36</sup> See *Gulf Power v. FCC*, 208 F.3d at 1273–75 (wireless), 1275–78 (cable rate); *Gulf Power*, 534 U.S. at 333–39 (cable rate), 339–342 (wireless).

<sup>37</sup> See *Gulf Power*, 534 U.S. at 336, 338–89. The Court rejected the view that “the straightforward language of [section 224's] subsections (d) and (e) establish two specific just and reasonable rates [and] no other rates are authorized.” *Id.* at 335 (citing *Gulf Power v. FCC*, 208 F.3d at 1276 n.29).

<sup>38</sup> See *Gulf Power*, 534 U.S. at 341.

<sup>39</sup> *Pole Attachment Notice*, 22 FCC Rcd 20195.

<sup>40</sup> See United States Telecom Association, Petition for Rulemaking, RM-11293 (filed Oct. 11, 2005) (USTelecom Petition); Fibertech Networks, LLC, Petition for Rulemaking, RM-11303 (filed Dec. 7, 2005) (Fibertech Petition). The records generated by both petitions were incorporated by reference. *Pole Attachment Notice*, 22 FCC Rcd at 20200, para. 12 n.12.

that incumbent LECs, as providers of telecommunications service, are entitled to just and reasonable pole attachment rates, terms, and conditions of attachment even though, under section 224, they are not included in the term “telecommunications carriers” and therefore have no statutory right of access.<sup>41</sup> Fibertech petitioned the Commission to initiate a rulemaking to set access standards for pole attachments, including standards for timely performance of make-ready work,<sup>42</sup> use of boxing and extension arms, and use of qualified third-party contract workers, among other concerns.<sup>43</sup> The *Pole Attachment Notice* sought comment on the concerns raised by USTelecom and Fibertech, as well as the application of the telecommunications rate to wireless pole attachments<sup>44</sup> and other pole access concerns.<sup>45</sup>

14. The American Recovery and Reinvestment Act of 2009 included a requirement that the Commission develop a national broadband plan to ensure that every American has access to broadband capability.<sup>46</sup> On March 16, 2010, the National Broadband Plan was released, and identified access to rights-of-way—including access to poles—as having a significant impact on the deployment of broadband networks.<sup>47</sup> Accordingly, the Plan included several recommendations regarding pole attachment access, enforcement, and pricing policies to further advance broadband deployment.<sup>48</sup>

15. On May 20, 2010, the Commission issued the *Pole Attachment Order and Further Notice*.<sup>49</sup> In the *2010 Order*, the Commission took initial steps to clarify the rules governing pole attachments and to streamline the pole attachment process. The Commission clarified the statutory right of communications providers to use the same space- and cost-saving techniques that pole owners use, such as placing attachments on both sides of a pole (“boxing”), and established that providers have a statutory right to timely access to poles.<sup>50</sup> In the *Further Notice*, the Commission sought comment on a variety of measures to speed access to poles. The Commission proposed a comprehensive timeline for all wired pole attachment requests<sup>51</sup> and sought comment on possible adjustments to that timeline. The Commission sought comment on whether to adopt a separate timeline for wireless attachments.<sup>52</sup> The Commission proposed to permit attachers to use independent contractors to perform surveys and make-ready work if the pole owner missed its deadlines, subject to certain conditions.<sup>53</sup> The Commission

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<sup>41</sup> *Pole Attachment Notice*, 22 FCC Rcd at 20205, para. 24; 47 U.S.C. § 224 (a)(5) (excluding incumbent local exchange carriers from the definition of “telecommunications carrier”); 47 U.S.C. § 224(a)(4) (defining “pole attachment” to include attachments by “any . . . provider of telecommunications service”); 47 U.S.C. § 224 (b)(1) (requiring the Commission to regulate pole attachments).

<sup>42</sup> “Make-ready” generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, 18056 n.50 (1999) (*Local Competition Reconsideration Order*).

<sup>43</sup> *Pole Attachment Notice*, 22 FCC Rcd at 20210, para. 37.

<sup>44</sup> *Id.* at 20209, para. 34.

<sup>45</sup> *Id.* at 20211, para. 38.

<sup>46</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(2) (2009).

<sup>47</sup> NATIONAL BROADBAND PLAN at 109.

<sup>48</sup> *Id.* at 109–13.

<sup>49</sup> *2010 Order and Further Notice*, 25 FCC Rcd 11864.

<sup>50</sup> *2010 Order*, 25 FCC Rcd at 11879–84, paras. 8–18.

<sup>51</sup> *Further Notice*, 25 FCC Rcd at 11876–85, paras. 25–45.

<sup>52</sup> *Id.* at 11885–89, paras. 46–54.

<sup>53</sup> *Id.* at 11891–94, paras. 61–68.

further proposed that utilities may deny access by contractors to work among the electric lines.<sup>54</sup> In addition, the Commission proposed a staggered payment system for make-ready work; proposed requiring a schedule of make-ready charges; proposed requiring joint pole owners to designate a single managing utility; and sought comment on improving the collection and availability of data.<sup>55</sup>

16. The Commission also sought comment on whether current rules governing pole attachment complaints create appropriate incentives for parties to settle or resolve disputes informally, and whether appropriate remedies are available when parties pursue formal complaints.<sup>56</sup> The *Further Notice* sought comment on ways to reduce the existing disparities in pole rental rates and proposed to address those disparities by reinterpreting the telecom rate formula and by considering the issues surrounding possible regulation of pole attachments by incumbent local exchange carriers (LECs).<sup>57</sup>

17. On September 2, 2010, various electric utilities and cable providers filed petitions seeking clarification or reconsideration of parts of the *2010 Order* concerning the nondiscriminatory use of attachment techniques.<sup>58</sup> The petitions ask the Commission to clarify, among other things, whether a utility must allow attachers to use the same attachment techniques that it uses for itself in the electric space, and whether a pole owner is free to impose new boxing and extension arm requirements going forward.<sup>59</sup>

18. The Commission has held workshops addressing pole attachment issues. On September 28, 2010 the Wireline Competition Bureau convened a workshop to “learn from the experiences and insights of state regulators regarding the Commission’s proposed pole attachment regulations.”<sup>60</sup> On February 9, 2011, the Commission held a Broadband Acceleration Conference that brought together leaders from federal, state, and local governments; broadband providers; telecommunications carriers; tower companies; equipment suppliers; and utility companies to identify opportunities to reduce regulatory and other barriers to broadband build-out.<sup>61</sup> At this conference, the Commission announced its Broadband Acceleration Initiative: an agenda for work inside the Commission, with our partners in

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<sup>54</sup> *Id.* at 11894–95, para. 69.

<sup>55</sup> *Id.* at 11895–97, paras. 70–77.

<sup>56</sup> *Id.* at 11898–09, paras. 78–109.

<sup>57</sup> *Id.* at 11909–27, paras. 110–48.

<sup>58</sup> Coalition of Concerned Utilities, Petition for Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sep. 2, 2010) (Coalition Petition); Florida Investor-Owned Electric Utilities, Petition for Reconsideration and Request for Clarification, GN Docket No. 09-51 (filed Sep. 2, 2009) (Florida IOUs Petition); Oncor Electric Delivery Company LLC, Petition for Reconsideration and Request for Clarification, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sep. 2, 2010); Alabama Cable Telecommunications Ass’n, Bresnan Communications, Broadband Cable Ass’n of Pennsylvania, Cable America Corp., Cable Television Ass’n of Georgia, Florida Cable Telecommunications, Inc., MediaCom Communications Corp., New England Cable and Telecommunications Ass’n, Ohio Cable Telecommunications Ass’n, Oregon Cable Telecommunications Ass’n, and South Carolina Cable Television Ass’n, Petition for Reconsideration or Clarification, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sep. 2, 2010) (Cable Providers Petition); *see 2010 Order*, 25 FCC Rcd at 11869–73, paras. 8–16.

<sup>59</sup> *See* Coalition Petition at 2–3; Florida IOUs Petition at 2–3.

<sup>60</sup> *Wireline Competition Bureau Announces September 28, 2010 Pole Attachments Workshop*, 25 FCC Rcd 13108 (WCB 2010). Forty-nine representatives of 32 electric utilities and their trade associations met with Federal Communications Commission staff to discuss issues of concern to utility pole owners. *See* Letter from Thomas B. Magee and Jack Richards, Counsel for the Coalition of Concerned Utilities, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 (filed Nov. 17, 2010).

<sup>61</sup> *FCC to Hold Broadband Acceleration Conference*, Public Notice, DA 11-241 (rel. Feb. 8, 2011).

Tribal, state, and local government, and with the private sector to reduce barriers to broadband deployment.<sup>62</sup>

### III. IMPROVED ACCESS TO UTILITY POLES

19. We take several steps to improve access to utility poles. Our rules are generally consistent with proposals in the *Further Notice*, but also reflect a close examination of the record developed in this proceeding.<sup>63</sup> We adopt a four-stage timeline that provides a maximum of 148 days for attachers to access the communications space on utility poles. For wireless attachments above the communications space, we adopt a modified form of the timeline.<sup>64</sup> The timeline begins to run after the requester submits a complete application. We also establish that a utility may stop the clock for emergencies pursuant to a “good and sufficient cause” standard. We adopt rules that allow attachers to use independent contractors pre-authorized by the utilities to complete survey and make-ready work in the communications space, subject to a number of protections and conditions, if the pole owner does not meet the prescribed timelines. In particular, electric utilities have ultimate decision-making authority regarding the contractor’s work with respect to section 224(f)(2) denial-of-access issues. We allow a utility to limit on a per-state basis the size of a pole attachment request that is subject to the timeline, and allow extra time for large orders. Specifically, we apply the basic timeline to requests of up to 300 pole attachments per state or attachments to 0.5 percent of the utility’s in-state poles, whichever is less. For larger requests of up to 3,000 pole attachments per state or 5 percent of the utility’s in-state poles, whichever is less, additional time is provided for survey and make-ready. Utilities may treat multiple in-state requests from a single attacher during a 30-day period as one request. Our rules further provide that any denial of a request to attach must cite with specificity the particular safety, reliability, engineering, or other valid concern that is the basis for denial. We clarify that blanket prohibitions on pole top access are not permitted. And, as noted elsewhere in this Order, we encourage a high degree of pre-planning and coordination between attachers and pole owners, to begin as early in the process as possible.

20. We decline to adopt several proposals set forth in the *Further Notice* or that commenters recommend, and explain those decisions. For example, we determine that the timeline will provide adequate incentives for joint owners of poles to coordinate, and thus do not require joint owners to name a single management entity. We also conclude that several subsections of section 224 provide the Commission with sufficient authority to adopt a timeline and other access rules.

#### A. Timeline for Section 224 Access

##### 1. Stages of the Timeline

21. We find that adopting a specific timeline for processing pole attachment requests will give necessary guidance to both pole owners and attachers. Evidence in the record reflects that, in the absence of a timeline, pole attachments may be subject to excessive delays.<sup>65</sup> Moreover, having a specific

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<sup>62</sup> *The FCC’s Broadband Initiative: Reducing Barriers to Spur Broadband Buildout*, Public Notice (rel. Feb. 9, 2011), available at [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db0209/DOC-304571A2.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A2.pdf); see Julius Genachowski, Chairman, FCC, *Remarks at Broadband Acceleration Conference* (Feb. 9, 2011), available at [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db0209/DOC-304571A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A1.pdf).

<sup>63</sup> See *infra* para. 21 (discussing the record evidence regarding adoption of a timeline).

<sup>64</sup> The modified timeline for access to poles above the communications space adopted in this Order applies solely to wireless attachments because the record in this proceeding does not demonstrate any need for a timeline for non-wireless attachments above the communications space. Thus, issues regarding wireline attachments above the communications space are beyond the scope of this Order.

<sup>65</sup> See, e.g., Fibertech/KDL Comments at 8 (citing an increase of 159 customers per year after NY adopted a timeline at an average of 100 days from application submission to licensing, contrasted with MD where applications average over 250 days); Letter from Michael P. Miller, CEO, Fiberlight LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 1 (filed Feb. 23, 2011) (Fiberlight Feb. 23 *Ex Parte* Letter) (citing examples of (continued...))

timeline offers certainty to attachers and allows them to make concrete business plans.<sup>66</sup> Beyond generalized problems caused by utility lack of timeliness from initial request through completion,<sup>67</sup> the record shows pervasive and widespread problems of delays in survey work,<sup>68</sup> delays in make-ready performance,<sup>69</sup> delays caused by a lack of coordination of existing attachers,<sup>70</sup> and other issues.<sup>71</sup> Adopting a specific timeline will also generate jobs and help to move large broadband projects forward more expeditiously, including those providing broadband to schools under the E-rate program.<sup>72</sup>

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network deployment significantly delayed by failure to timely attach to poles); Letter from Clifford K. Williams, Director—Regulatory & Compliance, Sidera Networks, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, RM-11303, RM-1293, at 1–2 (filed Mar. 11, 2011) (Sidera Mar. 11, 2011 *Ex Parte* Letter) (citing delays of up to 2 years); Letter from Brian Regan, Director, Government Relations, PCIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, at 3–4 (filed Mar. 2, 2011) (PCIA Mar. 15 *Ex Parte* Letter) (describing specific obstacles, including delays, faced by wireless providers); Letter from Jennie P. Chandra, Senior Counsel, Windstream to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245 at 1 (filed Mar. 31, 2011) (Windstream Mar. 31, 2011 *Ex Parte* Letter) (“One of the greatest challenges Windstream has faced in deploying fiber is the lengthy, unpredictable, and costly make-ready process. It is not uncommon for a fiber deployment project to be delayed by *one or two years* simply because of make-ready issues.”). Unless otherwise noted, all comments are in response to the *Further Notice*. A list of commenters is provided in Appendix C.

<sup>66</sup> See, e.g., Alpheus and 360networks *NPRM* Comments at 2 (arguing that unknown make-ready intervals make it extremely difficult to introduce services or promise timely delivery on potential sales); Cavalier *NPRM* Comments at 6 (arguing for predictability with regard to make-ready because potential customers will not engage a service without knowing whether it will begin receiving the service in months or in years).

<sup>67</sup> See, e.g., TWTC *NPRM* Comments at 15 (“Pole owners often wait months or even years after receiving an initial application to complete make-ready work, and these delays are exacerbated by the pole owners’ refusal to permit a mutually agreed upon third party to perform the make ready work.”); Cavalier *NPRM* Comments at 6 (stating that some utilities provide Cavalier access within three months after receiving an application, but others take more than five times as long); Alpheus *NPRM* Comments at 2 (complaining that the length of time for completion of make-ready varies significantly); Letter from Jean L. Kiddoo, counsel to MetroPCS Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 3 (filed Mar. 30, 2011) (stating that a significant hurdle with the issue of delay is that “most pole owners reject the notion of having any timeline in any circumstance”).

<sup>68</sup> See, e.g., Comments of Indiana Fiber Works, RM-11303 (filed Jan. 30, 2006) (noting that it has experienced serious delays involving its applications to one of the principal pole owners in its service area, often exceeding 45 days); Sigecom Comments, RM-11303, at 4 (filed Jan. 27, 2006) (citing mediation on delayed pre-construction survey to confirm Fibertech’s allegation that pole owners frequently do not meet the 45-day time frame set forth in the Commission’s rules).

<sup>69</sup> See, e.g., PCIA Mar. 2, 2011 *Ex Parte* Letter at 4 (reporting that after months of negotiation, one utility provided a distributed antenna system (DAS) provider with make-ready estimation of 260 days for the installation of 20 DAS nodes); *id.* at 4 (reporting that Windstream has refused to agree to make-ready timelines for wireline and wireless attachments, as has Frontier in Minnesota); Crown Castle *NPRM* Comments at 7 (asserting that make-ready work can take up to a year to complete when completed by the pole owner’s internal personnel, often because of difficulty in scheduling of crews in the field); Montgomery and Anne Arundel Counties Reply at 4 (asserting that recent experience with broadband deployments requiring pole attachments has been that the make-ready work performed by utility pole owners typically takes up to a year to complete, can take up to eighteen months in many cases, and is especially slow for larger deployments).

<sup>70</sup> See, e.g., Sidera Mar. 11, 2011 *Ex Parte* Letter at 4.

<sup>71</sup> Current Group *NPRM* Comments at 3 (complaining that utilities often seek to delay potential competitors’ market entry by forcing them to engage in disputes over well-settled issues).

<sup>72</sup> FiberLight Feb. 23, 2011 *Ex Parte* Letter at 2 (“With a pole attachment timeline in place consistent with that proposed by the Commission, FiberLight would be able to provide between 4–5 times as many construction projects thus creating more jobs and serving more areas.”); Windstream Mar. 31, 2011 *Ex Parte* Letter at 3 (“Time and (continued....)

22. As shown in Tables 1 (for attachments in the communications space) and 2 (for wireless attachments above the communications space), the timeline features four stages:

- Stage 1: Survey. During the 45-day survey phase, the pole owner conducts an engineering study to determine whether and where attachment is feasible, and what make-ready is required. (This period has an additional 15 days for large orders as defined below.)<sup>73</sup>
- Stage 2: Estimate. The pole owner provides an estimate of the make-ready charges within 14 days of receiving the results of the engineering survey.
- Stage 3: Attacher Acceptance. The attacher has up to 14 days to approve the estimate and provide payment.
- Stage 4: Make-Ready. The pole owner must notify any attachers with facilities already on the pole that make-ready for a new attacher needs to be performed within 60 days (or 105 days in the case of larger orders, as defined below).<sup>74</sup> In most cases, any required make-ready work will be completed within this period, but we provide for additional time in certain circumstances. For wireless attachments above the communications space, we adopt a longer make-ready period of 90 days (or 135 days in the case of larger orders), based on safety considerations and the fact that, at present, there is less experience with application of timelines to wireless attachments at the pole top.<sup>75</sup> Finally, an owner may take 15 additional days after the make-ready period runs to complete make-ready itself.

23. For most attachments, the total time from submission of the request through completion of make-ready should take between 105 and 148 days, depending on how long the parties take to prepare and accept an estimate.<sup>76</sup> Attachers may hire contractors authorized by the utility to complete make-ready either on the 133rd or 148th day, depending on whether an owner timely notifies the attacher that it intends to move existing facilities and conduct make-ready if existing attachers have failed to move their attachments. Although we establish this timeline as a maximum, we recognize that the necessary work can often proceed more rapidly, especially at the estimate and acceptance stages, or for relatively routine requests. It would not be reasonable behavior for a utility to take longer to fulfill any requests simply because a timeline with maximum timeframes is being adopted. Likewise, for large orders, we allow 15 more days for the survey and 45 more days to complete make-ready.

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again, KDL's fiber deployment efforts for schools, like cell towers, have been stalled for many months by delays in the make-ready phase of its projects.”).

<sup>73</sup> See *infra* para. 63.

<sup>74</sup> See *infra* para. 63.

<sup>75</sup> See Letter from Brian Regan, Director, Government Relations, PCIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, at 2 (filed Mar. 15, 2011) (PCIA Mar. 15 *Ex Parte* Letter) (indicating that Utah's total timeline applicable to wireless attachments for fewer than 300 poles ranges from 165 to 180 days, and Vermont's total timeline for up to 0.5% of a utility's poles is 180 days); Letter from Brian M. Josef, Assistant Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, at 4 (filed Mar. 15, 2011) (CTIA Mar. 15 *Ex Parte* Letter) (noting timelines in Utah and Vermont and stating that “[m]ore states are progressing in the same direction, taking steps to ensure wireless attachers have access to poles, and specifically access to the pole top”).

<sup>76</sup> See *supra* para. 22 (describing the various stages of the timeline and their respective lengths). For wireless attachments above the communications space, the relevant end point of the timeline is 178 days rather than 148 days.



# Access Timeline for Wireless Pole Attachment Above the Communications Space

Stage						
	Survey		Estimate	Acceptance	Make-Ready	
<b>Day:</b>	0	45	59	73	163-178	
<b>Stage in days:</b>	45		14	14	90-105	
<b>Owner Duty</b>	<ul style="list-style-type: none"> <li>• Conduct engineering survey.</li> </ul>		<ul style="list-style-type: none"> <li>• Provide cost estimate for make-ready.</li> </ul>		<ul style="list-style-type: none"> <li>• Give existing attachers 90 days notice.</li> <li>• Prepare poles if necessary.</li> <li>• Work with existing attachers' contractors.</li> </ul>	
<b>Attacher Remedy</b>	<ul style="list-style-type: none"> <li>• File complaint with Commission.</li> </ul>		<ul style="list-style-type: none"> <li>• File complaint with Commission.</li> </ul>		<ul style="list-style-type: none"> <li>• File complaint with Commission.</li> </ul>	
<b>Clock</b>			<ul style="list-style-type: none"> <li>• Parties may stop clock if no master agreement.</li> </ul>		<ul style="list-style-type: none"> <li>• Pole owner may stop clock for good and sufficient cause.</li> </ul>	

**Table 2**

24. *Stage 1 - Survey*: 45 days. We require a utility to respond within 45 days of receipt of a complete application to attach facilities on the utility’s poles—for both wireline and wireless attachments either in or above the communications space. This required response is specified in our current 45-day response rule, which provides that, where a utility denies an attachment request, it must provide a written explanation of its denial that is specific; include all supporting evidence and information; and explain how the evidence and information relate to reasons of lack of capacity, safety, reliability, or engineering standards.<sup>77</sup> The 45-day period also accords with the “survey” period in some state models and a proposal in the record.<sup>78</sup> Indeed, the *Further Notice* stated that “[the 45-day response] rule is functionally identical to a requirement for a survey and engineering analysis when applied to wired facilities, and is generally

<sup>77</sup> 47 C.F.R. § 1.1403(b).

<sup>78</sup> Case 03-M-0432—Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, *Order Adopting Policy Statement on Pole Attachments*, at 3–4 (New York Comm’n, rel. Aug. 6, 2004) (New York Order); *Re The State’s Public Service Company Utility Pole Make-Ready Procedures - Phase I*, Docket No. 07-02-13, at 17 (Dept. of Pub. Util. Control, Apr. 30, 2008); Coalition Proposal at 1.

understood by utilities as such.”<sup>79</sup> No commenter disagrees, and most utilities regularly meet this deadline. According to a Utilities Telecom Council survey of its members, utilities meet the 45-day requirement 81 percent of the time.<sup>80</sup> More than half of the missed deadlines are caused by either the size of the project or errors in the application.<sup>81</sup> Our new rules address both of these problems: under the rules we adopt today the timeline does not start until a completed application is submitted, and there is flexibility for larger orders.<sup>82</sup> Thus, we expect that utilities acting diligently and in good faith will be able to conduct surveys within the prescribed 45-day period. Owners are given an additional 15 days for large orders.

25. To constitute a “request for access” necessary to trigger the timeline, a requester must submit a complete application that provides the utility with the information necessary under its procedures to begin to survey the poles. We find that pole owners must timely notify attachers of errors in an application, and may not stop the clock to correct errors in an application once it is accepted as complete,<sup>83</sup> as surveys that are not interrupted are more conducive to dependable timeframes. Furthermore, the timing of any such notification of deficiencies in an application must be reasonable. If the request involves attachment of facilities that are unfamiliar to the utility, engineering specifications must be established prior to submission of the application. If an application is submitted for which such engineering specifications have not been established, the pole owner must respond in a manner that is reasonable and timely under the circumstances, but in any event within 45 days.<sup>84</sup> We leave the specific processes for establishing such engineering specifications to individual utilities, so long as they are reasonable and timely.

26. *Stages 2 and 3—Estimate and Acceptance:* Where a request for access is not denied, a utility must present to a requesting entity an estimate of charges to perform all necessary make-ready work within 14 days of providing its Stage-1 response—or within 14 days after the requesting entity delivers its own survey to the pole owner, as it may do if the pole owner fails to meet the timeline’s Stage 1 deadline. The requesting entity may consider the estimate for 14 days after receiving it before the utility may withdraw the offer. Both offer and acceptance may be made sooner than the maximum 14 days. Estimates will not expire automatically after 14 days, but rather must be actively withdrawn by the utility. If an estimate is withdrawn by the utility, the prospective attacher must resubmit its application for attachment.

27. By adopting a 14-day estimate stage, we ensure that a utility will have a reasonable opportunity to develop a cost estimate from the survey. Such an opportunity is essential when a utility

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<sup>79</sup> See Utilities Telecom Council Comments (filed Mar. 7, 2008), App., The Problem with Pole Attachments: A White Paper at 12 (2007) (stating that, under the rule “an application must be approved or denied in writing within 45 days from the date that it is filed with the utility. The typical process involves reviewing the proposal for completeness, conducting a field survey, conducting an engineering analysis (load and clearance), estimating make-ready and construction costs, submitting the estimate to the applicant and approving the attachment.”) (Utilities Telecom Council White Paper).

<sup>80</sup> *Id.* at 4, 12–13.

<sup>81</sup> *Id.* at 4, 13 (stating that, of surveys that took more than 45 days, 30% were due to the size of the project; 23% to errors in the application; 28% to backlog; and 19% to other factors).

<sup>82</sup> See *infra* Part III.A.2, III.A.3. Under this approach, we anticipate that missed survey deadlines will be reduced substantially, yielding higher success rates overall. Moreover, addressing these variables allows the survey stage to run without a provision for stopping the clock. See Sunesys Comments at 7–8 (arguing that utilities should be permitted to defer starting the clock and notify attachers of errors).

<sup>83</sup> See, e.g., Qwest Comments at 8 (arguing that errors should stop the clock); Sunesys Comments at 7–8 (arguing that utilities should be permitted to defer starting the clock and notify attachers of errors).

<sup>84</sup> See 47 C.F.R. § 1.1403(b).

works from a requesting entity's survey rather than its own. A separate estimate stage also allows for a survey response that is independent of negotiation of terms in a master pole attachment agreement.<sup>85</sup> If an entity submits a complete application for a survey, the survey should proceed independently of any ongoing negotiations regarding rates, terms, and conditions of attachment. Likewise, the right of an attacher to hire a contractor if the survey deadline is missed operates independently of a licensing agreement.<sup>86</sup> Finally, setting fixed limits to these transactional stages enhances the predictability of the timeline.

28. We find that allowing up to 14 more days after the survey period for the preparation of an estimate is appropriate.<sup>87</sup> Although neither stage need last a full 14 days, we conclude that providing this additional time is useful in allowing parties to prepare or review the estimate outside of the survey and make-ready stages. Also, if an attacher is not prepared to move forward, the utility may turn its attention and resources to another project, rather than delay the project indefinitely. Indeed, the proposal to limit an attacher's review of the estimate to 14 days received no negative comment.

29. *Stage 4—Make-Ready:* Upon receipt of payment from the attacher, we require a utility to notify immediately and in writing all known entities with existing attachments that may be affected by the planned make-ready. The notice shall: (1) specify where and what make-ready will be performed; (2) set a date for completion of make-ready no later than 60 days after notification (or 105 days after notification in the case of larger orders) for attachments in the communications space, or no later than 90 days after notification (or 135 days after notification in the case of larger orders) for wireless attachments above the communications space;<sup>88</sup> (3) state that any entity with an existing attachment may add to or modify the attachment before the date set for completion of make-ready; (4) state that the utility may assert its right to 15 additional days to complete make-ready and that, for attachment in the communications space, the requesting entity may complete the specified make-ready itself if make-ready is not completed by the date set by the utility (or, if the utility has asserted its 15-day right of control, by the date 15 days after that completion date); and (5) state the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure. Under normal circumstances, performance of make-ready will complete the elements of the timeline that precede actual attachment.

30. As shown in Figure 1, we anticipate that adoption of a 60-day timeframe for make-ready performance in the communications space (105 days for large projects) will expedite those make-ready projects—comprising at least 20 percent of the total—that today exceed the large-order 105-day target:

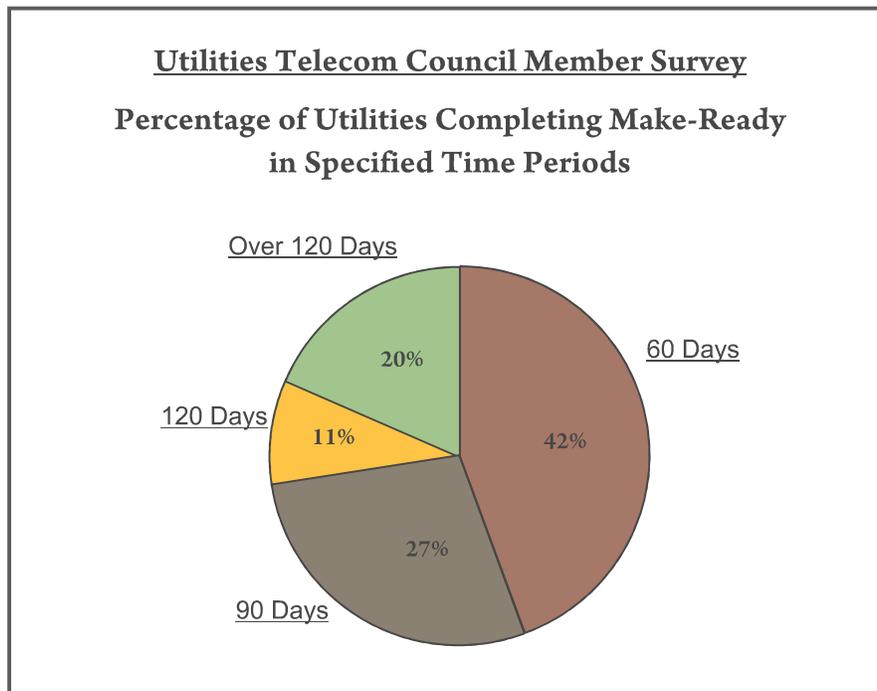
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<sup>85</sup> See *infra* Part IV.E; see also Florida IOUs Reply at 13 (arguing that a master agreement is needed to protect the pole owner and acquaint the attacher with the pole owner's standards, processes and application procedures); Letter from Sean B. Cunningham, Counsel, Alliance for Fair Pole Attachment Rules, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245 at 2 (filed Jan. 27, 2011) (arguing that timeline should not commence unless the applicant has a master agreement that addresses matters including, *inter alia*, insurance, indemnification, and safety procedures).

<sup>86</sup> This approach is consistent with the New York model. New York Order at 3 (14 day limit). See Coalition Proposal (15 day limit).

<sup>87</sup> See, e.g., Fibertech Comments at 5–6 (arguing that Connecticut's omission of additional time for estimates proves it to be unnecessary); Verizon Comments at 25–26 (arguing that 14 days would be more useful later in the timeline).

<sup>88</sup> As noted, the make-ready period for wireless attachments above the communications space is 90 days. See *infra* para. 33.



**Figure 1**

31. We adopt 60 days for the make-ready stage in the communications space in order to (1) synchronize make-ready with the Commission’s existing rules that give entities with existing attachments 60 days to move them before a pole owner modifies a pole,<sup>89</sup> and (2) promote a higher success rate that attachers and their investors can depend on. Section 224(h) requires pole owners to give any entity with an existing attachment a reasonable opportunity to add to or modify its facilities before the owner modifies the pole.<sup>90</sup> The Commission has long interpreted “a reasonable opportunity” to mean that a “utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to removal of facilities.”<sup>91</sup> This 60-day standard adopted in 1996 continued a Commission policy that dates back to the Commission’s *First Report and Order* implementing the Pole

<sup>89</sup> See *infra* App. A (47 C.F.R. § 1.1422).

<sup>90</sup> 47 U.S.C. § 224(h) provides:

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

<sup>91</sup> See 47 C.F.R. § 1.1403(c) (requiring a utility to provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to, *inter alia*, modifying a pole); *Local Competition Order*, 11 FCC Rcd at 16094–96, paras. 1207–09.

Attachment Act of 1978.<sup>92</sup> The Commission's longstanding rule appears to have influenced pole attachment expectations. No commenter challenges this well-established standard for reasonable notice.

32. Based on the record, 60 days also appears to be a workable timeframe that many utilities can meet.<sup>93</sup> This furthers our interest in dependability. The successful experiences of several utilities *and* attachers support the pragmatism of selecting this model. For example, Verizon reports that, when multiple parties must be sequenced to perform make-ready, 60 days are needed to design the work order and coordinate make-ready work.<sup>94</sup> Other utilities also estimate that they need 60 days to perform make-ready.<sup>95</sup> On the attachment side, TWC claims that requests for more than 200 attachments may require 60 days or more.<sup>96</sup> We disagree with commenters that contend we should adopt a 45-day deadline for make-ready performance because New York and Connecticut adopted that interval.<sup>97</sup> The record contains no data showing how often utilities in those states actually meet the 45-day deadline. Some utilities do report that they find 45 days adequate for make-ready, but only absent complicating factors.<sup>98</sup> On this record, it appears that 45 days may be a "best practice" for medium-sized pole attachment requests, and 30 days or less appears to be a reasonable "best practice" for small requests.<sup>99</sup> We decline to adopt these shorter "best practices" timeframes as rules, but we encourage utilities to maintain or improve upon these shorter timeframes when feasible. As discussed in greater detail *infra*, if existing attachers have not moved their facilities within 60 days of notification, the utility or the attacher may move the facilities for them.<sup>100</sup>

33. For wireless attachments above the communications space on a pole, we include an extra 30 days for make-ready for two reasons. First, these attachments generally are located in, near or above the electric space, which can raise significant safety concerns.<sup>101</sup> Second, the record reflects that, at

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<sup>92</sup> Communications Act Amendments of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978) (Pole Attachment Act); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket 78-144, First Report and Order, 68 FCC 2d 1585, para. 8 (1979) (*First Report and Order*).

<sup>93</sup> The ability to meet the 60-day make-ready period is premised on size limits to orders that would be subject to the timeline. *See infra* Part III.A.4. *See also, e.g.*, Coalition Comments at 33; AT&T Comments at 28; TWC Comments at 18. These comments respond to the 45-day make-ready period we proposed, not the 60-day make-ready period we adopt.

<sup>94</sup> Verizon Comments at 31 (arguing 60 days needed for pole owners to complete the engineering design, create a work order, and coordinate make-ready work with other attachers where work for multiple parties must be sequenced).

<sup>95</sup> *See, e.g.*, USTelecom Comments at 20; CPS Energy Comments at 9 (both arguing that 60 days are needed to perform make-ready).

<sup>96</sup> TWC Comments at 18 (arguing that requests to attach 200 poles or less can be filled in 45 days, but requests for more than 200 attachments may require 60 to 90 days).

<sup>97</sup> Fibertech Comments at 5–6 (arguing that experience in New York and Connecticut shows that a 45-day performance timeframe is sufficient).

<sup>98</sup> *See Further Notice*, 25 FCC Rcd at 11893, para. 40. *See, e.g.*, Idaho Power Comments at 2 (straightforward requests processed within 45 days); Florida IOUs Comments at 18–24 (45 days reasonable if limited to communications space); Oncor Comments at 23 (45 days reasonable when deadline applies to attaching entities).

<sup>99</sup> *See, e.g.*, TWC Comments at 18 (proposing that make-ready work for fewer than 20 poles should be complete in 30 days); Coalition Comments at 32 (proposing planning meetings for orders in excess of 25 poles); Utah Admin. Code § R746-345-3 (shorter timeframes for orders of 20 or fewer poles); NRECA Comments at 8–10 (finding that most utilities meet its orders within 30 days).

<sup>100</sup> *See infra* Part III.A.3.

<sup>101</sup> *See, e.g.*, HTI Reply at 9 (stating that siting such equipment among "active" components creates additional safety risks for workers); NY Comm'n Wireless Proceeding at 6 ("Special attention must be given to safety because (continued....)

present, there is less experience with application of state timelines to attachments at the pole top, and in those circumstances, it is appropriate to err on the side of caution.<sup>102</sup> Also, for reasons we discuss separately below, we follow state models that allow additional days for make-ready for large orders within a single state.<sup>103</sup>

34. We find that the benefit of requiring the utility to notify existing attachers of needed make-ready outweighs the relatively small burden of providing such notice. The requesting entity's interest in broad notification is typically strong, whereas a utility's additional burden in copying additional known attachers is minimal. The statute requires pole owners to notify in writing "any entity that has obtained an attachment so that such entity may have a reasonable opportunity to add to or modify its existing attachment."<sup>104</sup> When the notice requirement is triggered by a prospective attacher's acceptance of a utility's estimate, we interpret the word "any" to encompass as broad a range of attachers as is practicable, including not only cable system operators and telecommunications carriers, but also any attaching joint users or joint owners, and, if their address is known to the utility, entities with attachments that the utility believes to be unlawful.

35. Several utilities contend that they should not be required to actively manage and coordinate make-ready.<sup>105</sup> We agree. Utilities may fulfill their section 224(f)(1) access obligation by performing make-ready themselves, by contracting out the direction and management of make-ready, or by cooperating with existing attachers' contractors to ensure make-ready is timely. The "just and reasonable" standard in section 224(b) gives utilities the flexibility to develop and implement procedures for meeting make-ready obligations. However, the notification-in-writing requirement that we adopt is appropriate both because section 224(h) expressly requires written notification by the pole owner,<sup>106</sup> and because of the potential legal and practical consequences if entities with existing attachments are not properly notified.

36. *Completion by Owner:* If make-ready is not completed by the date specified in the utility's notice to entities with existing attachments, a utility, prior to the expiration of the 60-day notice period (or 105-day notice period in the case of larger orders), may notify the requesting attacher in writing that it intends to assert its right to complete all remaining work within 15 days. In such cases, the utility will have an additional 15 days to complete make-ready. If make-ready remains unfinished at the end of the 15-day extension, the attacher may assume control of make-ready at that point (Day 148 of the timeline, or Day 193 in the case of larger orders).<sup>107</sup> Thus, we permit a pole owner to assert its right to 15

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such facilities could fall over onto power lines in high wind conditions or in heavy wet snow conditions resulting in power outages.").

<sup>102</sup> Some states with timelines apply their pole attachment rules to wireless equipment, while others do not. Compare, e.g., Utah Admin. Code § R746-345 ("[T]hese rules apply to any wireless provider."), with NY Comm'n Wireless Proceeding at 6-7 ("[W]e will not apply the Pole Attachment Order and Policy Statement to wireless attachments.").

<sup>103</sup> See *infra* paras. 63-67.

<sup>104</sup> 47 U.S.C. § 224(h)(providing that "whenever the owner of a pole . . . intends to modify or alter such pole . . . the owner shall provide written notification of such action to any entity that has obtained an attachment . . . so that such entity may have a reasonable opportunity to add to or modify its existing attachment").

<sup>105</sup> See, e.g., Ameren *et al.* Comments at 11 (arguing that Commission authorization cannot mitigate other substantial liabilities to which pole owners may be exposed in resorting to such "self-help" remedies, including loss of service); Oncor Comments at 23 (stating that Oncor is not in the communication make-ready business and does not want to be); Florida IOUs Comments at 21-22 (urging the Commission to avoid putting pole owners in the untenable position of coordinating the sequence and timing of rearrangement for existing attachers).

<sup>106</sup> 47 U.S.C. § 224(h).

<sup>107</sup> See *infra* Part III.A.3.

days to complete make-ready in lieu of adopting an automatic fifth stage for “multi-party coordination” as proposed in the *Further Notice*.<sup>108</sup> For attachments in the communications space, if the utility does not timely assert its right to 15 extra days to perform make-ready, control of the project transfers to the new attacher immediately at the end of the 60-day period (or 105-day period in the case of larger orders), and the attacher may use a contractor to complete make-ready.<sup>109</sup>

37. Although the *Further Notice* proposed to adopt a fifth stage for multi-party coordination, no party supported that suggestion, and some argue that it would create needless delay.<sup>110</sup> Utilities also argue that they lack expertise or training to move communications wires, and would not risk the liability or legal consequences of doing so on behalf of requesting entities.<sup>111</sup> Nevertheless, we preserve an interval whereby any utility that chooses to use it can have exclusive control over the pole. In cases where a utility has failed to complete make-ready within the 60-day period (or 105-day period in the case of larger orders), a new attacher may hire an authorized contractor to complete make-ready, or in the case of a wireless attachment above the communications space, may invoke its complaint remedy.<sup>112</sup> This will ensure timely access to poles, if not by a pole owner or agent, then by the new attacher.

38. Many electric utilities object vigorously to any requirement that they must complete make-ready performance. They argue that they lack the authority or ability to control certain aspects of the make-ready process. For example, utilities claim that they cannot coordinate make-ready in the communications space, adding that, even if they had the right, they cannot be compelled to exercise it.<sup>113</sup> Utilities also argue that it would be unreasonable to compel utilities to move communications facilities “on demand” on behalf of requesting entities. Several utilities assert that, if they do move attachers’ facilities, they must be held harmless.<sup>114</sup>

39. As noted above, we do not require pole owners to conduct make-ready work. Nevertheless, we find that any utility that wishes to complete make-ready should have an additional 15 days in which to do so.<sup>115</sup> Given the nondiscriminatory access obligation imposed on utilities in section

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<sup>108</sup> See *Further Notice*, 25 FCC Rcd at 11885, paras. 43–44 (proposing multi-party coordination for stage 5 of the timeline).

<sup>109</sup> For wireless attachments above the communications space, if the utility does not assert its right to 15 extra days prior to the running of the 90-day notification period, the attacher may file a complaint as discussed in para. 42, *infra*.

<sup>110</sup> See, e.g., Fibertech Comments at 6–7; Sunesys Comments at 10 (both questioning the need for, and value of, a post-make-ready coordination stage).

<sup>111</sup> See, e.g., Coalition Comments at 70–71 (arguing that electric utilities are not entitled to move municipal attachments, and can no more move communications equipment safely than communications companies can move electric equipment safely); Coalition Comments at 65–66 (arguing that if electric utility pole owners could make existing attachers move their facilities, owners would not have to resort to “double wood,” *i.e.*, installation of a new pole next to shortened old pole); Verizon Comments at 39 (stating that, under joint use arrangements, Verizon has no greater control over the utility pole owner than any other attacher, and incumbent carriers cannot dictate how the utility pole owner processes applications or completes make-ready work).

<sup>112</sup> 47 C.F.R. §§ 1.1420(h), 1.1422.

<sup>113</sup> See, e.g., Coalition Comments at 65–66; Oncor Comments at 25; Ameren *et al.* Comments at 10.

<sup>114</sup> See, e.g., Ameren *et al.* Comments at 11; AT&T Comments at 32; Coalition Comments at 70–71 (all requesting indemnification and protection from liability). *But see* CPS Energy Comments at 9 (stating that it moves attachers after 30 days notice if the attacher fails to comply). We note that New York has permitted attachers to use contractors for make-ready since 2006. New York Order at 3. No commenter reports liability claims related to New York’s pole attachment rules.

<sup>115</sup> *Further Notice*, 25 FCC Rcd at 11885, para. 44.

224(f)(1), we presume that utilities could structure attachment agreements to include provisions for transfer of facilities, or otherwise address liability or other concerns they might have in cases where they elect to perform make-ready themselves. A utility may also assert its 15-day right of control in order to add flexibility to the timeline, which several utilities cite as a concern.<sup>116</sup> While it would not be reasonable for a utility to exercise its 15-day right merely to delay make-ready, a utility may, for example, depending on the circumstances, use the additional 15 days to make up for weather-related delays without surrendering the project to the new attacher. If a utility is working diligently to complete make-ready when its 15 days expire, a new attacher may prefer not to interrupt it for the sake of efficiency. Otherwise, if the attachment is in the communications space, the utility must cede control of the project to the new attacher, which may use approved contractors, accompanied by a representative of the utility, to perform any remaining make-ready work.<sup>117</sup> Thus, the timeline and this optional 15-day stage conclude either with the utility granting access to attach (*i.e.*, in cases where make-ready has been completed) or the passing of control over make-ready to the new attacher (*i.e.*, in cases where make-ready has not been completed).

## 2. Scope of the Timeline

40. The timeline we adopt today—which is modeled after the timeline that has been in use in Utah—applies to all requests by telecommunications carriers (including wireless) and cable operators for attachment in the communications space on a pole. The timeline begins when an application is complete, such that the utility has been provided with the information necessary under its procedures to begin to survey the requested pole(s), including developed engineering specifications for the particular equipment to be attached. A modified form of the timeline applies to wireless attachments by telecommunications carriers and cable operators that are made above the communications space. The timeline does not apply to section 224 ducts, conduits, or rights-of-way. We affirm that completion of an initial pole agreement or “master agreement” is not a prerequisite to starting the clock on a completed application, which may have multiple attachment requests within it. Applications that are outside the scope of the timeline remain subject to the general requirement that the pole owner provide a specific written response within 45 days.

41. *Technology Neutrality.* In the *Further Notice*, the Commission sought comment on developing timelines for section 224 access other than for wired pole attachments, and on whether the wired pole attachment timeline would be appropriate for wireless pole attachments (*i.e.*, antennas and other wireless telecommunications equipment).<sup>118</sup> Specifically, the Commission stated that its goal was to bring regularity and predictability to attachment of wireless facilities, while acknowledging that the attachment of wireless telecommunications equipment in or near the electric space may raise different safety, reliability, and engineering concerns.<sup>119</sup> Such predictability is important because it affords broadband providers an enhanced ability to attract investment and plan for buildout of needed

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<sup>116</sup> See, e.g., Idaho Power Comments at 12 (arguing that utilities need flexibility to retain control of relocation schedules); Qwest Comments at 6–7 (arguing timeline must be flexible enough to address realities of pole attachment process); EEI/UTC Comments at 17–18 (arguing against fixed timeline as not sufficiently flexible).

<sup>117</sup> Some utilities allege that facilities on some poles, such as attachments by municipalities, are not subject to section 224, and may not be moved by them or anyone else. See, e.g., Florida IOUs Comments at 20–21 (arguing that governmental attachments may not be moved); Coalition Comments at 70–71 (arguing that pole owners may not move municipal attachments). The record does not indicate the extent to which governmental attachments are implicated in make-ready delays in the communications space. In any event, the ability to hire contractors need not remove every impediment to attachment to every pole to be a meaningful remedy for attachers.

<sup>118</sup> *Further Notice*, 25 FCC Rcd at 11887–88, paras. 52–53.

<sup>119</sup> *Id.* at 11888, para. 53.

infrastructure such as fiber placed closer to end-user locations, and wireless antennas used to fill in coverage areas and expand capacity.<sup>120</sup>

42. Upon review of the record, we conclude that it is appropriate to apply the timeline to both wired and wireless attachments.<sup>121</sup> We find no reasonable basis for applying a timeline disparately to wired or wireless attachments as such. Concerns in the record relate to the facts that wireless attachments are commonly located in, near, or above the electric space, and the attachment request may be for a type of equipment for which engineering specifications have not already been developed. We address those concerns by adopting two modifications to our basic timeline for wireless attachments by telecommunications carriers and cable operators that are located above the communications space. The first modification is that an extra 30 days is added for make-ready performance for wireless attachments above the communications space, to account for: (1) safety concerns related to equipment being placed in, near or above the electric space; and (2) the fact that, at present, there is less experience with application of state timelines to attachments above the communications space. The second modification to the general timeline is that the remedy for failure to meet the timeline for wireless attachments above the communications space is a complaint remedy rather than the self-effectuating contractor remedy for failure to perform timely survey and make-ready that applies to requests to attach in the communications space.<sup>122</sup> Based on the record, we find the self-help remedy for survey and make-ready performance would not be appropriate for attachments that generally are located in, near, or above the electric space.<sup>123</sup> To accommodate the unique issues facing these requests for attachment, we establish an additional 30 days after the maximum time allowed for attachment requests in the communications space—178 days total.<sup>124</sup>

43. We further conclude that the appropriate avenue for seeking a remedy for failure to meet the timeline for wireless attachments above the communications space is a complaint filed through the FCC's complaint procedures for unreasonable delay on the part of the utility. We also adopt a rebuttable presumption in such proceedings that access has not been provided on just and reasonable terms and conditions. In such a case, a demonstration in a complaint that the timeline has been exceeded shifts the burden to the utility to demonstrate that additional time is warranted. We find a rebuttable presumption is appropriate in this context because wireless attachers above the communications space will not be able to avail themselves of the self-help remedy we provide for attachers in the communications space. Accordingly, we expect that shifting the burden of proof to the utility will deter unreasonable delays for wireless attachments above the communications space. The remedies available in such a complaint proceeding would include mandated access within a specified time frame and in accordance with

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<sup>120</sup> See, e.g., CTIA Comments at 2, 6 (arguing that wireless providers operate in a fast-moving, intensely competitive industry, so speedy access to poles is just as important to wireless attachers as it is to wireline attachers, if not more so); DAS Forum Comments at 20 (arguing that DAS attachments also include wired attachments that should be deployed on the same timeframe to ensure predictability and efficiency of deployment); MetroPCS Comments at 11 (stating that a timeline is appropriate to ensure a level playing field between wired and wireless providers).

<sup>121</sup> See, e.g., T-Mobile Comments at 9 (stating that “it often takes T-Mobile as much as four months to negotiate a master agreement with a cooperative pole owner and sometimes much longer -- even as much as 18 months or more -- to negotiate with an uncooperative one”); CTIA Mar. 15 *Ex Parte* at 2 (“CTIA proposes to extend the wireline timeline for pole owners to grant physical access to wireless attachers by 30 days to 178 days total.”); PCIA Mar. 15 *Ex Parte* at 1 (“Make ready for wireless pole top attachments must not exceed the Commission’s proposed make ready timeline, plus an additional 30 days.”).

<sup>122</sup> See *supra* Part III.A.3.

<sup>123</sup> See, e.g., Oncor Comments at 44–45 (describing the problems with a contractor remedy for access above the communications space); Florida IOUs Comments at 29–31 (same); see also *infra* para. 33 (discussing attachments above the communications space).

<sup>124</sup> CTIA Mar. 15 *Ex Parte* at 6–7.

specified rates, terms, and conditions; substitution of just and reasonable rates, terms, or conditions for unjust and unreasonable ones; and refund of an overpayment.<sup>125</sup> In addition the Commission could initiate enforcement actions that could result in forfeitures.<sup>126</sup>

44. *Engineering Specifications for New Equipment.* The record demonstrates that wireless equipment varies greatly and at least some of it is changing rapidly.<sup>127</sup> In contrast, the maturity of cable and wireline telecommunications equipment has allowed utilities to develop engineering specifications and manuals to address the engineering and safety issues raised by their attachment.<sup>128</sup> Thus, although we do not adopt particular access provisions for wireless attachments in the communications space, we recognize that, as a practical matter, the novelty of wireless equipment both within and above the communications space may pose additional challenges. To the extent that the record evidences concerns about the reasonableness of establishing a timeline for wireless attachments, those concerns have more to do with the lack of developed engineering specifications for untested equipment than with the difficulty of performing a survey or make-ready work.<sup>129</sup> We agree with commenters that assert that the key difference in the process between wireline and wireless attachments lies in the initial engineering evaluation, particularly when a utility is dealing with a type of attachment for the first time.<sup>130</sup> Our timeline thus is fashioned to take into account special treatment of novel engineering problems that do not hinge necessarily on whether the service is wireless or wireline. Indeed, wireline equipment lacking a developed construction specification would be subject to the same approach. To the extent there are concerns that attachment of wireless facilities involves unique safety, security, or engineering issues,<sup>131</sup> we find that development of protocols and specifications to address those issues is substantially more appropriate than excluding all such equipment from the timeline. We note that we expect any evaluation of new types of equipment to be done on commercially reasonable terms, and in a reasonable time – in keeping with the general statutory obligation that rates, terms and conditions for pole attachment be just and reasonable – and we will monitor industry practices in this area, including through our complaint process.

45. *Ducts, Conduits, and Rights-of-Way.* We decline to adopt a timeline for access to section 224 ducts, conduits, and rights-of-way at this time.<sup>132</sup> Access to ducts and conduits raises different issues than access to poles,<sup>133</sup> and the record does not demonstrate that attachers are, on a large scale, currently

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<sup>125</sup> See App. A at section 1.1410(a)–(b).

<sup>126</sup> See 47 C.F.R. § 1.80.

<sup>127</sup> See, e.g., Oncor Comments at 33 (stating that the wireless attachments on its poles “vary greatly in the type of equipment used” and that this equipment “differs in power outlet, dimension, height, weight, antenna size, power supply, photocell, etc.”); Florida IOUs Comments at 28 (“Unlike wireline attachments – which are fairly consistent from an engineering perspective – wireless antennae vary considerably in dimension, placement on the pole, vertical and horizontal space occupied, and loading profile.”); Alliance Reply at 51–53 (stating that “[t]he complexity and variability of make-ready is even greater in the case of wireless attachments, due [in part] to the size, number, and variety of wireless equipment attachments”).

<sup>128</sup> See, e.g., Coalition Comments at 36, 101–02; Oncor Reply at 31.

<sup>129</sup> See, e.g., EEI/UTC Comments at 26 (arguing that wireless attachments pose special operational and safety problems).

<sup>130</sup> See, e.g., Florida IOUs Comments at 28.

<sup>131</sup> See, e.g., Coalition Comments at 36 (asserting that wireless devices emit radio frequency (RF) energy that triggers exposure regulations); APPA Comments at 25; NRECA Comments at 13–14; HTI Comments at 9.

<sup>132</sup> See *Further Notice*, 25 FCC Rcd at 11888–89, para. 54 (seeking comment on whether to apply a timeline to ducts, conduits, and rights-of-way).

<sup>133</sup> See APPA Comments at 25; Coalition Comments at 43–45.

unable to timely or reasonably access ducts, conduits, and rights-of-way controlled by utilities.<sup>134</sup> We emphasize that the determination we make regarding section 224(a)(1) rights-of-way owned or controlled by a utility has no bearing on any public rights-of-way issues subject to section 253 of the Act.<sup>135</sup>

46. *Master Agreement not a Prerequisite to Completion of a Survey.* In the *Local Competition Order*, the Commission adopted a 45-day response rule, requiring a utility that denies access to a prospective attachers to respond in writing with specificity, delineating the reasons for the denial.<sup>136</sup> That rule remains in effect and applies to wireless just as it does to wireline attachments. The current 45-day response rule continues to apply to all requests for access under section 224, whether or not the request is an application subject to the timeline we adopt today, and completion of an initial pole attachment agreement or “master agreement” is not a prerequisite to starting the clock.<sup>137</sup> We reject the argument that surveys should not commence before an initial pole agreement or “master agreement” has been executed.<sup>138</sup> The Commission has never required completion of a master agreement to be a precondition of a request for access,<sup>139</sup> and we reaffirm that utilities may not defer the 45-day response requirement until a master agreement has been completed.<sup>140</sup> While an attacher may wish to investigate possible routes on the ground rather than rely only on maps, and may need access to a pole owner’s specifications and application requirements in order to file a complete application, we are not persuaded that a master agreement is needed for these purposes. Also, insofar as liability concerns arise regarding damage to property or injury to persons—and it is not clear that they do during the survey stage—the parties can resolve them for purposes of a 45-day engineering analysis without negotiating every aspect of the parties’ business relationship, as in a comprehensive master agreement.

47. We agree that make-ready performance does normally require an agreement to be in place between the parties. We find, however, that the engineering analysis (or any other aspect of a survey) and negotiation of rates, terms, and conditions can take place on separate tracks. Therefore, a utility may stop the clock during the estimate stage of the timeline if the parties need additional time to conclude a master agreement, but may not stop the clock during the survey stage. An attacher’s right to proceed with a survey of pole availability before completion of a master pole attachment agreement can be exercised

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<sup>134</sup> By contrast, the record developed on the issue of timely access to poles evidences problems justifying the adoption of a pole attachment timeline. *See generally infra* Part III.A.3.

<sup>135</sup> *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, Notice of Inquiry, FCC 11-59 (rel. April 7, 2011).

<sup>136</sup> *See Local Competition Order*, 11 FCC Rcd at 16101–02, paras. 1224–25; 47 C.F.R. § 1.1403(b) (45-day response rule).

<sup>137</sup> Master agreements are “private pole attachment agreements entered into between the parties in accordance with a patchwork of federal, state, and local regulations and industry standards.” *Local Competition Order*, 11 FCC Rcd at 16061, para. 1126. This agreement is usually generic and is separate from the agreement to attach to specific poles. *See* Letter from Brian Regan, Government Relations Director, PCIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 at 5 (filed Mar. 3, 2011).

<sup>138</sup> *See* Florida IOUs Reply at 13 (arguing against commencing a field survey before parties have reached a pole license agreement); Letter from Sean B. Cunningham, Counsel, Alliance for Fair Pole Attachment Rules, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 2 (filed Jan. 27, 2011) (Alliance Jan. 27, 2011 *Ex Parte* Letter) (arguing that a timeline should not commence unless the applicant has a master agreement that addresses matters including, *inter alia*, insurance, indemnification, and safety procedures).

<sup>139</sup> *See Local Competition Order*, 11 FCC Rcd at 16074, para. 1160 (stating that a utility’s obligation to permit access does not depend upon the execution of a formal written attachment agreement).

<sup>140</sup> *Id.* The *Local Competition Order* recognized that such agreements are the norm and encouraged their continued use, subject to the requirements of section 224, and we continue to believe that is the case. *Id.*

contingent on the attacher's agreement to make payment in advance for the survey.<sup>141</sup> We emphasize that any negotiations regarding a pole attachment agreement must be conducted in good faith, and that dragging out negotiations on the master agreement while the clock is stopped on a particular application would not be considered reasonable.

48. We also conclude that section 1.1403(b) of our rules, which generally requires that a utility approve or deny pole access within 45 days of a request,<sup>142</sup> continues to apply to all requests for access under section 224, independent of any application of the timeline.<sup>143</sup> For example, if the requested access concerns attachment in the electric space on a pole, attachment to a duct or conduit, or attachment of equipment that requires the development of new engineering specifications, the 45-day response rule and all its terms continue to apply. Also, in contrast to the timeline survey rule, section 1.1403(b) of our rules does not distinguish pole access requests by size. Where a utility denies any request for access, the utility must explain its reasons for doing so within 45 days, in writing, with specificity, and with all supporting evidence and information, and also must explain how the information and evidence relate to insufficient capacity, safety, reliability or engineering purposes.

### 3. Remedy: Utility-Approved Contractors

49. Requesters need a way to obtain access to poles if a utility does not meet the deadlines we impose. We adopt the proposal in the *Further* Notice and hold that, if a utility does not meet the deadline to complete a survey or make-ready established in the timeline, an attacher may hire contractors to complete the work in the communications space.<sup>144</sup> We require each utility to make available a reasonably sufficient list of contractors that it authorizes to perform surveys or make-ready on its poles, and require that the attacher must use contractors from this list. We also seek to ensure that safety and network integrity are preserved at all costs. Thus, we require attachers that hire contractors to perform survey and make-ready work to provide a utility with an opportunity for a utility representative to accompany and consult with the attacher and its contractor prior to commencement of any make-ready work by the contractor. Consulting electric utilities are entitled to make final determinations in case of disputes over capacity, safety, reliability, and generally applicable engineering purposes.

50. *General Right To Hire Contractors.* We concur with the Public Service Commission of New York that "it is reasonable to require the utilities either to have an adequate number of their own workers available to do the requested work, to hire outside contractors themselves to do the work, or to allow [a]ttachers to hire approved outside contractors."<sup>145</sup> The transfer of control to the new attacher, including the ability to hire contractors, is key to the effectiveness of the timeline. First, the prospect of surrendering control of the pole to an attacher may spur a utility to complete a survey or make-ready that it might otherwise not timely perform. Second, if the pole owner lacks the resources or the will to perform make-ready, the prospective attacher may pursue the project through any lawful means, including

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<sup>141</sup> See Level 3 Comments at 7 (arguing that attaching parties should have the right to proceed with the survey of pole availability before completion of a master pole attachment agreement, provided that the attaching party agrees to make payment in advance of the pole owner's standard costs for the survey); Alliance Jan. 27, 2011 *Ex Parte* Letter at 2 (asking the Commission to clarify that the utility is allowed to charge the applicant up front for the entire costs of the survey and collect such amount before commencing the survey).

<sup>142</sup> 47 C.F.R. § 1.1403(b).

<sup>143</sup> *Id.*

<sup>144</sup> As discussed in para. 42, *supra*, the contractor remedy does not apply to requests by wireless providers to attach outside the communications space on a pole. Rather, the remedy for a failure to meet the timeline for wireless attachments above the communications space is a complaint filed under the Commission's existing complaint procedures.

<sup>145</sup> New York Order at 3.

use of additional resources. Finally, because the remedy takes effect automatically, the benefit is immediate, and does not depend on the time- and resource-consuming complaint process.<sup>146</sup>

51. As many attachers argue, time is of the essence for the success of their businesses.<sup>147</sup> Utilities allege, however, that they face many impediments to accomplishing make-ready work.<sup>148</sup> We find that permitting this self-help remedy should address both sets of concerns. Moreover, we find this to be a practical solution. The record shows that contractors already work for utilities to perform surveys and make-ready work in the communications space on a regular and professional basis, and presumably can perform the same activities for attachers.<sup>149</sup>

52. We are not persuaded by contentions that use of contractors is impractical or unduly burdensome.<sup>150</sup> We agree that the statutory obligation to provide access to poles places some burden on pole owners. It is, however, a burden that Congress found appropriate to place on utilities in order to facilitate the critical delivery of video, telecommunications, and other communications services, including broadband, and one that the courts have upheld. We find no persuasive evidence in the record that the burdens on utilities of attachers' use of contractors are significant or that utilities are unable to work around the other impediments they claim. For example, pole owners argue that agreements limit the utilities' ability to hire outside contractors, but those agreements do not and cannot restrict who the attachers hire.<sup>151</sup> We also reject the argument that attachers' use of outside contractors exposes utilities to liability for substandard work.<sup>152</sup> The point of utility oversight of utility-authorized contractors is to ensure that the work meets utility engineering requirements. We also find unpersuasive the contention by electric utilities that qualified contract workers are unavailable.<sup>153</sup> A shortage of qualified *electric* workers is irrelevant to the availability of qualified engineers to perform surveys or workers qualified to perform make-ready work in the communications space. Moreover, our requirement that attachers use contractors that the utility has approved should substantially limit concerns about contractor qualifications.

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<sup>146</sup> See Peter McGowan, New York Public Service Commission, Panel Discussion at the FCC Pole Attachments Workshop (Sept. 28, 2010), *video available at* <http://reboot.fcc.gov/video-archives> (at approximately 33 minutes) (stating that since adopting rules, the NY Comm'n has seen relatively few complaints).

<sup>147</sup> See, e.g., Centurylink Comments at 35; Charter Comments at 22; CTIA Comments at 13.

<sup>148</sup> See, e.g., Oncor Comments at 25 (arguing that utilities should not be made into on-demand contractors); Verizon Comments at 39 (stating that, when it is a joint user, it cannot dictate how the utility pole owner processes applications or completes make-ready work); Ameren *et al.* Comments at 11; AT&T Comments at 32; Coalition Comments at 70–71 (all requesting indemnification and protection from liability).

<sup>149</sup> See, e.g., Oncor Comments at 22; Florida IOUs Comments at 31.

<sup>150</sup> See, e.g., Verizon Comments at 39–40; Coalition Comments at 23–24, 49, 52 (arguing that collective bargaining agreements prohibit work by outside personnel); Oncor Comments at 45–46 (arguing that there is a shortage of qualified contractors); Idaho Power Comments at 6 (arguing that training contractors would be burdensome); NRECA Comments at 11–12 (arguing that electric utilities are unable to assess competence of communications contractors).

<sup>151</sup> See, e.g., Coalition Comments at 49 (“Many utilities like NSTAR are parties to collective bargaining agreements that prohibit the hiring of outside contractors in certain circumstances.”); USTelecom Comments at 21–22 (arguing that the use of outside contractors may be subject to existing labor obligations) Verizon Comments at 39–40 (arguing that many incumbent carriers have unionized workforces and Verizon’s labor agreements typically restrict Verizon’s ability to use outside contractors for make-ready work).

<sup>152</sup> APPA Comments at 27 (arguing that use of outside contractors expose utilities to liability for the violation of state regulations due to overloading and substandard work performed by contractors outside of the utilities’ control).

<sup>153</sup> Coalition Comments at 23–24; Oncor Comments at 45–46 (arguing that there is a shortage of qualified contractors).

53. Some utilities contend that contractors do not share their long-term commitment to safety and reliability, but rather will owe their allegiance to the new attachers, whose overriding objective is to attach to the poles as quickly as possible.<sup>154</sup> Others object more generally that contractors do not work to utility standards, so their work may undermine safety and reliability.<sup>155</sup> We recognize that surveys and make-ready pertain directly to the capacity, safety, reliability, and sound engineering of the poles, and therefore trigger legitimate concern to all pole owners.<sup>156</sup> Indeed, competent performance of surveys and make-ready concerns not only utilities but also existing attachers and the general public, all of which rely on utility poles for delivery of vital services. We therefore adopt rules to address concerns relating to safety, reliability, and general competence.

54. *List of Authorized Contractors.* Attachers that utilize the self-help remedy above must use contractors that the utility has approved. We require utilities to identify and publish a list of authorized contractors for requesting entities to choose from when hiring a contractor after a timeline deadline has been missed.<sup>157</sup> Utilities have discretion about which contractors to include, and the listed contractors must be made available to attachers without discrimination. If a utility fails to list approved contractors, attachers may use the “same qualifications” standard that we have previously adopted.<sup>158</sup> Pursuant to this default rule, the contractor must have the “same qualifications, in terms of training, as the utility’s own workers,” and this means the qualifications that are appropriate for a utility worker or contractor performing the particular work, such as survey or make-ready in the communications space.<sup>159</sup>

55. Requiring utilities to prepare and publish a list of authorized contractors ensures that only qualified contractors work on utility poles. We do not adopt more particular proposed regulations governing contractor qualifications.<sup>160</sup> For example, in the *Further Notice*, the Commission proposed that contractors that have worked for the utility should automatically be included on that utility’s list.<sup>161</sup> Utilities argue persuasively, however, that the list should not automatically include such contractors because the contractor may have performed poorly, or been hired only out of necessity to restore power.<sup>162</sup> We therefore conclude that utilities may use their own best judgment in listing contractors they currently view as qualified. We also decline to adopt the proposal requiring each utility to post the qualifications it uses to evaluate contractors for approval and certification. Commenters have convinced us that doing so is unnecessary in light of the substantial duties on utilities to act reasonably and nondiscriminatorily.

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<sup>154</sup> See, e.g., Coalition Comments at 49–50; Idaho Power Comments at 7; Oncor Comments at 39.

<sup>155</sup> See, e.g., Coalition Comments at 14–15, 48; Idaho Power Comments at 5–6; Oncor Comments at 43 *citing* Utilities Telecom Council White Paper at 15–16 (66% of reporting utilities did not permit licensees to hire third parties for field surveys and 78% of utilities did not allow licensees to hire third parties for make-ready).

<sup>156</sup> See 47 U.S.C. § 224(f)(2); *Local Competition Order*, 11 FCC Rcd at 16081, para. 1176 (acknowledging that, in some circumstances, incumbent LECs have legitimate safety and engineering concerns).

<sup>157</sup> 47 C.F.R. § 1.1422(a). For allegations of non-compliance with the estimate stage of the timeline, our traditional complaint regulations would apply. See 47 C.F.R. §§ 1.1403, 1.404.

<sup>158</sup> See *Further Notice*, 25 FCC Rcd at 11892, para. 64; see *Local Competition Order*, 11 FCC Rcd at 16083, para. 1182 (setting requirements for contractors that attach facilities to poles).

<sup>159</sup> *Local Competition Order*, 11 FCC Rcd at 16083, para. 1182.

<sup>160</sup> See *Further Notice*, 25 FCC Rcd at 11891–92, paras. 61–65.

<sup>161</sup> *Further Notice*, 25 FCC Rcd at 11891–92, para. 62; see MetroPCS Comments at 14–15.

<sup>162</sup> Coalition Comments at 58.

56. Utilities inquire whether they may require listed contractors to meet the requirements they impose on contractors that they employ as virtual extensions of full-time utility personnel.<sup>163</sup> Any requirements that a pole owner wishes to place on listed contractors must be just, reasonable, and nondiscriminatory.<sup>164</sup> We decline to reach *a priori* conclusions about specific requirements. If a requirement advances and is tailored narrowly to ensure safety, reliability, and generally applicable engineering practices, it is likely reasonable. If a requirement is customary and prudent whenever a contractor is hired, such as requiring a service bond and license to practice, it is likely reasonable. If a requirement governs aspects of the business relationship, such as requiring a contractor to give priority to the utility over the attachers, such requirement probably does not pass a “reasonable and nondiscriminatory” test. Beyond these rules of reason, the record does not support specific conclusions, or indicate that utilities need further guidance in order to identify authorized contractors.

57. Attachers may only select a contractor that is not on the utility’s list of authorized contractors if the utility fails to develop and keep up-to-date a list of contractors.<sup>165</sup> In this way, and in keeping with our goal of accelerating the pole attachment process to facilitate broadband deployment, we do not permit inaction by a utility to bring progress to a halt. Off-list contractors may not be hired, however, merely because the listed contractors are already engaged.<sup>166</sup> We find this solution less cumbersome than those we proposed in the *Further Notice*, and adequate for our purpose of encouraging utilities to develop and maintain lists of approved contractors to perform survey and make-ready work.<sup>167</sup> While we do not expressly adopt a minimum number of contractors as the threshold for the list, we emphasize that maintaining a reasonably sufficient and up-to-date list of contractors is a key element of this obligation. What constitutes a reasonable number may vary, depending upon the number of potential contractors that serve the area. We will monitor industry practices in this area, including through our complaint process.

58. *Utility Oversight.* To guard against substandard work or undue haste, we also require attachers to provide the utility with an opportunity for a utility representative to accompany and consult with the attacher and the attacher’s authorized contractor whenever the contractor visits a pole.<sup>168</sup> Consistent with the nondiscrimination requirement in section 224(f)(1), the utility representative may monitor a contractor’s work, and may insist that the work meet utility specifications for safety and

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<sup>163</sup> See, e.g., Oncor Comments at 46–47 (maintaining that many approved contractors have contractual agreements with utilities setting out specific requirements); Coalition Comments at 53–54 (proposing specific contractor safeguards).

<sup>164</sup> 47 U.S.C. § 224(b)(1) (rates, terms, and conditions required to be just and reasonable), (f)(1) (right of nondiscriminatory access).

<sup>165</sup> See ITTA Comments at 4; Level 3 Comments at 12–13 (both arguing that any pole owner should have the right to certify and approve contract workers, provided that it establishes and maintains a certification and approval process).

<sup>166</sup> See, e.g., Oncor Comments at 45–46 (arguing that approved contractors may have contracts with utilities especially during storm restoration); Coalition Comments at 23–24 (contending that there is a shortage of qualified contractors).

<sup>167</sup> See *Further Notice*, 25 FCC Rcd at 11891–92, para. 62 (proposing that utilities be required to list any contractors that the utility itself uses, and to post or otherwise share with attachers the standards the utility uses to evaluate contractors for approval); ITTA Comments at 4; Level 3 Comments at 12–13 (arguing that any pole owner should have the right to certify and approve contract workers, provided that it establishes and maintains a certification and approval process); ACA Comments at 8 (supporting proposal to allow attachers to use outside contractors to perform surveys and make-ready work if a utility has failed to perform its obligations within the timeline).

<sup>168</sup> See *infra* App. A (including rule 1.1422(b), which we adopt today).

reliability, including requirements that may exceed NESC standards.<sup>169</sup> The utility oversight should protect against any attachers pressure to cut corners, and mitigates concerns about the contractor's potential conflict of interest.<sup>170</sup>

59. Consistent with the statutory distinction of section 224(f)(2), we authorize electric utilities, but not incumbent LECs, to render a final attachment decision. Specifically, if the pole owner is an electric utility, it retains the statutory right to deny access where there is insufficient capacity or for reasons of safety, reliability, or generally applicable engineering purposes.<sup>171</sup> We recognize that no matter how rigorous a survey is carried out, disputes over interpretation or changed circumstances can arise in the field. Where the attacher and an electric utility's representative disagree, they are obligated to try to reach an accommodation within a reasonable amount of time, and disputes should be escalated within the companies when no agreement is reached on the ground.<sup>172</sup> If the electric utility and the attacher are unable to reach agreement, or to find a suitable alternative, the electric utility may make the final decision on such a matter, subject to Commission review through our complaint process.

60. Although the Commission has long recognized that incumbent LECs are interested in pole capacity, safety, reliability, and sound engineering,<sup>173</sup> we find that there are legal and policy reasons to distinguish between utilities and incumbent LECs. We therefore do not permit incumbent LECs to render final attachment decisions. First, the statute authorizes only utilities, not incumbent LECs, to deny access for reasons such as lack of capacity or safety concerns.<sup>174</sup> Moreover, the Commission has recognized that, unlike electric utilities, incumbent LECs may view other attachers as rivals. Since the initial adoption of access requirements, the Commission has determined that objections from incumbent LECs based on alleged engineering concerns "will be scrutinized very carefully, particularly when the parties concerned are in a competitive relationship."<sup>175</sup> We therefore decline to give incumbent LECs veto power over the engineering judgments of a contractor selected in accordance with our rules.

61. Some utilities support our decision to allow attachers to use contractors under the circumstances and with the conditions set forth above.<sup>176</sup> However, other utilities argue that, even with

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<sup>169</sup> See Oncor Comments at 47–48 (seeking assurance that contractors will follow its standards when these are more stringent than the NESC, including Texas-specific stringent specifications); *Local Competition Order*, 11 FCC Rcd at 16070–72, paras. 1148–50.

<sup>170</sup> See, e.g., Idaho Power Comments at 7 (arguing that contractors will be forced into conflicts between attachers' interest in timely make-ready work and utilities' interest in safe and reliable service); Oncor Comments at 39 (arguing that Oncor must maintain control over the performance of survey and make-ready on its poles to maintain quality control, and that attachers' desires for speed to market provide an incentive for "blow and go" construction); Coalition Comments at 14–15, 48 (arguing that only electric utilities do the surveys and make-ready work safely and properly, and that attachers' contractors increase safety violations, unauthorized attachments, and shoddy attacher workmanship).

<sup>171</sup> 47 U.S.C. § 224(f)(2) (providing that electric utilities may deny access where there is insufficient capacity or for reasons of safety, reliability, or generally applicable engineering purposes).

<sup>172</sup> See *infra* Part IV, para. 100.

<sup>173</sup> *Local Competition Order*, 11 FCC Rcd at 16081, paras. 1176–77.

<sup>174</sup> 47 U.S.C. § 224(a)(1), (a)(5), (f)(2).

<sup>175</sup> *Local Competition Order*, 11 FCC Rcd at 16081, para. 1177.

<sup>176</sup> See, e.g., Ameren *et al.* Comments at 13 (stating that outside contractors should perform make-ready work if and only if the pole owner has failed to perform such work within the timeline); Florida IOUs Comments at 30–31 (stating that make-ready in communications space is handled without significant involvement from electric utilities).

the above protections, the use of contractors presents safety and quality concerns.<sup>177</sup> We find these objections unpersuasive. The record, as well as the experience of some states, provides ample basis for concluding that the combination of utility authorization and oversight that our rules provide for, along with allowing utilities to make final decisions about capacity, safety, reliability, and sound engineering, will adequately address these concerns and ensure the public interest in a safe and reliable network. We find that the rules we adopt to facilitate access, combined with the conditions and protections we impose, strike the proper balance between encouraging deployment of facilities and safeguarding the network.

#### 4. Limitations and Exceptions

62. As proposed in the *Further Notice* and in response to the practical concerns of utilities in processing pole attachment requests in conjunction with their other critical work, we adopt rules that limit or create exceptions to the timelines in appropriate circumstances. Utilities may process pole attachment requests, whether in the communications space or above, according to size limits based either on a percent of a utility's poles in a state or an absolute number of poles in a state, whichever is lower, and utilities may treat all in-state requests from a single attacher within a 30-day interval as a single request. Also, as proposed in the *Further Notice*, we adopt rules and standards for "stopping the clock" (*i.e.*, for tolling the timeline).<sup>178</sup>

63. *Limit on Order Size.* Based on the record before us and successful state models, we adopt limits on the size of attachment requests that are subject to the timelines we adopt today.<sup>179</sup> The limits on size of attachment requests apply both to attachments in the communications space and the longer timeline for wireless attachments above the communications space. Specifically, we apply the timeline to orders up to the lesser of 0.5 percent of the utility's total poles within a state or 300 poles within a state during any 30-day period. For larger orders—up to the lesser of 5 percent of a utility's total poles in a state or 3,000 poles within a state—we add 15 days to the timeline's survey period and 45 days to the timeline's make-ready period, for a total of 60 days. For in-state orders greater than 3,000 poles, we require parties to negotiate in good faith regarding the timeframe for completing the job. An attacher always has the ability to submit requests of up to 3,000 poles in any 30-day period, so an attacher could start a 9,000 pole order within a single state through the timeline over three successive months.

64. We rely in part on the successful experience of Utah, which has implemented comparable limits on the number of orders that are subject to a timeline.<sup>180</sup> Like the plan we adopt today, Utah applies a different timeline at the 0.5 percent/300 pole level than at the 5 percent/3,000 pole level.<sup>181</sup> Vermont, by contrast, relies exclusively on percentages as a gating mechanism for large orders, and

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<sup>177</sup> See, e.g., Oncor Comments at 40 (stating that Oncor is willing to permit approved contractors in the communications space but unwilling for attachers' contractors to perform critical surveys and make-ready).

<sup>178</sup> *Further Notice*, 25 FCC Rcd at 11887, para. 51 (stopping and restarting the clock).

<sup>179</sup> See, e.g., Utah Admin. Code § R746-345-3(C)(1) (shorter timeframes for orders of 20 or fewer poles); AT&T Comments at 28; TWC Comments at 18; Coalition Comments at 33; Associations Comments at 10–11. *But see* Level 3 Comments at 6–7.

<sup>180</sup> See Utah Admin. Code § R746-345-3(C) (implementing single-attacher batch mechanism and adjusting timeline length to accommodate large orders).

<sup>181</sup> For applications that represent greater than 20 poles, but equal to or less than 0.5% of the pole owner's poles in Utah, or 300 poles, whichever is lower, the time for construction is 120 days; for applications equal to or less than 5% of the pole owner's poles in Utah, or 3,000 poles, whichever is lower, the time for construction is 180 days; for applications that represent greater than 5% of the pole owner's poles in Utah, or 3,000 poles, whichever is lower, the times for the above activities will be negotiated in good faith. Utah Admin. Code § R746-345-3(C)(1)–(4).

allows for no comparable ceiling at an absolute number of pole attachments per request.<sup>182</sup> We agree with commenters that a percentage-based system alone could be onerous for larger utilities with very large numbers of poles within a single state, and therefore follow Utah in offering an absolute number alternative.<sup>183</sup> Although the Vermont and Utah timelines differ somewhat from the timeline we adopt, (e.g., they are somewhat longer overall), we find this approach to be a reasonable method that appropriately scales the work required with the existing resources of the utility.

65. We further find that both the percentage-based caps and the absolute number caps in use in Utah are within the zone of reasonableness suggested in the record. At one end of the proposals, several pole owners propose caps such as 100, 200, or 250 pole attachments per order.<sup>184</sup> At the other end, several attachers suggest limits of 3,000 or even 5,000 poles per month, even for the shortest timeline.<sup>185</sup> The Utah model accommodates both categories and receives favorable comment from both utilities and attachers.<sup>186</sup> We adopt similar caps to Utah's, although our record indicates that the overall timelines should be somewhat shorter than Utah's.<sup>187</sup>

66. We find that setting both a numerical cap and a cap based upon the percentage of poles owned in a state is a fair approach, as well as one that is easy to understand and administer.<sup>188</sup> By contrast, we reject less administrable and more subjective proposals, such as capping timeline orders based on the size of a utility's workforce or the complexity of a request.<sup>189</sup> We are not persuaded by those commenters who dispute the assumption that the size of an order correlates to how long it will take to complete the order.<sup>190</sup> We recognize that some pole make-ready projects are more difficult to complete

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<sup>182</sup> Vermont has a 120-day deadline to complete make-ready for an attachment request of up to 0.5% of a company's poles, and a 180-day deadline to complete make-ready for an attachment request of 0.5 % to 3 percent of a company's poles. Vermont PSB Rules § 3.708(E)(1).

<sup>183</sup> See, e.g., Oncor Comments at 11 (stating that Oncor has 2 million poles in Texas); Florida IOUs Reply at 10 (stating that two member companies each have 1.1 million poles).

<sup>184</sup> See, e.g., Coalition Comments at 33 (arguing 45 days is adequate if single orders capped at 250 poles per order among other limitations); AT&T Comments at 28 (arguing that orders for 200 poles or more should be deemed "special orders" not subject to the timeline); Associations Comments at 10–11 (suggesting cap at 100 pole attachments per order).

<sup>185</sup> See, e.g., Level 3 Comments at 6–7 (suggesting cap at 3,000 pole attachments per order); Letter from Alan Fishel, Counsel for Sunesys, LLC to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245 at 9–10 (filed Mar. 11, 2011) (proposing cap at the lesser of 5000 or 5% of a utility's poles).

<sup>186</sup> See, e.g., Coalition Comments at 28–29; CTIA Comments at 10; Qwest Comments at 9 (deeming the Utah system "ideal"). But see EEI/UTC Comments at 25 (arguing that requests for access to a limited number of attachments or to a small percentage of a utility's poles does not mean that a utility can automatically process the request and complete make-ready work in proportionately less time).

<sup>187</sup> See, e.g., *infra* note 200; TWTC/COMPTEL Comments at 10–11; NTELOS Comments at 5–7.

<sup>188</sup> See Qwest Comments at 8–9 (arguing timeframe should permit automatic extensions for large pole attachment requests); Ameren *et al.* Comments at 7–8 (favoring establishment of a maximum number of pole attachment requests that may be submitted per individual permit application); Coalition Comments at 31 (arguing that the total number and size of requests for make-ready within a certain period should be limited to an amount that is reasonable in light of the utility's other responsibilities). But see Sunesys Reply at 11–12 (suggesting that limits are prejudicial to large orders).

<sup>189</sup> See, e.g., Coalition Comments at 30–35 (suggesting that an electric utility should not be required to devote more than 10 percent of its workforce to third-party work, and setting out criteria to distinguish complex make-ready from non-complex make-ready work).

<sup>190</sup> See, e.g., EEI/UTC Comments at 25 (arguing that size-of-order and workforce percentage limits do not mean orders can automatically be processed in proportionately less time); Verizon Comments at 32.

than others, and electric utilities report the size of the order as the primary reason they miss the 45-day survey deadline.<sup>191</sup> However, the experience in the states and the scalability of such work supports a correlation between an order's relative size and its expected processing time. We further reject proposals that utilities and attachers should negotiate the size and scope of all access requests;<sup>192</sup> the record demonstrates the problems with an open-ended approach that lacks the certainty and predictability of a timeline with specific caps.<sup>193</sup>

67. As previously described, for purposes of calculating the limit, utilities may aggregate into one order all requests from a single entity within a 30-day period.<sup>194</sup> Capping the size of an order from any single attacher within a 30-day period helps utilities to manage workflow and ensures that utilities can meet incremental goals within each project. When orders from a single attacher are processed on a 30-day rolling basis, the attacher may hire contractors if a deadline for a particular monthly batch is missed. Utilities should undertake to perform smaller orders in a shorter amount of time; as stated when discussing the make-ready stage, a cap that is reasonable for this timeline does not preclude an alternative, shorter, "best practice" timeline for smaller orders.<sup>195</sup> Utilities may not consider the timeline a safe harbor for very small orders, but rather remain subject to section 224(b)(1)'s overall requirement of reasonableness, which includes timeliness in the context of the obligation to provide access to poles.<sup>196</sup> However a utility structures its size and time limits relating to small orders, its policy must be made public and applied without discrimination.

68. *Stopping the Clock.* Emergencies and certain events during the make-ready phase that are beyond a utility's control may legitimately interrupt pole attachment projects, and the *Further Notice* sought comment on how best to reconcile the timeline with this reality.<sup>197</sup> We adopt a "good and sufficient cause" standard under which a utility may toll the timeline for no longer than necessary where conditions render it infeasible to complete the make-ready work within the prescribed timeframe. For example, utilities may toll the timeline to cope with an emergency that requires federal disaster relief, but may not stop the clock for routine or foreseeable events such as repairing damage caused by routine seasonal storms; repositioning existing attachments; bringing poles up to code; alleged lack of resources;

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<sup>191</sup> Utilities Telecom Council White Paper at 12–13 (finding most frequent cause of survey delays to be the size of the project).

<sup>192</sup> Ameren *et al.* Comments at 7–8 (arguing that utilities should manage the size and scope of access requests); Oncor Comments at 21–22 (arguing that Commission should continue to allow parties to negotiate and enforce contractual terms and course of dealings in this area).

<sup>193</sup> See, e.g., Alpheus and 360networks NPRM Comments at 2 (arguing that unknown make-ready intervals make it extremely difficult to introduce services or promise timely delivery on potential sales); Cavalier *NPRM* Comments at 6 (arguing that potential customers will not engage a service without knowing when they will begin receiving the service, and stating that some utilities provide Cavalier access within three months while others take more than five times as long).

<sup>194</sup> See Utah Admin. Code § R746-345-3(C).

<sup>195</sup> See, e.g., Coalition Comments at 33; Sunesys Comments at 11; Verizon Comments at 32–33 (arguing that smaller requests do not justify shorter timeframes). *But see, e.g.,* Fibertech Comments at 7–8; Level 3 Comments at 6–7 (arguing that small orders should require shorter timeframes). See also Qwest Comments at 8 (arguing that larger orders need longer timeframes).

<sup>196</sup> *2010 Order*, 25 FCC Rcd at 11873–74, paras. 17–18 (concluding that access to poles must be timely in order to be reasonable). See, e.g., Level 3 Comments at 6–7 (arguing that the proposed timeline should not be construed as a "safe harbor" when an application involves only a small number of poles); Fibertech Comments at 7–8 (stating that the proposed timeframe is unsuited for smaller applications where a customer is within a short distance from the network backbone and where pole attachment application is limited in size); TWC Comments at 18 (proposing that make-ready work for fewer than 20 poles should be complete in 30 days).

<sup>197</sup> *Further Notice*, 25 FCC Rcd at 11887, para. 51.

or awaiting resolution of regulatory proceedings, such as a state public utilities commission rulemaking, that affect pole attachments.<sup>198</sup> Aside from these examples of very serious occurrences that impede make-ready on the one hand, and routine events that do not justify tolling the timeline on the other hand, a utility must exercise its judgment in invoking a clock stoppage in the context of its general duty to provide timely and nondiscriminatory access.<sup>199</sup> An attacher may challenge a utility's failure to either meet its deadline or surrender control of make-ready if a clock stoppage is not justified by good and sufficient cause.

69. Time is of the essence for requesting entities, their investors, and their potential consumers.<sup>200</sup> We limit the size of orders subject to the timeline in part to create a manageable workflow that will allow the timeline to absorb occasional interruptions.<sup>201</sup> Whenever possible, a utility should accommodate a moderate interruption without interruption in the timeline, and if a utility resorts to stopping the clock, its reason for doing so should usually be apparent. For example, Oncor states that the two longest power outages due to weather that its customers have suffered in recent memory lasted six and 10 days.<sup>202</sup> Therefore, even assuming that Oncor needed some extra days to return to normal operations after a 10-day storm-related outage, Oncor might have been able to complete attachment requests within the 60-day make-ready period.<sup>203</sup> We recognize, however, that no timeline can absorb all interruptions.<sup>204</sup>

70. New York allows its timeline to be interrupted for "events beyond the utility's control" and several commenters support this standard.<sup>205</sup> We find this standard unsuitably broad for our purposes, however, because every downed pole could presumably be characterized as due to an event beyond the utility's control. Thus, as some commenters correctly note, a "beyond the utility's control" exception could be applied to swallow the rule.<sup>206</sup>

71. When a utility stops the clock, it must notify the requesting entity and other affected attachers as soon as practicable.<sup>207</sup> The clock does not stop until a utility provides notice to all relevant

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<sup>198</sup> See EEI/UTC Comments at 22–25 (suggesting clock should stop for, *inter alia*, severe weather conditions, state and local regulatory proceedings, failure of an existing attacher to cooperate, or the need to correct for safety violations).

<sup>199</sup> 47 U.S.C. § 244(f)(1); 2010 Order, 25 FCC Rcd at 11873–74, paras. 17–18 (holding that utilities must perform make-ready promptly and efficiently whether or not a specific rule applies to an aspect of the make-ready process).

<sup>200</sup> Local Competition Order, 11 FCC Rcd at 16101, para. 1224 (finding that "time is of the essence"); see, e.g., Centurylink Comments at 35; Charter Comments at 22; CTIA Comments at 13.

<sup>201</sup> We anticipate that capping timeline orders will leave utilities with enough spare resources to handle the occasional interruption and still stay on schedule.

<sup>202</sup> Oncor Comments at 27 (stating that a June 2004 storm caused outages that lasted for ten days and a February 2010 storm caused outages that lasted for 6 days).

<sup>203</sup> It is not suggested that weather events may never be cause for stopping the clock, but rather that, even in the face of severe disruptions, utilities should consider whether or not lost time can be made up over the course of the entire timeline.

<sup>204</sup> See, e.g., Ameren *et al.* Comments at 9–10; EEI/UTC Comments at 22–25; Coalition Comments at 30–35; Florida IOUs Comments at 16–17; Sunesys Comments at 14–15. *But see* TWC Reply at 13–14 (arguing that proposed timeline needlessly extends make-ready process).

<sup>205</sup> Further Notice, 25 FCC Rcd at 11887, para. 51; see, e.g., Verizon Comments at 9; Coalition Comments at 20–23; Ameren *et al.* Comments at 4.

<sup>206</sup> Sunesys Comments at 14; Florida IOUs Comments at 11; TWC Reply at 14–15. See Oncor Comments at 29.

<sup>207</sup> Sunesys Comments at 9. The utility must notify the same parties that received notice of the initial make-ready deadline.

parties that the deadline must be deferred. Notification may be brief, but must be in writing and include the reason for and date of the stoppage.<sup>208</sup> As soon as the reason for the clock stoppage no longer exists, the utility must notify affected entities of the new deadline and the date that the clock will restart. This minimal notice burden on utilities is within the bounds of a utility's duty to provide just, reasonable, and nondiscriminatory access, and any burden on the utility is outweighed by the need for affected entities to receive notice and remain informed.

72. The clock stoppage may be no longer than necessary based on the nature of the event. The clock must restart no later than the date when the utility returns to routine operations.<sup>209</sup> Moreover, under the statute, utilities may not discriminate against pole attachment projects.<sup>210</sup> Utilities state candidly, however, that their highest priority is providing service to their customers.<sup>211</sup> In the aftermath of an emergency, a utility will naturally and reasonably devote its utmost resources to public safety and restoring service. When the utility resumes normal operations, however, nondiscrimination requires a utility to resume pole attachment projects in place with internal work orders in the utility's queue.<sup>212</sup>

73. In light of the scaled approach to limiting the order size, and the timeline tolling provisions we adopt, we disagree with utilities that argue that the timeline imposes a rigid, "one-size-fits-all" solution that lacks the flexibility utilities need to accommodate pole attachment requests.<sup>213</sup> Although we appreciate the complexity of some attachment requests, we find that several measures adequately address this concern. First, the timeline applies to orders that are within the scope of the timeline and subject to the volume cap set forth in this section.<sup>214</sup> Second, the timeline does not begin to run until engineering protocols and technical standards have been established for the prospective attachments at issue.<sup>215</sup> We leave utilities free to implement the timeline consistent with our rules. We leave the details of specific application criteria and processes to individual utilities, but the criteria must be reasonable.<sup>216</sup> For example, some utilities have "detailed permit manuals which explain the application and attachment process," and at least one utility has a "web-based application platform, which provides an on-line, step-by-step, item-by-item description of the application and attachment process."<sup>217</sup> We do not dictate utility

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<sup>208</sup> The writing may be sent by email to the recipients.

<sup>209</sup> Sunesys Comments at 9.

<sup>210</sup> 47 U.S.C. § 224(f)(1).

<sup>211</sup> See, e.g., Coalition Comments at 14, 17–18; EEI/UTC Comments at 13–14; Verizon Comment at 29 (arguing that pole owners must prioritize core service).

<sup>212</sup> See Coalition Comments at 34 (arguing that electric utilities should be able to show compliance by demonstrating that they have scheduled communications company make-ready work as if the attacher were a rate paying customer).

<sup>213</sup> See, e.g., NRECA Comments at 9–10 (stating that a one size fits all approach fails to consider the varied circumstances of the pole attachment process); Qwest Comments at 6–7 (arguing against mandating a one-size-fits-all process given the complexity of the pole attachment process, and stating that a timeline must be flexible enough to address realities of the pole attachment process); Idaho Power Comments at 2–3 (arguing that no single set of rules can take into account all of the issues that arise in the context of an attachment).

<sup>214</sup> See *supra* Part III.A.2; para. 19.

<sup>215</sup> See *supra* Part III.A.2 (discussing scope of the timeline).

<sup>216</sup> EEI/UTC Comments at 21; see 47 U.S.C. § 224(b)(2); 2010 Order, 25 FCC Rcd at 11874, para. 18.

<sup>217</sup> Florida IOUs Comments at 14 (describing various members' application procedures).

implementation procedures.<sup>218</sup> When we consider these factors together, we reject the contention that the timeline is inflexible.

## B. Wireless

74. In the timeline portion of this order, section III.A.1, *supra*, we make clear that our new timeline applies equally to wireline and wireless equipment in the communications space, and a modified version applies to wireless attachments above the communications space. Here, we address two issues that have arisen with regard to wireless attachments regardless of the applicability of a timeline: (1) the section 1.1403(b) requirement that any denials of requests for section 224 access be specific in nature; and (2) the section 224 requirement that attachers be allowed to access the space above what has traditionally been referred to as “communications space” on a pole.

### 1. Specificity of Denials

75. We clarify that, regardless of whether a utility has a master agreement with a wireless carrier, the specificity requirement of section 1.1403(b) applies to all denials of requests for access. The Commission’s rules require that, when a utility denies a request for access, it must state with specificity its reasons for doing so. Section 1.1403(b) requires that denials of access be confirmed in writing within 45 days of the request.<sup>219</sup> The utility also “shall be *specific*, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.”<sup>220</sup> In the *Further Notice*, the Commission proposed that, where a utility has no master agreement with a carrier for wireless attachments requested, the utility may satisfy the requirement to respond with a written explanation of its concerns with regard to capacity, safety, reliability, or engineering standards.<sup>221</sup>

76. We agree with those commenters who assert that the proposed standard would be susceptible to abuse.<sup>222</sup> It is not sufficient for a utility to dismiss a request with a written description of its blanket concerns about a type of attachment or technology, or a generalized citation to section 224. Instead, we find that a utility must explain in writing its precise concerns—and how they relate to lack of capacity, safety, reliability, or engineering purposes—in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue. Furthermore, such concerns must be reasonable in nature in order to be considered nondiscriminatory. Concerns that appear to be mere pretexts rather than legitimate reasons for denying statutory rights to access will be given serious scrutiny by the Commission, including in any complaint proceeding arising out of a denial of access. We believe that this clarification regarding the specificity of denials will encourage communication and cooperation between utilities and wireless attachers,<sup>223</sup> and thereby promote the deployment of and competition for telecommunications and broadband services.

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<sup>218</sup> *Further Notice*, 25 FCC Rcd at 11881, para. 33; 47 U.S.C. § 224(b), (f); *see, e.g.*, Coalition Comments at 15–17, 30–31, 88; Oncor Comments at 42; Verizon Reply at 26. The statute requires nondiscriminatory access, which forecloses procedures and requirements that are not available to all requesting entities. *See* 47 U.S.C. § 224(f)(1).

<sup>219</sup> 47 C.F.R. § 1.403(b).

<sup>220</sup> *Id.* (emphasis added).

<sup>221</sup> *Further Notice*, 25 FCC Rcd at 11887–88, para. 52.

<sup>222</sup> *See, e.g.*, MetroPCS Comments at 12; NextG Comments at 11–14; DAS Forum Comments at 9–12.

<sup>223</sup> *See, e.g.*, NextG Comments at 11–14 (explaining how open communication and good-faith negotiation can help overcome initial concerns about wireless antennas).

## 2. Pole Tops

77. We clarify that section 224 allows wireless attachers to access the space above what has traditionally been referred to as “communications space” on a pole.<sup>224</sup> On previous occasions, the Commission has declined to establish a presumption that this space may be reserved for utility use only, and has stated that the only recognized limits to access for antenna placement are those contained in the statute.<sup>225</sup> Yet wireless attachers assert that pole top access is persistently challenged by pole owners, who often impose blanket prohibitions on attaching to some or all pole tops.<sup>226</sup> Blanket prohibitions are not permitted under the Commission’s rules.<sup>227</sup> We reject the assertions of some utilities that our rule regarding pole tops will create a “*de facto* presumption in favor of pole top attachments” or otherwise “restrict an electric utility’s right to deny access for reasons of safety and reliability.”<sup>228</sup> Instead, we clarify that a wireless carrier’s right to attach to pole tops is the same as it is to attach to any other part of a pole. Utilities may deny access “where there is insufficient capacity, and for reasons of safety, reliability, and generally applicable engineering purposes.”<sup>229</sup> The record in this proceeding is replete with examples of various types of pole top attachments that have been successfully accommodated, both for wireless attachers and for the utilities themselves.<sup>230</sup>

### C. Use of Contractors for Attachment

78. As proposed in the *Further Notice*, we resolve an ambiguity in the Commission’s rules regarding the use of contractors to attach facilities “in the proximity of electric lines” after make-ready has been completed and attachment permits issued. Specifically, we clarify that “proximity of electric lines” in this context includes work that extends into the safety space that separates the communications space from the electric space, but does not include work among the power lines. While an attacher may use a contractor to attach a wireless antenna above the communications space and associated safety space, we find that an attacher may only use a contractor that has the proper qualifications and that the utility has approved to perform such work.<sup>231</sup> Utilities are not required to keep a separate list of contractors for this purpose, but must be reasonable in approving or disapproving contractors. Accordingly, as we explain

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<sup>224</sup> See 47 U.S.C. § 224(f).

<sup>225</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98, Order on Reconsideration, 14 FCC Rcd 18048, 19074, para. 72 (1999); *Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, Public Notice, 19 FCC Rcd 24930 (WTB 2004).

<sup>226</sup> See, e.g., DAS Forum Comments at 12–13; NextG Comments at 21. Wireless attachments often require placement at or near the top of the pole in order to efficiently provide distributed antenna systems (DAS) or other wireless services. See, e.g., DAS Forum Comments at 12 (“Pole top installations are typically at the optimal elevation for DAS antennas. If antennas are lower the (wireless) coverage footprint will be too small.”); Letter from William J. Sill, Counsel, ATC Outdoor DAS, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245 (filed Mar. 15, 2011).

<sup>227</sup> 47 C.F.R. § 1.1403(b).

<sup>228</sup> Florida IOUs Reply at 38–40; see Alliance Reply at 62–63.

<sup>229</sup> 47 U.S.C. § 224(f)(2).

<sup>230</sup> See, e.g., Letter from Robert Millar, Senior Regulatory Counsel, NextG, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, at 2 (filed Mar. 14, 2011) (stating that NextG has built over 800 pole top wireless installations in Pennsylvania); Oncor Comments at 33 (stating that Oncor’s poles have approximately 755 wireless attachments from three different attachers).

<sup>231</sup> The record indicates that the utilities routinely perform this work themselves because of the location and the type of work involved. See, e.g., Oncor Comments at 40; Florida IOUs Comments at 29.

below, the standard for attachment by a contractor in the communications space remains that of the “same qualifications” as the utility, but any attachment in the electric space must be at the higher utility-approved standard.

79. The Commission has long guaranteed attachers the right to choose the workers they hire to attach their facilities to poles. With regard to contractors, the Commission in 1996 “agree[d] that utilities should be able to require that only properly trained persons work in the proximity of the utilities’ lines,” but held that “we will not require parties seeking to make attachments to use the individual employees or contractors hired or pre-designated by the utility.”<sup>232</sup> Rather, “[a] utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility’s own workers, but the party seeking access will be able to use any individual workers who meet these criteria.”<sup>233</sup> The Commission reasoned that “[a]llowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers.”<sup>234</sup> In the *Further Notice*, we recognized that the word “proximity” is ambiguous, and could mean either “up to the electric lines” or “among the electric lines.”<sup>235</sup> We proposed that the former reading was the more reasonable choice, and sought comment from interested parties.

80. We find that the phrase “proximity of electric lines” where attachers may engage contractors for attachment means up to and including the safety space, but not among the electric lines, for historical, statutory, and safety reasons. The NESC requires 40 inches of clearance between electric power lines and communications cable on the same pole.<sup>236</sup> Because the *Local Competition Order* does not discuss attachment of facilities above the communications space or endorse in any way attachers’ contractors entering the electric space, we read “proximity of electric lines” to refer to the 40-inch “safety space,” and not to the region above it. Also, as we discuss above, the statute provides electric utilities the right to deny access where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes. The *Local Competition Order* considered this provision of the statute to reflect congressional acknowledgment that capacity, safety, reliability and engineering issues raise heightened concerns when electricity is involved, because electricity is inherently more dangerous than communications services.<sup>237</sup> We affirm this interpretation today, and likewise maintain that safety concerns must take priority when communications equipment is installed among or above potentially lethal electric lines. Therefore, we clarify that the longstanding right of attachers to use attachment contractors solely of their own choosing is confined to the communications space and associated safety space.

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<sup>232</sup> *Local Competition Order*, 11 FCC Rcd at 16083, para. 1182.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* On reconsideration, the Commission reaffirmed this approach. *Local Competition Reconsideration Order*, 14 FCC Rcd at 18079, para. 86.

<sup>235</sup> *Further Notice*, 11 FCC Rcd at 11894–95, para. 69. In the *Further Notice*, the Commission explained that generally, attachments on a pole, from the bottom up, include traditional communications attachments (including space for attachments by incumbent LECs, cable service providers, and other telecommunications service providers), followed by several feet of safety space separating the communications space from the upper space on a pole, traditionally used for the attachment of energized electrical lines. *Id.* at 11894 n.187.

<sup>236</sup> See, e.g., *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78–144, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59, 69–71 (1979) (*Second Report and Order*) (discussing cost allocation of safety space).

<sup>237</sup> *Local Competition Order*, 11 FCC Rcd at 16081, para. 1177.

81. We disagree with Fibertech and others who argue that utility control of the electric space improperly delays attachers “from timely completing their work” in a meaningful way.<sup>238</sup> With regard to attachment of facilities in the electric space, if a utility’s legitimate concern over safety conflicts with an attacher’s concern over timeliness, the statute already resolves the conflict in favor of the utility.<sup>239</sup> Additionally, we agree with MetroPCS that, if a wireless carrier consents to the utility’s specified contractor to work above or among the lines, additional contractors should not be required to work with antenna equipment.<sup>240</sup> We agree that a single contractor with the proper qualifications may be all that is needed.

#### **D. Joint Ownership**

82. In the *Further Notice*, we proposed to require owners to consolidate authority in one managing utility when more than one utility owns a pole and to make the identity of this managing utility publicly available.<sup>241</sup> We decline to adopt the proposed rules relating to joint ownership,<sup>242</sup> but we clarify and emphasize that we expect joint owners to coordinate and cooperate with each other and with requesting attachers consistent with pole owners’ duty to provide just and reasonable access.<sup>243</sup>

83. After careful consideration of the record, we find that the potential benefits of these proposals do not justify the likely costs. We are convinced by evidence in the record that, on balance, consolidating authority in a single managing utility would create substantial administrative burdens for the managing utility.<sup>244</sup> The proposed rule would have required joint owners of millions of poles to confer and designate a managing utility, even though the vast majority of those poles would not be subject to pole attachment requests in the near future, if at all. In addition, because the joint owners typically consist of an electric utility and an incumbent LEC, which have different rights under section 224(f)(2) and often have different competitive incentives *vis a vis* a new attacher, there exists a real possibility that it may be difficult to ensure that only the electric utility is actually asserting section 224(f)(2) rights.

84. We emphasize, however, that joint ownership or control of poles should not create or justify a confusing or onerous process for attachers. Thus, for example, we would consider utility procedures requiring attachers to undergo a duplicative permitting or payment process to be unjust and unreasonable.<sup>245</sup> Avoiding such duplication might involve, for example, joint owners establishing a single administrative contact point for all pole attachment applications--or joint owners agreeing, and informing the attacher, that one of the owners will be the attacher’s point of contact for a specific pole

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<sup>238</sup> See, e.g., Fibertech Comments at 4–5; T-Mobile Comments at 13.

<sup>239</sup> 47 U.S.C. § 224(f)(2).

<sup>240</sup> MetroPCS Comments at 15. This responds to a proposal in our *Further Notice* that utilities be required to admit among the power lines contract personnel with specialized communications-equipment training or skills that the utility cannot duplicate, such as work with wireless antenna equipment. *Further Notice*, 25 FCC Rcd at 11894–95, para. 69.

<sup>241</sup> *Further Notice*, 25 FCC Rcd at 11895–96, paras. 72–73.

<sup>242</sup> *Id.*

<sup>243</sup> See 47 U.S.C. § 224; see also *Cable Telecommunications Association of Maryland, Delaware and the District of Columbia, et al. v. Baltimore Gas and Electric Company and Bell Atlantic – Maryland, Inc.*, File No. PA 00-001, Order, 16 FCC Rcd 5447, 5450, para. 7 (Cable Serv. Bur. 2001) (*CTA v. BGE*) (“It is unreasonable to expect attachers to separately negotiate agreements with more than one pole owner for attachment to a single pole that is jointly owned.”). “Joint ownership” also includes situations in which the pole is controlled, if not actually owned, by two entities.

<sup>244</sup> See Coalition Comments at 74; ITTA Comments at 6.

<sup>245</sup> See *CTA v. BGE*, 16 FCC Rcd at 5450, para. 7.

attachment application or series of applications, for certain types of attachments, or for attachments on certain parts of the pole or in certain geographic areas. If access is denied, the joint pole owners must clearly identify to the attacher which owner is denying access, and on what basis.

85. We also believe that some of the other remedies adopted today will cure or mitigate many of the delays associated with joint ownership and control. In particular, the timeline and the rules on the use of contractors should help to ensure timely access to all poles, including those that are jointly owned or used.<sup>246</sup> We will closely monitor the effect of the rules we adopt today and will adjust the framework as appropriate.

## **E. Other Access Proposals**

### **1. Schedule of Charges**

86. We decline to require utilities to make available to attaching entities a schedule of common make-ready charges, and find that the burdens of such a requirement would exceed its benefits. In the *Further Notice*, the Commission suggested that such a schedule could provide transparency to providers seeking to deploy their networks.<sup>247</sup> T-Mobile and TWC agree,<sup>248</sup> but other commenters point out that make-ready is priced based on specific tasks at specific locations.<sup>249</sup> Actual charges vary depending on numerous unique factors, including material and labor costs which fluctuate.<sup>250</sup> As such, the price of make-ready does not lend itself well to a fixed schedule of charges.<sup>251</sup> Plus, many utilities already make information about common charges available upon request.<sup>252</sup> Thus, we conclude, on balance, that the limited benefit of this proposal would not outweigh the burdens it would impose on utilities, and we decline to adopt it at this time.

### **2. Payment for Make-Ready Work**

87. In the *Further Notice*, the Commission asked whether it should attempt to align incentives to perform make-ready work on schedule.<sup>253</sup> In particular, it proposed to adopt the Utah rule, under which applicants pay for make-ready work in stages and may withhold a portion of that payment until

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<sup>246</sup> See *supra* Parts III.A.1; III.A.3.

<sup>247</sup> *Further Notice*, 25 FCC Rcd at 11895, para. 71.

<sup>248</sup> T-Mobile Comments at 13; TWC Reply at 12–13.

<sup>249</sup> See, e.g., Ameren *et al.* Comments at 20 (arguing that a schedule of charges falsely implies that a particular task will always cost a particular amount to complete, regardless of construction circumstances or nuances); Idaho Power Comments at 8 (stating that a uniform schedule of charges fails to consider the unique nature of each pole attachment request); ITTA Comments at 5–6 (stating that there are few “common” fees as costs fluctuate depending on the varied circumstances surrounding different attachments).

<sup>250</sup> Other factors that vary the price of make-ready for a specific task at a specific location include the types of equipment required to perform the work, the location of the pole (front lot or rear lot), site conditions, city or county permitting requirements, environmental issues, congested attachments, necessary switching, and necessary tree trim. Florida IOUs Comments at 33–34; see NRECA Comments at 16–17; Ameren *et al.* Comments at 20. The Florida IOUs argue that in order to create a firm price sheet, it would have to price common make-ready charges based on the costliest permutation of potential factors. Florida IOUs Comments at 34.

<sup>251</sup> See ITTA Comments at 6 (stating that “there are few ‘common’ fees”).

<sup>252</sup> See, e.g., Verizon Comments at 36–37; Oncor Comments at 32. Cf. Dairyland Reply at 2 (smaller, non-investor owned utility indicating that creating and keeping current a list of charges could be unduly burdensome); Idaho Comments at 8–9 (same).

<sup>253</sup> *Further Notice*, 25 FCC Rcd at 11895, para. 70.

work is complete.<sup>254</sup> It also sought comment on alternatives, including schedules of payments used in comparable situations in other commercial contexts.<sup>255</sup>

88. Based on the record before us, we decline to adopt the Utah rule or any other schedule of payment for make-ready work at this time. Although a staggered payment system might motivate pole owners to perform make-ready work more quickly, as some commenters point out,<sup>256</sup> it would also unfairly expose them to a greater risk of non-payment for make-ready work necessary to accommodate attachers.<sup>257</sup> The record contains little evidence that up-front payment is a barrier to telecommunications, cable, or broadband deployment,<sup>258</sup> but, as the Coalition indicates, attaching entities frequently lose contracts for new business, change routes or ownership, go out of business, or experience other difficulties that cause make-ready costs to remain unpaid after work has been completed.<sup>259</sup> In any of these situations, a utility might be unable to recover its costs if required to accept payment for make-ready work in stages. A staggered payment system would also administratively burden utilities<sup>260</sup> and, in some cases, could actually delay the make-ready process.<sup>261</sup> Moreover, up-front payment is both consistent with the way that utilities charge other customers for construction work,<sup>262</sup> and either encouraged or required by a number of state tariffs.<sup>263</sup> For these reasons, we are persuaded that any benefit that might result from the proposed rule likely would be outweighed by its costs.

### 3. Data Collection

89. We decline to adopt requirements regarding the collection and availability of information about the location and availability of poles, ducts, conduits, and rights-of-way. In the *Further Notice*, we sought comment on the type of data that would be beneficial to maintain, how such data should be collected, the scope of the task, and potential benefits.<sup>264</sup> The record before us indicates that the burdens of such a data collection are outweighed by the potential benefits. EEI and UTC, for instance, report that a database of their members' assets would take years and hundreds of millions dollars to create, then

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *See, e.g.*, ACA Comments at 9; TWTC/COMPTEL Comments at 15–16. *But see, e.g.*, Verizon Reply at 35 (asserting that staggered make-ready payments would not provide any incentive for completing make-ready work faster because the timing of make-ready work is often determined by numerous factors that are outside of pole owners' control); HTI Reply at 17 (arguing that installment payments would increase costs for attachers and often delay the completion of make-ready work).

<sup>257</sup> *See, e.g.*, Verizon Comments at 28; EEI/UTC Comments at 38; ITTA Comments at 6–7.

<sup>258</sup> *See, e.g.*, Sunesys Comments at 19 (“oppos[ing] the Utah rule proposal because it is unfair to utilities”); Verizon Reply at 35 (arguing that staggered payments would not improve access to poles).

<sup>259</sup> Coalition Comments at 77.

<sup>260</sup> *See, e.g.*, HTI Comments at 17 (“Utilities, unlike contractors, are not in the business of providing construction services and do not have expertise or resources devoted to managing installment payments.”); Oncor Comments at 30.

<sup>261</sup> *See, e.g.*, EEI/UTC Comments at 38 (asserting that up-front payment streamlines the make-ready process).

<sup>262</sup> *See, e.g.*, HTI Reply at 17 (pointing out that utilities would need to halt make-ready work if payments are not received in a timely fashion); Florida IOUs Comments at 32; Coalition Comments at 77.

<sup>263</sup> *See Ameren et al.* Comments at 19–20 (“utility tariffs routinely require payment in advance for the total estimated cost of requested construction”); Alliance Reply at 53–55 (“Electric utilities are also subject to State regulations that can further complicate—or preclude altogether—any such scheme for payment of make ready”).

<sup>264</sup> *See Further Notice*, 25 FCC Rcd at 11897, paras. 75–76.

would require annual maintenance.<sup>265</sup> Such a data collection would necessarily take significant time for the millions of poles that a single utility can own, and it is not likely that such data for all utilities would be kept sufficiently up-to-date for a prospective attachers to rely on for access and network planning.<sup>266</sup> Major events like storms can compromise the integrity of data, as can the activities of unauthorized attachers.<sup>267</sup> Moreover, legitimate concerns exist about making critical infrastructure information and proprietary information available to the public,<sup>268</sup> and about whether a database would be susceptible to abuse by unauthorized attachers.<sup>269</sup> Meanwhile, the record reflects significant doubt—from both utilities and telecommunications providers—that improving the collection and availability of data would have much value to attachers.<sup>270</sup> For these reasons, we are not persuaded by those commenters who support the idea of a central database in order to improve tracking of attachments and to cut down on unauthorized attachments.<sup>271</sup> After considering the record, we find that the burdens associated with an information collection requirement likely outweigh the benefits, and therefore, we decline to adopt such a proposal at this time.

#### F. Legal Authority

90. We conclude that section 224 authorizes the Commission to promulgate the access rules, we adopt today, including the timeline and its self-effectuating remedy for failure to meet the timeline in the communications space. Through section 224(b)(1), Congress explicitly delegated authority to the Commission to “regulate the rates, terms, and conditions for pole attachments,”<sup>272</sup> as well as to develop procedures necessary for resolving complaints arising under the Commission’s substantive regulations, and to fashion appropriate remedies.<sup>273</sup> In addition, section 224(b)(2) directs the Commission to make

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<sup>265</sup> EEI/UTC Comments at 30–32. For instance, Ameren estimates that it would take approximately 4–5 years and cost \$42 million to inventory two million poles in Missouri and Illinois, and Idaho Power estimates that it would take at least six years and cost nearly \$20 million to field and record data for its 550,000 distribution poles. *Id.* at 31.

<sup>266</sup> *See, e.g.*, Florida IOUs Comments at 37; EEI/UTC Comments at 30.

<sup>267</sup> *See, e.g.*, Florida IOUs Comments at 37; ITTA Comments at 8–9; Oncor Comments at 55.

<sup>268</sup> *See, e.g.*, EEI/UTC Comments at 28–29; Qwest Comments at 14–15.

<sup>269</sup> *See* Alliance Reply at 64–65.

<sup>270</sup> *See, e.g.*, Verizon Comments at 40–41 (indicating that a national database or reporting requirements would not eliminate the need to file applications, conduct make-ready surveys, or perform make-ready work); USTelecom Comments at 24–25 (describing the Commission’s proposal as “a monumental undertaking without any apparent benefit” and stating that “there is no evidence that a problem currently exists that would be addressed by such a database”).

<sup>271</sup> *See* T-Mobile Comments at 13–14; TWC Comments at 20.

<sup>272</sup> 47 U.S.C. § 224(b)(1); *see Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002) (finding that the Act does not specify which sorts of concerns constitute the section 224(b)(1) “conditions” of pole attachment but that there was no statutory language that would suggest that physical attachment is outside the scope of “conditions.”) (*Southern Co. I*).

<sup>273</sup> 47 U.S.C. § 224(b)(1). The section also creates exceptions to our authority for railroads, cooperatives, federal entities, and state entities, 47 U.S.C. § 224(a)(1), as well as substantive reverse preemption for states who choose to regulate attachments themselves. 47 U.S.C. § 224(c).

rules to carry out the provisions of this section.<sup>274</sup> Congress also gave more specific substantive guidance for access to poles in section 224(f): “just and reasonable” access must also be “nondiscriminatory.”<sup>275</sup>

91. The language and structure of the statute, as well as Commission precedent, support our conclusion. As we recognized in the *Further Notice*, the “Commission’s expectation that ‘swift and specific enforcement procedures’ would satisfy the need for timely access to pole attachments”<sup>276</sup> has not been met. While we affirm that “no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment,”<sup>277</sup> a set of broadly applicable rules in discrete areas will help to “ensure that the terms and conditions of access to pole attachments are just, reasonable, and nondiscriminatory.”<sup>278</sup> In particular, in relation to the remainder of section 224, the broad language of section 224(b)(1) and (b)(2) indicate a delegation of comprehensive rulemaking authority over all attachment issues, including access. Where a statute specifically provides for promulgation of rules to carry out the provisions of the statute, rules that further define and flesh out the content of the statute are valid exercises of agency authority.<sup>279</sup> We interpret section 224(b)(1)’s parallel construction in its first sentence to contain two separate Congressional directives: to make rules *and* to adopt procedures for adjudication.<sup>280</sup> Further, section 224(b)(2) specifically mandates that the Commission must “prescribe *by rule* regulations to carry out the provisions of *this section*,”<sup>281</sup> evincing Congressional intent to give the Commission rulemaking authority over the entirety of section 224.<sup>282</sup> The relatively narrower scope of other subsections of section 224 supports our construction. For example, section 224(e)(1) only applies “when the parties fail to resolve a dispute over such charges,” but section 224(b)(1) contains no such limitation.<sup>283</sup> Because section 224(b)(2) applies the Commission’s rulemaking authority to the entire section, the choice necessarily lies with the Commission whether to implement the Congressional directive in section 224(f) via rulemaking, adjudication, or both. The access rules we adopt today fit squarely within our statutory authority over terms and conditions for pole attachments pursuant to section 224(f).

92. This reading of section 224 is consistent with Commission and judicial precedent. Although the Commission adopted a predominantly adjudicatory model for regulating access to poles in

<sup>274</sup> 47 U.S.C. § 224(b)(2).

<sup>275</sup> See 47 U.S.C. § 224(b)(1) (just and reasonable rates, terms, and conditions), (f) (nondiscriminatory access to poles); *Local Competition Order*, 11 FCC Rcd at 16067, para. 1143 (discussing the “reasonableness of particular conditions of access”).

<sup>276</sup> *Further Notice*, 25 FCC Rcd at 11875, para. 22 (quoting *Local Competition Order*, 11 FCC Rcd at 16101–02, para. 1224).

<sup>277</sup> *Local Competition Order*, 11 FCC Rcd at 16068, para. 1145; see *Further Notice*, 25 FCC Rcd at 11875, para. 22.

<sup>278</sup> *Further Notice*, 25 FCC Rcd at 11875, para. 22.

<sup>279</sup> See, e.g., *Gulf Power*, 534 U.S. at 339 (“agencies have authority to fill gaps where the statutes are silent.”) (citation omitted); *Shaker Med. Ctr. Hosp. v. Sec’y of Health and Human Serv.*, 686 F.2d 1203, 1209 (6th Cir. 1982) (“It is within the power of an agency to promulgate prophylactic regulations which are broad in scope in order to effectuate the purposes of enabling legislation.”); *Camp v. Herzog*, 104 F. Supp. 134, 137–38 (D.D.C. 1952).

<sup>280</sup> See 47 U.S.C. § 224(b)(1) ([T]he Commission shall regulate the rates, terms, and conditions for pole attachments, . . . and shall adopt procedures necessary and appropriate to hear and resolve complaints . . .”).

<sup>281</sup> 47 U.S.C. § 224(b)(2) (emphasis added). The Communications Assistance for Law Enforcement Act struck “[W]ithin 180 days from the date of enactment of this section the Commission” and inserted “The Commission”, expanding the reach of this particular subsection. Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, § 304, 108 Stat. 4279, 4297 (1994).

<sup>282</sup> See TWC Reply at 20–21 (arguing that FCC has broad authority pursuant to 224(b)(1)–(2), (f)).

<sup>283</sup> Compare 47 U.S.C. § 224(b)(1), with 47 U.S.C. § 224(e)(1).

the *Local Competition Order*, the Commission also adopted access rules of general applicability, many of which were upheld by the court in *Southern Company*.<sup>284</sup> Adopting a case-by-case approach while the Commission gained greater subject matter expertise in pole attachments hardly precludes adoption of further substantive rules years later.<sup>285</sup> In fact, the Commission expressly anticipated the possible need to revisit its adjudicatory model and impose such regulations: “We will monitor the effect of this [case-specific] approach and propose more specific rules at a later date if reasonably necessary to facilitate access and the development of competition in telecommunications and cable services.”<sup>286</sup> For these reasons, we are not persuaded by commenters who argue that we lack rulemaking authority or substantive statutory authority under the section 224 to adopt access rules here.<sup>287</sup>

93. We also reject the argument raised by some commenters that the Commission improperly applied both the “just and reasonable” and “nondiscriminatory” standards to access in the *Further Notice*,<sup>288</sup> and that only the latter standard actually applies.<sup>289</sup> Section 224(b)(1) applies the “just and reasonable” standard to *all* rates, terms, and conditions of pole attachments, including the conditional access regime set up under section 224(f).<sup>290</sup> Section 224(f) is a broad mandate of “nondiscriminatory” access with a specific carve-out for certain conditions where electric utilities may deny access (*i.e.*, insufficient capacity, safety, reliability, and generally applicable engineering purposes).<sup>291</sup> While the Commission continues to accord substantial leeway to electric utilities with regard to the practical application of this important exception,<sup>292</sup> the Commission has not and could not delegate away the authority to ensure “just and reasonable” and “nondiscriminatory” terms and conditions under which utilities may grant or deny access.<sup>293</sup> Interpreting section 224(f) as a Congressional delegation of

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<sup>284</sup> See *Local Competition Order*, 11 FCC Rcd at 16071–74, paras. 1151–58, *aff’d in part, rev’d in part*, *Southern Co. I*, 293 F.3d 1338; see also TWTC/COMPTEL Reply at 20–22.

<sup>285</sup> See *supra* note 279.

<sup>286</sup> *Local Competition Order*, 11 FCC Rcd at 16067, para. 1143. As we explain above, the market has changed significantly since the *Local Competition Order* and the limitations of the case-specific approach have become apparent, requiring more substantive guidance from the Commission. See Part II, paras. 19–20. *But see* Verizon Comments at 29 (arguing that nothing has changed to warrant a departure from the “guideline” approach”).

<sup>287</sup> See, e.g., Oncor Comments at 16–19; Coalition Comments at 69, 81–82; EEI/UTC Comments at 2, 5, 13, 34–35; Florida IOUs Comments at 57 (arguing that the Commission’s jurisdiction limited to adjudication); Coalition Comments at 7 (“It is no coincidence that Congress left to electric utilities the sole right to determine whether access to their poles, ducts, conduits or rights-of-way should be denied ‘for reasons of safety, reliability and generally applicable engineering purposes.’ This is the function of utilities, not the FCC.”); EEI/UTC Comments at 2–5, 13, 34 (arguing that the Commission may not regulate before access is requested or a complaint is filed).

<sup>288</sup> Florida IOUs Comments at 12 (citing *Further Notice*, 25 FCC Rcd at 11875–76, 11879–80, paras. 22, 25, 30).

<sup>289</sup> See, e.g., Florida IOUs Comments at 12 (arguing that section 224(f) is the only portion of the statute that regulates access); EEI/UTC Comments at 34–35 (stating that the FCC’s authority to review engineering practices is limited to evaluating whether they are nondiscriminatory).

<sup>290</sup> NCTA Reply at 2; Sunesys Reply at 6–7. *But see* Oncor Comments at 33; Alliance Reply at 51 (arguing that the FCC has no jurisdiction over make-ready timelines).

<sup>291</sup> 47 U.S.C. § 224(f)(2).

<sup>292</sup> *Local Competition Order*, 11 FCC Rcd at 16070, para. 1148 (recognizing that a utility normally will have its own operating standards that dictate conditions of access).

<sup>293</sup> See *Southern Co. I*, 293 F.3d at 1348 (“Petitioners’ construction of the Act, which claims that the utilities enjoy the unfettered discretion to determine when capacity is insufficient, is not supported by the Act’s text.”)

authority to utilities to define the terms and conditions of attachment<sup>294</sup> would trump the grant of rulemaking authority to the Commission in section 224(b)(1) and (2), and would render such determinations effectively unreviewable by the Commission.<sup>295</sup> Such a reading of the statute would also render section 224(b)(2) meaningless.<sup>296</sup>

94. Similarly, we disagree with certain commenters that the statute precludes the Commission from regulating because there are joint use or joint ownership agreements between various entities mentioned in the statute<sup>297</sup> or that the presence of non-regulated attachment (such as a municipality's traffic light) on poles somehow places these poles outside of Commission authority.<sup>298</sup> As previously stated, the Commission has the authority to regulate, by rule, the terms and conditions of pole attachments;<sup>299</sup> a utility cannot escape the Commission's jurisdiction simply by attaching attachments that are outside the reach of the statute or by entering into a joint use contract.<sup>300</sup> A joint use contract gives the parties to the contract some degree of control over the pole, and "control" is the statutory floor for Commission jurisdiction, regardless of whether a non-regulated attachment is also located on the pole.<sup>301</sup>

95. We also disagree that the location of the term "usable space" in the rates portion of the statute precludes the Commission from adopting rules regarding wireless attachments,<sup>302</sup> or that make-ready rules are merely capacity expansion under another name.<sup>303</sup> Because section 224(a)(4) defines "pole attachment" as "any attachment" and does not contain a substantive spatial limitation, the Commission retains the authority to interpret the types of, and spatial requirements for, pole attachments under its broad authority in section 224(b).<sup>304</sup> Nor is a rule regarding make-ready an attempt at mandating capacity expansion. As the court noted in *Southern Company*, mandating the construction of new capacity is beyond the Commission's authority.<sup>305</sup> Here, however, we merely regulate the process by which a new attacher may gain access to existing capacity on a pole. The "terms and conditions" of pole attachment encompass the process by which new attachers gain access to a pole, and setting deadlines and remedies for that process in no way constitutes a mandate to expand capacity.<sup>306</sup>

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<sup>294</sup> See Oncor Comments at 18–19 ("The Commission should leave everyday access issues in the hands of the electric utility pole owners . . ."); Florida IOUs Reply at 40 (adopting a wireless rule would "unduly constrain an electric utility's right to implement and enforce non-discriminatory access standards").

<sup>295</sup> 47 U.S.C. § 224(b)(1)–(2).

<sup>296</sup> *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible to every clause and word of a statute rather than to emasculate an entire section . . .").

<sup>297</sup> Cf. Coalition Comments at 72–73 (arguing that FCC cannot designate managing utility on jointly owned poles).

<sup>298</sup> Oncor Comments at 26.

<sup>299</sup> See AT&T Comments at 2 (arguing that the FCC has authority to regulate pole attachments by incumbent LECs).

<sup>300</sup> See 47 U.S.C. § 224(a)(1).

<sup>301</sup> See 47 U.S.C. § 224(a)(1) (requiring either ownership or "control" of a pole to fall within the ambit of the statute).

<sup>302</sup> See Florida IOUs Reply at 38–40.

<sup>303</sup> See Florida IOUs Comments at 13; Oncor Comments at 16–19. See also *Further Notice*, 25 FCC Rcd at 11871–73, paras. 14–16.

<sup>304</sup> See 47 U.S.C. § 224(a)(4), (b).

<sup>305</sup> See *Southern Co. I*, 293 F.3d at 1346.

<sup>306</sup> See 47 U.S.C. § 224(b)(1).

96. Finally, we reject contentions that the Commission has not developed a sufficient administrative record to support the instant rulemaking.<sup>307</sup> We have engaged in significant record-building and information-gathering through a variety of means to ensure broad participation by the public and interested parties and to serve as a sound foundation for the conclusions we reach here. For example, the Commission has sought comment on these issues multiple times, reviewed tens of thousands of pages of comments, convened public workshops, and participated in many *ex parte* meetings.<sup>308</sup> A wide variety of commenters have submitted evidence to the record frequently on all sides of the issues we address through these rules,<sup>309</sup> and we believe we have gathered sufficient evidence to carry our burden of articulating a “rational connection between the facts found and the choice made.”<sup>310</sup>

#### IV. IMPROVING THE ENFORCEMENT PROCESS

##### A. Revising Pole Attachment Dispute Resolution Procedures

97. In the *Further Notice*, we sought comment on whether the Commission should modify its existing procedural rules governing pole attachment complaints.<sup>311</sup> Several commenters expressed the view that new procedures and processes are not needed or that existing procedures can be improved to address any problems.<sup>312</sup> A number of commenters, however, maintained that the Commission should do more to encourage parties to resolve their disputes themselves prior to filing a complaint with the Commission.<sup>313</sup>

98. We agree that parties ought to make every effort to settle their disputes informally before instituting formal processes at the Commission. Section 1.1404(k) of the Commission’s rules requires a complainant to “include a brief summary of all steps taken to resolve the problem before filing,” and, if no such steps were taken, to “state the reason(s) why it believed such steps were fruitless.”<sup>314</sup> In our view, however, that rule does not adequately ensure that the parties will engage in serious efforts to resolve disputes prior to the initiation of litigation. That may be because individuals with sufficient decision-making authority are not involved in the discussions; other times it is because parties prematurely forego such discussions with the thought that they would be futile.

99. One commenter suggested that the Commission consider adopting an “executive level negotiation” requirement similar to that imposed by the California Public Utility Commission

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<sup>307</sup> See, e.g., APPA Reply at 24 (arguing that there is an insufficient record to establish comprehensive access timelines); Verizon Reply at 32 (similar); Coalition Comments 26–28 (stating that the Commission lacks the extensive record generated by various state commissions).

<sup>308</sup> See *supra* Parts I–II.

<sup>309</sup> See, e.g., TWTC/COMPTEL Comments at 11–12 (noting that “pole owners take many months to complete make-ready work and often refuse to agree to any deadlines in pole attachment contracts”); DAS Forum Comments at 8–9 (stating that utilities have used section 224(f) to effect blanket denials for access to poles); Sunesys Comments at 25–26 (characterizing current section 224(f) practices by utilities as burdensome); Level 3 Comments at 8–11 (arguing that it is being overcharged).

<sup>310</sup> *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1165 (D.C. Cir. 1987) (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)).

<sup>311</sup> *Further Notice*, 25 FCC Rcd at 11898, para. 79.

<sup>312</sup> Coalition Comments at 88–92; Sunesys Comments at 21–22; AT&T Comments at 19–20; Florida IOUs Comments at 41; CTIA Comments at 11–13; Idaho Power Comments at 13; Alliant Comments at 6; Verizon Comments at 43–44; GEMC Reply at 12; EEI/UTC Reply at 38–39; APPA Reply at 35; Verizon Reply at 36–38.

<sup>313</sup> CPS Energy Comments at 14; NextG Comments at 26–27; Idaho Power Comments at 13; Alliant Comments at 6; TWTC/COMPTEL Reply at 42–43; Coalition Reply at 15.

<sup>314</sup> 47 C.F.R. § 1.1404(k).

(“CPUC”).<sup>315</sup> As a prerequisite to the CPUC’s acceptance of a request for resolution of a pole attachment access dispute, the parties must escalate their dispute to the executive level within each company to attempt good faith efforts at negotiation.<sup>316</sup>

100. We believe a similar requirement should be incorporated into the Commission’s rules. Consequently, we are revising Commission rule 1.1404(k) to require that there be “executive-level discussions” (*i.e.*, discussions among individuals who have sufficient authority to make binding decisions on behalf of the company they represent) prior to the filing of a complaint at the Commission. In addition, we encourage parties to meet face-to-face for these executive-level discussions, because our experience shows that in-person meetings create an environment more conducive to reaching agreement than when communications occur only by telephone or written correspondence. The revised rule 1.1404(k) now states:

The complaint shall include a certification that the complainant has, in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute. A refusal by a respondent to engage in the discussions contemplated by this rule shall constitute an unreasonable practice under section 224 of the Act.

101. Further, in our desire to encourage pre-planning and coordination among pole owners and attachers to the greatest extent, and as early in the process, as possible, we will consider in any enforcement proceedings whether such coordination has taken place. Especially in the case of extremely large orders, or in a case of special circumstances (such as poles on tribal lands, environmental sensitivities, new or experimental or unconventional attachments, pendency of special permits), the question of whether attachers and pole owners have coordinated at an early stage will be material in our consideration of whether terms and conditions are just and reasonable.

102. In addition, a number of commenters expressed concern about the length of time it takes for the Commission to resolve pole attachment complaints,<sup>317</sup> and some advocated the creation of new processes for handling pole attachment complaints.<sup>318</sup> Although we do not believe that the current record warrants creation of new pole attachment complaint rules, we acknowledge the commenters’ concern. We believe that the new processes adopted elsewhere in this Order will have the effect of expediting the pole access process. And, to the extent that access disputes remain a problem, we will make every effort

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<sup>315</sup> NextG Comments at 26–27. *See* Coalition Reply at 15 (“the ability to take the dispute to the next level in the [other party’s] organization would be useful”).

<sup>316</sup> CPUC Order Instituting Rulemaking on the Commission’s Own Motion into Competition for Local Exchange Service, Dec. No. 98-10-058 (Oct. 22, 1998).

<sup>317</sup> *See, e.g.*, Level 3 Comments at 17; Comcast Comments at 30–32; Charter Comments at 23; Florida IOUs Comments at 41; NCTA Comments at 50–52; Ohio Comments at 2–3; TWTC/COMPTEL Comments at 35–37; TWTC/COMPTEL Reply at 42–43; TWC Reply at 21–23.

<sup>318</sup> CTIA Comments at 11–13; TWTC/COMPTEL Comments at 35–37; T-Mobile Comments at 14; Level 3 Comments at 17–18; MetroPCS Comments at 20–22; TWTC/COMPTEL Reply at 42–43; Verizon Reply at 6. *But see* EEI/UTC Reply at 39–40 (no “rocket docket” for pole attachment complaints).

to resolve them expeditiously. Toward that end, whenever possible, the Enforcement Bureau will resolve pole attachment complaints itself, to the extent permitted by its delegated authority.<sup>319</sup>

103. Finally, the *Further Notice* invited comment on numerous issues surrounding the possible formation of specialized forums to handle pole attachment disputes.<sup>320</sup> We received limited commentary about these issues, all indicating that such forums are unnecessary.<sup>321</sup> As a result, we do not believe that changes of this sort are justified at this time. If future events warrant, however, we will reexamine the issues at a later date.

#### **B. Efficient Informal Dispute Resolution Process**

104. The *Further Notice* sought comment on whether the Commission should attempt to encourage “local dispute resolution” (*i.e.*, dispute resolution processes outside the Commission’s auspices) by enacting a set of “best practices” and, if so, what the contours and impact of those best practices should be.<sup>322</sup> Several commenters endorsed the notion that local dispute resolution is beneficial in the first instance,<sup>323</sup> and others supported Commission efforts to formulate best practices.<sup>324</sup>

105. We agree with the commenters who support encouragement of local dispute resolution. Thus, we believe it is desirable for parties to include dispute resolution procedures in their pole attachment agreements. Any refusal to enter into an agreement because it contains a dispute resolution provision would be considered unreasonable. We suggest that one issue to be addressed specifically in a dispute resolution provision is the requirement (codified in new rule 1.1404(k)) of executive-level settlement negotiations preceding the filing of a complaint with the Commission. Further, we believe it would be reasonable for parties to agree to a forum other than the Commission (*e.g.*, an arbitrator or expert panel) to resolve disputes. That said, it would be unreasonable for a party to *insist*, over the other party’s objection, that a forum other than the Commission is the only appropriate forum for resolving disputes that otherwise fall within the Commission’s jurisdiction under section 224. We also note that the Commission’s pre-complaint mediation process has had marked success in helping parties resolve pole attachment disputes, and we encourage parties to utilize that process.<sup>325</sup>

106. The *Further Notice* tentatively concluded that the portion of rule 1.1404(m) that provides that potential attachers who are denied access to a pole, duct, or conduit must file a complaint “within 30 days of such denial” should be eliminated.<sup>326</sup> Specifically, the *Further Notice* observed that the existence of that language has deterred attachers from pursuing pre-complaint mediation and has prompted the premature filing of complaints.<sup>327</sup> A number of commenters agreed that the 30-day rule should be eliminated.<sup>328</sup> Other commenters felt that the rule should be retained, but all but one of those commenters also supported an exception to the rule for parties that are engaged in good-faith negotiations to resolve

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<sup>319</sup> See, *e.g.*, 47 C.F.R. § 0.311.

<sup>320</sup> *Further Notice*, 25 FCC Rcd at 11898, para. 80.

<sup>321</sup> AT&T Comments at 21–23; Florida IOUs Comments at 41; Comcast Comments at 32 n.96.

<sup>322</sup> *Further Notice*, 25 FCC Rcd at 11899, para. 81.

<sup>323</sup> Idaho Power Comments at 13; Alliant Comments at 6; ITTA Comments at 9.

<sup>324</sup> AT&T Comments at 20; NCTA Comments at 50–52. *But see* CenturyLink Comments at 49 (the cases and issues before the FCC are so idiosyncratic that it is unlikely a helpful set of general best practices could be developed).

<sup>325</sup> See *Further Notice*, 25 FCC Rcd at 11875, para. 23 & n.73.

<sup>326</sup> *Id.* at 11899–900, para. 82 (citing 47 C.F.R. § 1.1404(m)).

<sup>327</sup> *Id.*

<sup>328</sup> NCTA Comments at 53; Comcast Comments at 33; Charter Comments at 24; Sunesys Comments at 22.

their dispute.<sup>329</sup> We believe the 30-day rule no longer serves a useful purpose, and is actually counterproductive at times, for the reasons explained in the *Further Notice*. Any concern about stale complaints is addressed by our modifications of rule 1.1410, which state that remedies must be “consistent with the applicable statute of limitations.” We therefore eliminate the portion of rule 1.1404(m) requiring that denial of access complaints be filed within 30 days.

### C. Remedies

107. The *Further Notice* proposed to amend section 1.1410 of the Commission’s pole attachment complaint rules to enumerate the remedies available to an attacher that proves a utility has unlawfully delayed or denied access to its poles.<sup>330</sup> No comments were received on this proposal, which, as noted, would simply codify the existing authority and practice, and we accordingly adopt the rule change as proposed.<sup>331</sup> The *Further Notice* also proposed to amend rule 1.1410 to specify that compensatory damages may be awarded where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust and unreasonable.<sup>332</sup> We stated that doing so might be appropriate to deter unlawful conduct by utilities and to fully compensate attachers harmed by utilities’ unlawful conduct.<sup>333</sup>

108. The comments contain sharp disagreements about our proposal regarding compensatory damages. Many utilities argue that (i) the Commission lacks authority under section 224 of the Act to award compensatory damages,<sup>334</sup> (ii) allowing compensatory damages would make the complaint process unduly cumbersome,<sup>335</sup> and (iii) utilities have no competitive reason to obstruct, delay, or burden pole access.<sup>336</sup> By contrast, many attachers argue that (i) the Commission does have authority under section 224 of the Act to award compensatory damages,<sup>337</sup> and (ii) allowing compensatory damages will encourage utilities to comply promptly and fully with their pole access obligations under section 224 of the Act and the Commission’s implementing rules.<sup>338</sup>

109. Based on our review of the record and on the other actions we take in this Order, we decline at this time to amend rule 1.1410 to allow compensatory damages. Given all of the rules designed to improve and expedite pole access that we adopt herein, we anticipate that attachers will experience far fewer difficulties than they have to date. Consequently, this does not appear to be a propitious time to add the potential for compensatory damages. Of course, we will continue to monitor the pole attachment

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<sup>329</sup> Florida IOUs Comments at 42; EEI/UTC Comments at 52; Verizon Comments at 42–44; T-Mobile Comments at 14–15; Verizon Reply at 39–41. *But see* Alliance Comments at 69 (proposing retention without modification).

<sup>330</sup> *Further Notice*, 25 FCC Rcd at 11901, para. 85, and 11932–33, App. B, para. 6.

<sup>331</sup> Section 1.1410, as amended, would thus include the following provision: (2) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or unreasonably delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms and conditions.

<sup>332</sup> *Further Notice*, 25 FCC Rcd at 11901, paras. 86–87.

<sup>333</sup> *Id.*

<sup>334</sup> *See, e.g.*, EEI/UTC Comments at 42–49; NRECA Comments at 20; Alliance Comments at 69–71.

<sup>335</sup> *See, e.g.*, EEI/UTC Comments at 48–49; Florida IOUs Comments at 50–51; APPA Reply at 35.

<sup>336</sup> EEI/UTC Comments at 49–50.

<sup>337</sup> *See, e.g.*, TWTC/COMPTEL Reply at 35–38; TWC Reply at 25–29; Sunesys Reply at 20.

<sup>338</sup> *See, e.g.*, ACA Comments at 9–10; Coalition Comments at 92; Charter Comments at 24; Comcast Comments at 32; EEI/UTC Comments at 42–51; MetroPCS Comments at 22; TWC Comments at 26–28; CTIA Comments at 13–15; Sunesys Comments at 22–23; TWC Reply at 24.

processes experienced by attachers, and if our expectations regarding improvements are unmet, we may revisit the propriety of amending rule 1.1410 to allow compensatory damages.

110. In the *Further Notice*, the Commission proposed to modify rule 1.1410(c), which permits a monetary award in the form of a “refund or payment,” measured “from the date that the complaint, as acceptable, was filed, plus interest.”<sup>339</sup> The proposed modification to the rule would allow monetary recovery in a pole attachment action to extend back as far as the applicable statute of limitations allows.<sup>340</sup> We reasoned that the current rule fails to make injured attachers whole, and is inconsistent with the way that claims for monetary recovery are generally treated under the law.<sup>341</sup> The Commission expressed a concern that, by allowing monetary recovery *only* from the date the complaint is filed, the current rule discourages pre-complaint negotiations between the parties to resolve disputes about rates, terms and conditions of attachment.<sup>342</sup>

111. A number of commenters favored the proposed modification, and generally supported the rationale for the rule change described in the order.<sup>343</sup> Several commenters, however, oppose the rule modification. We find the arguments offered by these opponents to be unpersuasive. Specifically, we reject the contention that the proposed rule change creates an incentive for attaching entities to attempt to maximize their monetary recovery by waiting until shortly before the statute of limitations has expired to bring a dispute over rates to the Commission.<sup>344</sup> We see no basis to conclude that an attacher injured by pole attachment rate over-charges would be any more likely than any other injured plaintiff to wait the full length of the limitations period before bringing a claim. An injured pole attacher has no more incentive than any other plaintiff to delay filing a complaint in order to make additional over-payments that will later need to be refunded.<sup>345</sup>

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<sup>339</sup> *Further Notice*, 25 FCC Rcd at 11901–02, para. 88 (quoting 47 C.F.R. § 1.1410(C)).

<sup>340</sup> *Id.* at 11901–02, para. 88, 11932–33, App. B, para. 6 (proposed amendment to rule 1.1410). Elsewhere in this Order, we address a proposal to expand the relief available under rule 1.1410 to include the recovery of compensatory damages in pole attachment complaint proceedings. *See supra* paras. 107–109.

<sup>341</sup> *Further Notice*, 25 FCC Rcd at 11901–02, para. 88.

<sup>342</sup> *Id.*

<sup>343</sup> *See, e.g.*, TWC Comments at 26–28 (allowing recovery consistent with the applicable statute of limitations, rather than from the date a complaint is filed, will facilitate informal dispute resolution and reduce litigation before the Commission, because attachers will not be compelled immediately to file a complaint in order to preserve their claims); Charter Comments at 25 (the existing refund rule provides no incentive for pole owners to charge just and reasonable rates because even when an attacher prevails in a complaint proceeding, the current remedy—a refund back to the day of the complaint—rarely makes the complainant whole); NCTA Comments at 53 (attachers typically are reimbursed only to the date on which an error is discovered and reported to the utility—or, if a complaint is filed, to the date of the complaint; requiring pole owners to compensate attachers from the date of wrongful conduct would encourage pole owners to comply with the Commission’s rules).

<sup>344</sup> *See* EEI/UTC comments at 50–52. *See also* Alliance Comments at 67–69 (the proposed rule change would discourage timely filing of complaints); Coalition Comments at 93 (permitting attachers to recover refunds dating back years before a complaint is filed would eliminate any incentive for them to resolve rate issues in a timely manner. Rate disputes would drag on indefinitely, and the amount potentially to be refunded will grow proportionately). EEI/UTC also complained that our order “does not specify exactly what statute of limitations it believes may be relevant.” EEI/UTC Comments at 51.

<sup>345</sup> One commenter noted that, in the 1978 *First Report and Order*, the Commission specifically rejected a suggestion that refunds be calculated from the date the disputed rate was first paid, and expressed the view that allowing refunds from the date of complaint is “entirely appropriate in a complainant form of regulation” in order to “avoid abuse and encourage early filing when rates are considered objectionable.” Alliance Comments at 68 (citing the *First Report and Order*). In the more than 30 years since that order issued, we have had the opportunity to weigh this concern about potential abuse against our experience that the rule, as currently written, creates a (continued....)

112. At the same time, we encourage attachers to provide early notice to utilities of any alleged overcharges so that the parties can attempt to resolve such issues through negotiation rather than litigation before the Commission. However, we decline the invitation of one commenter to modify our rules to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge.<sup>346</sup> Such a rule modification runs counter to the very idea of a statute of limitations, which permits complaints to be filed up until the last day of the limitations period. We therefore modify rule 1.1410(c) to allow monetary recovery in a pole attachment action to extend as far back in time as the applicable statute of limitations allows.

#### D. Unauthorized Attachments

113. Another issue addressed by the *Further Notice* was attachments installed on poles without a lawful agreement with or permit from the pole owner—so-called “unauthorized attachments.”<sup>347</sup> The *Further Notice* explained that, under current precedent (*i.e.*, the *Mile Hi* decisions),<sup>348</sup> penalties for unauthorized attachments may not “exceed an amount approximately equal to the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less, plus interest.”<sup>349</sup> This standard, the *Further Notice* observed, amounted to “little more than back rent” and may be insufficient to encourage compliance with proper authorization processes.<sup>350</sup> Consequently, the *Further Notice* asked a series of questions about alternatives to the Commission’s penalty regime, including the system adopted by the Oregon Public Utilities Commission (“Oregon PUC”).<sup>351</sup>

114. Commenters continue to disagree about the scope of the problem posed by unauthorized attachments, with attachers arguing that utilities vastly overstate the numbers,<sup>352</sup> and utilities arguing that the problem is widespread and serious.<sup>353</sup> Although the record is insufficient for us to make specific findings regarding the scope and severity of non-compliance, there appears to be a well-founded concern that an unauthorized attachment payment amounting to no more than back rent provides little incentive for attachers to follow authorization processes, and that competitive pressure to bring services to market

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disincentive to engage in pre-complaint negotiation. We find that the benefits of encouraging negotiated resolution of disputes outweighs any concern that attachers will “abuse” the process by unduly delaying the filing of overcharge complaints.

<sup>346</sup> See Verizon Comments at 45.

<sup>347</sup> *Further Notice*, 25 FCC Rcd at 11902–05, paras. 89–98.

<sup>348</sup> *Mile Hi Cable Partners v. Public Service Company of Colorado*, Order, 15 FCC Rcd 11450 (Cable Serv. Bur. 2000) (“*Mile Hi Order*”), *review denied*, 17 FCC Rcd 6268 (2002) (“*Mile Hi Recon Order*”), *review denied sub nom. Public Serv. Co. of Colorado v. FCC*, 328 F.3d 675 (D.C. Cir. 2003). In the *Mile Hi Order*, the Cable Services Bureau concluded that a penalty payment for each unauthorized attachment limited to not more than five times the annual attachment rent was a sufficient incentive for the attacher to comply with a reasonable application process. *Mile Hi Order*, 15 FCC Rcd at 11458, para. 14. On appeal, the Commission declined to adopt the *Mile Hi Order* as a standard of general applicability, but found that the record supported the Bureau’s determination. *Mile Hi Recon Order*, 17 FCC Rcd at 6273, para. 11.

<sup>349</sup> *Further Notice*, 25 FCC Rcd at 11903, para. 92.

<sup>350</sup> *Id.* at 11904, para. 94.

<sup>351</sup> *Id.* at 11904–05, paras. 95–98.

<sup>352</sup> Bright House Comments at 28; NCTA Comments at 42–50; Sunesys Comments at 27–28; Comcast Comments at 33–34; Charter Comments at 26–32; TWC at 30–36; Verizon Reply at 43–44.

<sup>353</sup> See, e.g., Coalition Comments at 97.

overwhelms any deterrent effect.<sup>354</sup> That said, we take seriously the arguments by attachers that utilities may deem attachments to be unauthorized because of poor record keeping or changes in pole ownership, rather than because of the attacher's failure to follow proper protocol.<sup>355</sup> Consequently, the policy we enunciate today applies on a prospective basis only -- i.e., to new agreements, or amendments to existing agreements, executed after the effective date of this Order.

115. To address the concerns implicated by unauthorized attachments, we explicitly abandon the *Mile Hi* limitation on penalties and instead create a safe harbor for more substantial penalties. Specifically, going forward, we will consider contract-based penalties for unauthorized attachments to be presumptively reasonable if they do not exceed those implemented by the Oregon PUC.<sup>356</sup> Oregon has established a multifaceted system that contains, among others, the following provisions:

- An unauthorized attachment fee of \$500 per pole for pole occupants without a contract (*i.e.*, when there is no pole attachment agreement between the parties),<sup>357</sup>
- An unauthorized attachment fee of five times the current annual rental fee per pole if the pole occupant does not have a permit and the violation is self-reported or discovered through a joint inspection, with an additional sanction of \$100 per pole if the violation is found by the pole owner in an inspection in which the pole occupant has declined to participate.<sup>358</sup>
- A requirement that the pole owner provide specific notice of a violation (including pole number and location) before seeking relief against a pole occupant.<sup>359</sup>
- An opportunity for attachers to avoid sanctions by submitting plans of correction within 60 calendar days of receipt of notification of a violation or by correcting the violation and providing notice of the correction to the owner within 180 calendar days of receipt of notification of the violation.<sup>360</sup>
- A mutual obligation of pole owners and pole occupants to correct immediately violations that pose imminent danger to life or property. If a party corrects another party's violation, the party responsible for the violation must reimburse the correcting party for the actual cost of corrections.<sup>361</sup>

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<sup>354</sup> Alliant Comments at 7; ITTA Comments at 10; Idaho Power Comments at 15; Florida IOUs Comments at 49–52; Verizon Comments at 45–46; Alliance Comments at 72–75; APPA Comments at 30–31; Oncor Comments at 51–52; Verizon Reply at 43–44.

<sup>355</sup> Florida IOUs Reply at 15; APPA Reply at 36.

<sup>356</sup> See Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0130 – 0220; [http://arcweb.sos.state.or.us/rules/OARS\\_800/OAR\\_860/860\\_028.html](http://arcweb.sos.state.or.us/rules/OARS_800/OAR_860/860_028.html).

<sup>357</sup> Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0130. “To facilitate the joint use of poles,” the Oregon regulations provide that “entities must execute contracts establishing the rates, terms, and conditions of pole use.” *Id.* 860-028-0060(2).

<sup>358</sup> Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0140.

<sup>359</sup> Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0190.

<sup>360</sup> Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0150.

<sup>361</sup> Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0115, 860-028-0120.

- The opportunity for resolution of factual disputes via settlement conferences before an alternative dispute resolution forum.<sup>362</sup>

116. In a case where an attacher makes unauthorized attachments to a pole at a time when the attacher has no pole attachment agreement with the utility, but later enters into such an agreement, we find that it would be reasonable for the utility to apply the unauthorized attachment provisions in that agreement to attachments that were made before the agreement was executed, as well as to any unauthorized attachments made following execution. If an attacher who has made unauthorized attachments without any contract with the utility refuses to enter into a pole attachment agreement, the utility may seek other remedies including, for example, an action in state court for trespass.

117. The comments evidenced significant support for the Oregon PUC's sanctions.<sup>363</sup> The record shows that the system of fines instituted by the Oregon PUC has been effective in reducing substantially the incidence of unauthorized attachments in that state.<sup>364</sup> The Oregon penalties have been tested and refined with assistance from the Oregon Joint Use Association.<sup>365</sup>

118. We do not adopt the Oregon system as federal law, but rather continue to favor agreements negotiated between utilities and attaching entities.<sup>366</sup> We simply conclude that we have examined Oregon's rules and find them to be reasonable, and that we would expect to find reasonable any unauthorized attachment provisions contained in agreements that do not exceed the Oregon penalties. As noted above, however, the Oregon sanctions are part of a larger system that also affords protections to attachers that operate in good faith. Consequently, we anticipate that, like the Oregon system, a reasonable pole attachment agreement also will contain provisions that provide notice to attachers, a fair opportunity to remedy violations, and a reasonable process for resolving factual disputes that may arise.

#### **E. The "Sign and Sue" Rule**

119. The *Further Notice* reviewed the Commission's long-standing "sign and sue" rule, which allows an attacher to challenge the lawfulness of terms in an executed pole attachment agreement that the attacher claims it was coerced to accept in order to gain access to utility poles.<sup>367</sup> Finding that utilities continue to have the potential to abuse their monopoly power in negotiating pole attachment agreements, the Commission proposed to retain the "sign and sue" rule, but sought comment on whether to add a notice requirement to the rule.<sup>368</sup> Specifically, the Commission proposed that rule 1.1404(d) be amended

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<sup>362</sup> The Oregon rules provide for dispute resolution before a Joint-Use Association, which is comprised of pole owners, pole occupants, and government entities. Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0200, 860-028-0220. We encourage stakeholders to develop dispute resolution fora that would function in a manner similar to the Joint-Use Association in Oregon.

<sup>363</sup> Alliant Comments at 7; NRECA Comments at 20; Coalition Comments at 100–01; CPS Energy Comments at 15; Verizon Comments at 45–46; Alliance Comments at 72–75; APPA Reply at 36. Of course, the comments were not unanimous. Some believe the Oregon system is not sufficiently stringent. Idaho Power Comments at 15; APPA Comments at 30–31; Oncor Comments at 51–52. Others believe the Oregon system is unworkable or that it results in penalties that are too harsh. Charter Comments at 26–32; TWC Comments at 30–36.

<sup>364</sup> See Coalition Comments at 101 and Exh. C.

<sup>365</sup> Portland General Electric *NPRM* Comments at 6 (describing the Oregon Joint Use Association as an industry group in which the interests of both attaching entities and utilities are represented).

<sup>366</sup> See *1998 Implementation Order*, 13 FCC Rcd at 6783–84, para. 10 (preference for negotiated agreements).

<sup>367</sup> *Further Notice*, 25 FCC Rcd at 11905–09, paras. 99–108.

<sup>368</sup> Some commenters continue to urge the Commission to eliminate the "sign and sue" rule entirely. See, e.g., EEI/UTC Comments at 59–63; Idaho Power Comments at 15–16. We decline to do so, for the reasons stated in the *Further Notice*, 25 FCC Rcd at 11907–08, paragraphs 104–05. See, e.g., AT&T Comments at 25 (attachers might feel economic pressure to accept a less than satisfactory agreement in order to get into business or to serve a specific (continued...))

to require an attacher to provide a utility with written notice of its objections to provisions of a proposed pole attachment agreement, during contract negotiations, as a prerequisite for later bringing a complaint challenging those provisions.<sup>369</sup> We also sought comment on whether such a notice requirement should include an exception for circumstances where a challenged provision was not unjust and unreasonable on its face, but only as later applied, and the attacher could not reasonably have anticipated the unreasonable application.<sup>370</sup>

120. A few commenters expressed support for the proposed notice requirement.<sup>371</sup> A number of other commenters, however, advocated retaining the “sign and sue” rule without modification, and raised various objections to the proposed notice requirement.<sup>372</sup> After reviewing these comments, we conclude that the Commission should not amend rule 1.1404(d) to add a notice requirement to the “sign and sue” rule. As discussed below, we find that such a requirement poses a significant risk of unduly delaying the negotiation process and adding unnecessary complexity to the adjudication of pole attachment disputes before the Commission. Moreover, we find that a number of the intended benefits of the proposed notice provision will be realized through the amendment to rule 1.1404(k) that we adopt elsewhere in this order.

121. Commenters both for and against the notice requirement raised valid concerns that the requirement would prompt attachers to be over-inclusive in identifying potentially problematic contract terms in correspondence with the utility during the negotiation process.<sup>373</sup> One commenter opined that the notice requirement would cause attachers to make “blanket” objections to contract terms that would provide utilities with no notice of which provisions the attachers actually consider to be objectionable (as

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customer by a certain time frame); Level 3 Comments at 14–16 (attaching parties often do not sign the agreements because they have reached accord on significant provisions, but because they can no longer delay their construction while negotiations drag on); TWC Comments at 23–26 (utilities, relying on superior bargaining power, often present attachers with one-sided boilerplate agreements, and have little or no incentive to make concessions other than removing facially illegal terms); NCTA Comments at 37–42 (the “sign and sue” rule is virtually the only leverage attachers have when negotiating contracts with utilities).

<sup>369</sup> *Further Notice*, 25 FCC Rcd at 11905, 11908–09, paras. 99, 107–08.

<sup>370</sup> *Id.* at 11909, para. 108.

<sup>371</sup> *See, e.g.*, Coalition Comments at 104–05; Florida IOUs Comments at 53–55; AT&T Comments at 25; APPA Comments at 30. Some commenters expressed only weak support for the proposed notice requirement. *See, e.g.*, Oncor Comments at 52–54 (Oncor does not oppose the notice requirement); EEI/UTC Reply at 51–54 (although the proposed revision to the sign and sue rule is a step in the right direction, it does not go far enough in providing assurance a pole attachment agreement was negotiated in good faith by an attaching entity). One commenter who advocates eliminating the sign and sue rule in its entirety, opposed the proposed notice requirement. Idaho Power Comments at 15–16 (the proposed notice requirement is “not likely to remedy or improve the negotiation process and could increase the potential for adverse impacts for all parties.”).

<sup>372</sup> *See, e.g.*, NCTA Comments at 37–42; TWC Comments at 23–26; MetroPCS Comments at 22–26; Level 3 Comments at 14–16; Comcast Comments at 25–30; Charter Comments at 16–21; CenturyLink Comments at 35–37; CTIA Comments at 15–15; ACA Comments at 10–11. The proposed exception to the notice requirement for circumstances where rates, terms, and conditions are not unjust and unreasonable on their face was criticized by both supporters and opponents of the notice requirement. *See, e.g.*, AT&T Comments at 26–27; NCTA Comments at 40–41; Oncor Comments at 53. *But see* CTIA Comments at 15–16 (supporting the exception); Sunesys Comments at 28 (same).

<sup>373</sup> *See, e.g.*, Florida IOUs Comments at 53–55 (proposed notice requirement will encourage attachers to word all correspondence in negotiations to include language that could later be deemed “notice” under the rule). *See also* NCTA Comments at 40; Charter Comments at 16–21; Oncor Comments at 53. To address this potential problem, the Florida IOUs, who support the notice requirement, suggested that the Commission require an attacher to designate, immediately before the agreement is executed, the specific provisions of the final agreement it contends are unjust and unreasonable. Florida IOUs Comments at 53–55.

distinguished from those the attacher included merely to ensure it did not waive any rights to later object).<sup>374</sup> This effort to memorialize all conceivably objectionable terms, some feared, would set off time-consuming exchanges of correspondence between the attacher and the utility, and thus increase the time and expense involved in negotiating a pole attachment agreement.<sup>375</sup>

122. Some commenters also predicted that the proposed notice requirement would prematurely ignite a host of unnecessary disputes during the negotiation process over contract provisions that may never be implemented or enforced by the utility.<sup>376</sup> Further, some commenters raised credible concerns that the notice requirement would complicate and prolong complaint proceedings before the Commission by requiring the Commission, as a threshold matter, to review the parties' negotiating history to determine whether the attacher provided the utility with notice of its objections to disputed contract terms during negotiations, and, if not, whether the attacher could have reasonably anticipated that the challenged term would be applied in an allegedly unreasonable manner.<sup>377</sup>

123. Comments from both utilities and attachers emphasized the need for parties to engage in good faith negotiations to resolve disputes over contract terms before claims are raised at the Commission.<sup>378</sup> Indeed, we affirm, pursuant to our authority under section 224(b) of the Act, that both attachers and utilities have a duty to negotiate the rates, terms, and conditions of attachment in good faith, and to make a good faith effort to resolve disputes prior to seeking relief from the Commission. We thus reject the position of commenters who contend that the sign and sue rule effectively relieves attachers of any obligation to negotiate pole agreements in good faith.<sup>379</sup> At the same time, however, we note that the sign and sue rule was adopted in recognition that in some situations, despite good faith efforts to reach agreement, an attacher may be forced to execute a pole attachment agreement containing what it believes to be unjust and unreasonable terms in order to gain timely access to the utility's poles.<sup>380</sup> Although the sign and sue rule exists to address these situations, based on the relatively few complaints the

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<sup>374</sup> Oncor Comments at 53–54.

<sup>375</sup> See, e.g., Comcast Comments at 25–30; NCTA Comments at 40; Charter Comments at 16–21; TWC Comments at 23–26; TWC Reply at 41.

<sup>376</sup> See Comcast Comments at 25–30 (although utilities routinely salt their pole agreements with boilerplate terms that violate numerous provisions of pole attachment law and policy, many of these provisions are never implemented or enforced by the utility, in part because the provisions are known to be unenforceable); TWC Comments at 23–26 (the proposed notice requirement may lead attachers to litigate over terms that may never be enforced by a utility); Charter Comments at 16–21 (memorializing every conceivable basis for complaint, as attachers will feel compelled to do, will most likely be unnecessary).

<sup>377</sup> See Charter Comments at 16–20; Florida IOUs Comments at 53–55.

<sup>378</sup> See, e.g., Coalition Comments at 105; EEI/UTC Comments at 59–63; EEI/UTC Reply at 51–54; Comcast Comments at 25–30; TWC Comments at 23–26.

<sup>379</sup> See, e.g., EEI/UTC Reply at 51–54.

<sup>380</sup> See *Further Notice*, 25 FCC Rcd at 11905–07, paras. 100, 104. Such a coercive situation may arise, for example, where “the attacher acquiesces in a utility’s ‘take it or leave it’ demand that it pay more than the statutory maximum or relinquish some other valuable right — without any *quid pro quo* other than the ability to attach its wires on unreasonable or discriminatory terms.” See *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002) (*Southern Co. II*) (quoting the Commission’s brief with approval). As we discussed in the *Further Notice*, a utility may successfully defend a complaint challenging the reasonableness of a term in a pole attachment agreement by showing that the term was adopted as part of a *quid pro quo* for which the utility provided a valuable concession. See *Further Notice*, 25 FCC Rcd at 11908, para. 106. See also NCTA Comments at 41 (if a pole owner wishes to demonstrate that an attacher bargained away the precise term or condition that it subsequently challenges in a complaint, it can do so under the existing regulatory regime); Comcast Comments at 25–30 (utilities are protected by the Commission’s policy of not disturbing bargained-for package of provisions where a *quid pro quo* has been established). *Accord*, Level 3 Comments at 14–16; Charter Comments at 16–21.

Commission has received challenging the terms of executed pole attachment agreements, it appears that in most instances, parties are able to achieve an agreement that is acceptable to both sides.<sup>381</sup>

124. Our proposal to include a notice requirement in rule 1.1404(d) was designed to promote efforts by attachers and utilities to negotiate innovative and mutually beneficial solutions to contested contract issues.<sup>382</sup> After reviewing comments on that proposal, however, we have concluded that it carries a significant risk of unduly complicating and delaying the negotiation of pole attachments agreements and the adjudication of disputes over such agreements. Moreover, we find that the modifications to rule 1.1404(k) adopted elsewhere in this order,<sup>383</sup> including the requirement for good faith, executive-level negotiations, will provide a number of the benefits we originally envisioned for the amendment to rule 1.1404(d). Amended rule 1.1404(k) should encourage the negotiated resolution of disputes over the terms of pole attachment agreements by providing utilities with notice of those provisions in a pole attachment agreement that an attacher finds so unreasonable that it is prepared to seek relief at the Commission. Moreover, because application of amended rule 1.1404(k) — unlike the proposed amendment to rule 1.1404(d) — carries no risk that an attacher’s right to challenge unreasonable contract provisions will be waived through incomplete notice, attachers will have little incentive to be over-inclusive in designating issues for pre-complaint resolution. Similarly, relying on a pre-complaint notice requirement, instead of a requirement for notice during contract negotiations, will decrease the likelihood that parties will spend valuable time and resources wrangling over terms that a utility may never seek to enforce.

125. Rule 1.1404(k), as modified, will thus provide a number of the dispute resolution benefits that the notice requirement was intended to offer. Further, it does not pose the complications and potential delays to the negotiation and adjudication process that many commenters feared would result from the proposal addition of a notice requirement to rule 1.1404(d). Accordingly, we decline to amend rule 1.1404(d) to add a provision requiring an attacher to provide a utility with written notice of its objections to provisions of a proposed pole attachment agreement, during contract negotiations, as a prerequisite for later bringing a complaint challenging those provisions.

## V. POLE RENTAL RATES

126. As discussed below, the record developed in response to the *Further Notice* persuades us to adopt a form of the proposed new telecommunications rate formula, which we believe strikes the right balance between promoting broadband and providing continued incentives for investment by pole owners consistent with section 224 of the Act.<sup>384</sup> In addition, the new formula will minimize the difference in rental rates paid for attachments that are used to provide voice, data, and video services, and thus will help remove market distortions that affect attachers’ deployment decisions. Removing these barriers to telecommunications and cable deployment will enable consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband. Increasing competitive neutrality also improves the ability of different providers to compete with each other on an equal footing, better enabling efficient competition.

### A. Background

127. *1978 Pole Attachment Act.* Congress first directed the Commission to ensure that the rates, terms and conditions for pole attachments by cable television systems were just and reasonable in

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<sup>381</sup> See TWC Reply at 40 (noting the “relative dearth of pole attachment complaints filed with the Commission); NCTA Comments at 37–40 (if attachers were simply signing virtually any pole attachment agreement and filing complaints later, significantly more complaints would have been filed to date).

<sup>382</sup> See *Further Notice*, 25 FCC Rcd at 11908, para. 107.

<sup>383</sup> See *supra* para. 100.

<sup>384</sup> *Further Notice*, 25 FCC Rcd at 11917–24, paras. 128–41.

1978 when it added section 224 to the Communications Act.<sup>385</sup> Although section 224 relied on “cost” as the foundation for determining just and reasonable attachment rates, it recognized the range of ways that “cost” could be interpreted. In particular, section 224(d)(1) defines a just and reasonable rate as ranging from a statutory minimum based on the additional costs of providing pole attachments to a statutory maximum based on fully allocated costs.<sup>386</sup>

128. The additional, or incremental, costs that form the basis for the statutory minimum are the costs that would not be incurred by the utility “but for” the pole attachments.<sup>387</sup> These costs include pre-construction survey, engineering, make-ready, and change-out costs incurred in preparing the pole for attachments.<sup>388</sup> Congress expected a pole attachment rate based on incremental costs to be minimal since most of those costs would have been fully recovered in the make-ready charges already paid by the attacher.<sup>389</sup> The maximum rate for attachments under section 224(d)(1), identified as a percentage of fully allocated costs, reflects a portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles; the percentage is equal to the portion of space on a pole occupied by an attacher.<sup>390</sup>

129. In a series of orders, the Commission implemented a formula that cable television system attachers and utilities could use to determine a maximum allowable just and reasonable pole attachment rate – referred to as the cable rate formula – and procedures for resolving rate complaints.<sup>391</sup> In 1987, the U.S. Supreme Court found that the cable rate formula adopted by the Commission provides pole owners with adequate compensation, and thus did not result in an unconstitutional “taking.”<sup>392</sup>

130. *Telecommunications Act of 1996.* Congress expanded the reach of section 224 in the 1996 Act to promote infrastructure investment and competition. Among other things, Congress added “provider[s] of telecommunications service[s]” as a category of attacher entitled to pole attachments at just and reasonable rates, terms and conditions under section 224,<sup>393</sup> and added section 224(e), which provides a methodology “to govern the charges for pole attachments used by telecommunications carriers

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<sup>385</sup> Pole Attachment Act of 1978, Pub. L. No. 95-234, 92 Stat. 33, codified at Communications Act of 1934, as amended; 47 U.S.C. § 224. Congress reacted to an apparent need in the cable television industry to resolve conflicts between such providers, then known as “CATV systems,” and utility pole, duct, and conduit owners over the charges for use of such facilities. *See generally* 1977 Senate Report, *reprinted in* 1978 U.S.C.C.A.N. 109.

<sup>386</sup> 47 U.S.C. §§ 224(d)(1); *see also* 1977 Senate Report at 19–21, *reprinted in* 1978 U.S.C.C.A.N. at 127–28.

<sup>387</sup> 1977 Senate Report at 19, *reprinted in* 1978 U.S.C.C.A.N. at 127.

<sup>388</sup> “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).

<sup>389</sup> *See* 1977 Senate Report at 19, *reprinted in* 1978 U.S.C.C.A.N. at 127; *1987 Rate Order*, 2 FCC Rcd at 4388, para. 4.

<sup>390</sup> 1977 Senate Report at 19–20, *reprinted in* 1978 U.S.C.C.A.N. at 127–28.

<sup>391</sup> *See, e.g., First Report and Order*, 68 FCC 2d 1585 (adopting complaint procedures); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Memorandum Opinion and Order, 77 FCC 2d 187 (1980) (defining, e.g., safety space, average usable space, attachment as occupying 12 inches of space, and make-ready as non-recurring cost); *1987 Rate Order*, 2 FCC Rcd 4387. The cable rate formula was codified in the *1998 Implementation Order*, 13 FCC Rcd 6777 at 47 C.F.R. § 1.1409(e)(1).

<sup>392</sup> *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *see Alabama Cable Telecomm. Ass’n v. Alabama Power Co., Application for Review*, File No. PA 00-003, Order, 16 FCC Rcd 12209 (2001) (*Alabama Cable Order*), *review denied sub. nom. Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied, Alabama Power Co. v. FCC*, 540 U.S. 937 (2003).

<sup>393</sup> 47 U.S.C. §§ 224(a)(4), (b)(1).

to provide telecommunications services.”<sup>394</sup> Section 224(e) provides for the determination of pole attachment rates based on “the cost of providing space on a pole.”<sup>395</sup> The statute explains how the costs should be divided, or allocated, between the pole owner and attacher.<sup>396</sup>

131. By virtue of the 1996 Act revisions, section 224 of the Act now sets forth two separate methodologies to determine the maximum rates for pole attachments – one applies to pole attachments used by telecommunications carriers (the telecom rate formula), and the other to pole attachments used “solely to provide cable service” (the cable rate formula).<sup>397</sup> Under section 224, pole attachments for telecommunications carriers initially were established under the cable rate formula, and were transitioned to the telecom rate formula over a five-year period.<sup>398</sup> As the Commission implemented these statutory formulas, the telecom rate formula generally resulted in higher pole rental rates than the cable rate formula.<sup>399</sup>

132. *Subsequent Proceedings.* At the same time that the Commission adopted a rule implementing the telecom rate formula, it addressed the issues of cable attachments used to offer commingled cable and Internet access services. In particular, the Commission held that cable television systems that offer commingled cable and Internet access service should continue to pay the cable rate.<sup>400</sup> In 2002, the Supreme Court upheld this decision, finding that section 224(b) gives the Commission authority to adopt just and reasonable rates for attachments within the general scope of section 224 of the Act, but outside the “self-described scope” of the telecom rate formula or cable rate formula as specified under sections 224(d) and (e).<sup>401</sup>

133. On November 20, 2007, the Commission released the *Pole Attachment Notice*, which sought comment on, among other things, the difference in pole attachment rates paid by cable systems, incumbent LECs, and competing telecommunications carriers that provide the same or similar services.<sup>402</sup> The Commission likewise recognized “the importance of promoting broadband deployment and the

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<sup>394</sup> 47 U.S.C. § 224(e)(1)–(4). For purposes of section 224, however, Congress excluded incumbent LECs from the definition of “telecommunications carrier.” 47 U.S.C. § 224(a)(5). We discuss below issues relating to the treatment of pole attachments by incumbent LECs for purposes of section 224. *See infra* Part V.C.

<sup>395</sup> 47 U.S.C. § 224(e)(2).

<sup>396</sup> 47 U.S.C. § 224(e)(2)–(3).

<sup>397</sup> 47 U.S.C. §§ 224(d), (e). The difference between the cable and existing telecom rate formulas is the way they allocate the costs associated with the unusable portion of the pole — the space on a pole that cannot be used for attachments. *Compare* 47 C.F.R. § 1.1409(e)(1) *with* 47 C.F.R. § 1.1409(e)(2). The cable and telecom rate formulas both allocate the costs of usable space on a pole based on the fraction of the usable space that an attachment occupies. Under the cable rate formula, the costs of unusable space are allocated in the same way. Under the telecom rate formula, however, two-thirds of the costs of the unusable space is allocated equally among the number of attachers, including the owner, and the remaining one third of these costs is allocated solely to the pole owner.

<sup>398</sup> 47 U.S.C. § 224(e)(4).

<sup>399</sup> Under the cable formula, each attacher, other than the pole owner, pays about 7.4% of the annual cost of a pole. *See* 47 U.S.C. §§ 224(d). Under the telecom rate formula, each attacher, other than the pole owner, pays between about 11.2% of the annual cost of a pole in urban areas to about 16.9% in non-urban areas. *See Further Notice*, 25 FCC Rcd at 11913–14, para. 11. These rates are based on the Commission’s rebuttable presumptions of 37.5 feet for the height of a pole, 24 feet for the unusable space on a pole, 13.5 feet for the usable space, 1 foot for the space occupied by an attachment, 3 attachers in non-urban areas, and 5 attachers in urban areas. *See* 47 C.F.R. §§ 1.1417–18.

<sup>400</sup> *See 1998 Implementation Order*, 13 FCC Rcd at 6796, para. 34.

<sup>401</sup> *Gulf Power*, 534 U.S. at 335–36, 338–39.

<sup>402</sup> *Pole Attachment Notice*, 22 FCC Rcd at 20200, 20206, paras. 13, 26.

importance of technological neutrality,” and thus “tentatively conclude[d] that all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service.”<sup>403</sup> The *Pole Attachment Notice* went on to tentatively conclude, however, that “the [uniform] rate should be higher than the current cable rate, yet no greater than the telecommunications rate.”<sup>404</sup>

134. In the 2010 *Further Notice*, however, the Commission declined to pursue that approach for several reasons. The Commission explained that pursuing uniformity by increasing cable operators’ pole rental rates – potentially up to the level yielded by the current telecom formula – “would come at the cost of increased broadband prices and reduced incentives for deployment.”<sup>405</sup> Instead, the Commission sought to limit the distortions present in the current pole rental rates “to increase the availability of, and competition for, advanced services to anchor institutions and as middle-mile inputs to wireless services and other broadband services,” some of which potentially could be classified as telecommunications services.<sup>406</sup> Accordingly, in the *Further Notice*, the Commission sought comment on alternative approaches for reinterpreting the telecom rate formula within the existing statutory framework, including a specific Commission proposal based on elements proposed by TWTC. As the Commission noted, this approach was consistent with the National Broadband Plan’s recommendation to establish rates “as low and close to uniform as possible” based on evidence that the uncertainty regarding the applicable rate “may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities (such as high-capacity links to wireless towers).”<sup>407</sup> This uncertainty results from the risk that, by offering services that potentially could be classified as “telecommunications services,” a higher telecom rental rate might then be applied to the broadband provider’s entire network.<sup>408</sup> The *Further Notice* explained that the record likewise bears out these concerns.<sup>409</sup>

## **B. The New Telecom Pole Rental Rate**

135. After review of the extensive filings in this proceeding, we adopt a modified form of the *Further Notice*’s proposal as the new telecom rate. Under this new approach, explained in detail below, we revise the section 224(e) rental rate for pole attachments used by telecommunications carriers to provide telecommunications services. As we explain in detail below in Part V.B.2, Congress gave the Commission authority to interpret section 224(e), including the ambiguous phrases “cost of providing space . . . other than the usable space” in section 224(e)(2) and “cost of providing usable space” in section 224(e)(3). Exercising that authority, we identify a range of possible rates, from the current application of the telecom rate formula at the upper end, to an alternative application of the telecom rate formula based on cost causation principles at the lower end. Within that range, we seek to balance the goals of promoting broadband and other communications services with the historical role that pole rental rates have played in supporting the investment in pole infrastructure, and thus define the “cost of providing space” on that basis.

136. As explained below, we believe the telecom rate should be lowered to more effectively achieve Congress’ goals under the 1996 Act to promote competition and “advanced telecommunications

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<sup>403</sup> *Id.* 20209, para. 36.

<sup>404</sup> *Id.*

<sup>405</sup> *Further Notice*, 25 FCC Rcd at 11913, para. 118.

<sup>406</sup> *Id.*

<sup>407</sup> NATIONAL BROADBAND PLAN at 110–11 & n.11 (citing a filing with the Commission by Bright House explaining the deterrent effect of higher pole attachment rates on offering new, advanced services to anchor institutions like school districts).

<sup>408</sup> *Id.*

<sup>409</sup> *Further Notice*, 25 FCC Rcd at 11912, para. 116 (noting examples cited by cable operators of the negative effects that a higher pole attachment rate would have on deploying new, advanced services).

capability” by both wired and wireless providers by “remov[ing] barriers to infrastructure investment,” and the broader pro-competitive goals and policies that Congress directed the Commission to carry out under the 1996 Act.<sup>410</sup> Indeed, the *Sixth Broadband Deployment Report* identified reform of the Commission’s pole attachment rules as a means to advance the deployment of broadband.<sup>411</sup> Additionally, this rate is readily administrable and consistent with the “simple and expeditious” regulatory framework Congress intended. Most importantly from a consumer standpoint, the new rate methodology that we implement will better serve the public interest by making broadband and other advanced services more widely available.

137. We also find this approach consistent with the specific statutory framework governing pole attachments. For one, as a matter of law, the new telecom rate reflects a reasonable interpretation of the ambiguous statutory language of section 224(e) and remains true to the statutory requirements for allocating cost between attachers and pole owners. The rate is just, reasonable, and fully compensatory, and our new methodology is grounded in sound economic policies.

### 1. Description of the New Telecom Rate

138. *Overall Approach.* The new telecom rate we adopt today originates from an initial proposal by TWTC.<sup>412</sup> Fundamentally, TWTC asserts that the Commission’s prior telecom rate included costs that “bear no relation” to the cost of providing space for an attachment and are not necessitated by the language of section 224(e). In particular, TWTC contends that “none of these ‘costs’ has anything to do with actually providing ‘space’ on a pole for pole attachments because a utility would incur these costs ‘regardless of the presence of pole attachments.’”<sup>413</sup> Thus, TWTC proposes that those costs should be eliminated from the telecom rate.<sup>414</sup> TWTC suggests instead that utilities should determine “how much *extra* a utility must incur to provide non-usable and usable space on poles for pole attachments (in both construction and maintenance costs) and then fully allocate those costs based on the cost-apportionment formulas under Section 224(e)(2) and (3).”<sup>415</sup> Drawing upon this conceptual framework, the *Further Notice* sought comment on a modified proposal designed to ensure consistency with the statutory framework of section 224. Based upon the record received in response to the *Further Notice*, we adopt a revised form of that proposal, as described below.

139. As a threshold matter, we note that the Commission recognizes that “[r]ather than insisting upon a single regulatory method for determining whether rates are just and reasonable, courts and other federal agencies with rate authority similar to our own evaluate whether an established regulatory scheme produces rates that fall within a ‘zone of reasonableness.’” For rates to fall within the zone of

<sup>410</sup> 47 U.S.C. § 1302(a); Telecommunications Act of 1996, Public Law No. 104-104, 110 Stat. 56.

<sup>411</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future*, GN Docket Nos. 09-51, 09-137, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9560–61, 9575, para. 7 & n.26, para. 29 & n.125 (2010) (*Sixth Broadband Deployment Report*) (citing the 2010 *Further Notice*). Such actions also were recommended by the National Broadband Plan. NATIONAL BROADBAND PLAN at 109–11.

<sup>412</sup> *Further Notice*, 25 FCC Rcd at 11915–17, paras. 123–128 (discussing Letter from Thomas Jones, Counsel for Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, RM-11293, RM-11303, Attach. (filed Jan. 16, 2007) (TWTC White Paper)).

<sup>413</sup> See TWTC White Paper, RM-11293, at 20 (comparing 47 U.S.C. §§ 224(e)(2)–(3) with *Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Report and Order, 15 FCC Rcd 6453, 6477–91, paras. 44–76 (2000) (*2000 Fee Order*)).

<sup>414</sup> See TWTC White Paper, RM-11293, at 19–20.

<sup>415</sup> *Id.* at 20.

reasonableness, the agency rate order must undertake a ‘reasonable balancing’ of the ‘investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates.’<sup>416</sup>

140. We employ this approach and establish an upper-bound and lower-bound telecom rate under section 224(e). Specifically, depending upon the relative magnitude of costs included, the telecom rate formula will yield relatively higher or lower rates. Identifying reasonable, albeit different interpretations of the ambiguous term “cost” that are consistent with the statute thus provides an upper and lower limit on the possible telecom rates that would be consistent with section 224(e). Although any of the definitions of cost within that range potentially could be adopted by the Commission, and would therefore yield the “just and reasonable” rate for purposes of section 224(e), as discussed below we adopt an approach that seeks to balance the goals of increased broadband competition and availability with the historical role that pole rental rates have played in supporting the cost of pole infrastructure consistent with the framework of section 224(e).

141. *Upper-Bound Rate.* To begin identifying the range of reasonable rates that could result from the telecom rate formula, we first identify the present telecom rate as a reasonable upper bound. The Commission’s current telecom rate formula is based on a fully allocated cost methodology,<sup>417</sup> which recovers costs that the pole owner incurs regardless of the presence of attachments.<sup>418</sup> It includes a full range of costs, some of which, as TWTC points out, do not directly relate to or vary with the presence of pole attachments.<sup>419</sup> For this reason, this interpretation of the statutory telecom rate formula serves as the upper end of the range of reasonable rates.

142. *Lower-Bound Rate.* As the Commission observed in the *Further Notice*, “a rate that covers the pole owners’ incremental cost associated with attachment would, in principle, provide a reasonable lower limit.”<sup>420</sup> The Eleventh Circuit, in addressing a takings challenge, has held that a pole attachment rate above marginal cost can provide just compensation,<sup>421</sup> and marginal or incremental cost

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<sup>416</sup> *Long-Term Number Portability Tariff Filings*, CC Docket No. 99-35, Memorandum Opinion and Order, 14 FCC Rcd 11983, 12026–27, para. 98 (1999) (citing *FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979); *AT&T v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988) (quoting *Jersey Cent. Power & Light v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987); *Wisconsin v. FPC*, 373 U.S. 294, 309 (1963); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585–86 (1942)).

<sup>417</sup> See, e.g., *Amendment of Commission’s Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Communications Act, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-97, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12131–32, para. 55 (2001) (*2001 Order on Reconsideration*). The term “fully allocated cost methodology” is also sometimes referred to as “fully distributed costs.”

<sup>418</sup> See, e.g., *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Notice of Proposed Rule Making, 12 FCC Rcd 7449, 7455, para. 11 (1997) (“Carrying charges are the costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments.”).

<sup>419</sup> TWTC White Paper at 19. In particular, the Commission’s current telecom rate formula, as with the current cable rate formula, includes a component for the net cost of a bare pole and a carrying charge rate. 47 C.F.R. § 1.1409(e)(1), (2). The net cost of a bare pole is the initial capital outlay, i.e., the investment, for a pole, minus accumulated depreciation. The carrying charge rate is a composite rate that reflects separate carrying charge rates for the costs of owning and maintaining poles. See, e.g., *1987 Rate Order*, 2 FCC Rcd at 4391, para. 25; *2001 Order on Reconsideration*, 16 FCC Rcd at 12121, para. 28. The carrying charges include a pole owner’s administrative, maintenance, and depreciation expenses, a return on investment, and taxes. *2001 Order on Reconsideration*, 16 FCC Rcd at 12121, para. 28. The net cost of a bare pole is multiplied by the carrying charge rate to determine the annual cost of a pole.

<sup>420</sup> *Further Notice*, 25 FCC Rcd at 11919, para. 133.

<sup>421</sup> Legal precedent has established that a pole attachment rate above marginal cost provides just compensation, and marginal or incremental cost pricing can be an appropriate approach to setting regulated rates. *Alabama Power Co.* (continued...)

pricing can be an appropriate approach to setting regulated rates more generally.<sup>422</sup> Indeed, section 224(d) establishes such an approach as the low end of permissible rates under the cable rate formula.<sup>423</sup> However, the section 224(e) formulas allocate the relevant costs in such a way that simply defining “cost” as equal to incremental cost, as TWTC initially proposed, would result in pole rental rates *below* incremental cost.<sup>424</sup>

143. Thus, to identify a lower-bound rate that is consistent with this statutory framework – and enables costs to be allocated based on the prescribed cost-apportionment formulas – we rely on the basic principles of cost causation that would underlie a marginal cost rate without defining “cost” as equivalent to marginal or incremental cost *per se*. Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer – the cost causer – pays a rate that covers this cost.<sup>425</sup> This is consistent with the Commission’s existing approach in the make-ready context, where a pole owner recovers the entire associated capital costs through make-ready fees.<sup>426</sup> For example, if rearrangement or bracketing is performed to accommodate a new attachment, the new attacher is responsible for those costs.<sup>427</sup> Likewise, a pole owner recovers the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is installed to enable the attachment.

144. Under this approach, we apply cost causation principles to each category of a pole owner’s costs – broadly consisting of capital and operating costs – for purposes of the pole rental rate, as well.<sup>428</sup> We recognize that, under traditional ratemaking principles that we have applied in the past, the

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*v. FCC*, 311 F.3d at 1370. (“In some cases, then, marginal cost will be sufficient to compensate the pole owner.”); *id.* at 1370–71 (“In short, before a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.”). In this regard, we note that the statute identifies a rate that allows the utility to recover its marginal costs as the lowest permissible just and reasonable rate under section 224(d). 47 U.S.C. § 224(d).

<sup>422</sup> See, e.g., ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 65–122 (vol. 1, 1970); CHARLES F. PHILLIPS, JR., *THE REGULATION OF PUBLIC UTILITIES* 443–49 (1993).

<sup>423</sup> See 47 U.S.C. § 224(d)(1). Explaining the cable rate formula, the Supreme Court stated, “The minimum measure is thus equivalent to the marginal cost of attachments, while the statutory maximum measure is determined by the fully allocated cost of the construction and operation of the pole to which cable is attached.” *FCC v. Florida Power Corp.*, 480 U.S. at 253; see also 1977 Senate Report at 2, *reprinted in* 1978 U.S.C.C.A.N. at 110 (“The formula describes a range between marginal and a proportionate share of fully allocated costs within which pole rates are to fall.”).

<sup>424</sup> See 47 U.S.C. § 224(e)(2)–(3).

<sup>425</sup> That is to say, prices based on cost-causation principles enable an allocation or a mix of goods to be produced that buyers desire and are willing to pay for and so are socially efficient, and enable an efficient firm to recover its costs. See, e.g., Greg Houston and Hayden Green, NERA Economic Consulting, *Treatment of Operating Costs: A Report for Meridian* 65–75 (Aug. 6, 2010). The allocation of goods is optimal in a perfectly competitive market. That is, no buyer can be made better off by reallocating resources to produce a different mix of goods without making other buyers worse-off. See, e.g., WALTER NICHOLSON, *MICROECONOMIC THEORY, BASIC PRINCIPLES AND EXTENSIONS* 512–13 (2d ed. 1978).

<sup>426</sup> See, e.g., *Second Report and Order*, 72 FCC 2d at 62–63, 72–73, paras. 8–9, 28–30 (defining make-ready cost). These capital costs would not have been incurred “but for” the pole attachment demand and the attacher—the cost causer—pays for these costs.

<sup>427</sup> The circumstances where bracketing is required are discussed in greater detail below. See *infra* Parts VI.A, D, F.

<sup>428</sup> Specifically, as discussed below, given the section 224(e) framework and Congress’ expectations regarding the administrability of pole rental rate calculations, we cannot, and do not, seek to define precisely the marginal costs associated with pole attachments. Rather, in establishing the lower bound telecom rate, we adopt an approach that (continued...)

telecom rate for pole attachments recovered both operating expenses and capital costs, including a rate of return, taxes, and depreciation.<sup>429</sup> For purposes of identifying a lower bound for the telecom pole rental rate, however, we exclude capital costs from the definition of “cost of providing space.”<sup>430</sup> As an initial matter, we note that if capital costs arise from the make-ready process, our existing rules are designed to require attachers to bear the entire amount of those costs.<sup>431</sup> With respect to other capital costs, as we explain more fully below, the record demonstrates that the attacher is not the “cost causer” of these costs.<sup>432</sup> In the case here of applying cost-causation principles to identify the lower-bound telecom rate, the record includes findings by economists and analysts that capital costs are justifiably excluded from the lower-bound rate because the attachers cause none or no more than a *de minimis* amount of these costs, other than those that are recovered up front through the make-ready fees.<sup>433</sup> Past investment in an existing pole would have been incurred regardless of the demand for attachments other than the owner’s attachments. As a result, under a cost causation theory, where there is space available on a pole, an attacher would be required to pay for none of the capital costs of that pole. Thus, we exclude capital costs from the lower-bound telecom rate.

145. By contrast, we continue to include certain operating expenses – namely maintenance and administrative expenses – in the definition of “cost” for purposes of the lower bound telecom rate formula.<sup>434</sup> This is generally consistent with cost causation principles because it is likely that an attacher is causally responsible for some of the ongoing maintenance and administrative expenses relating to use of the pole. Although the attacher might not be the cost causer with respect to all the operating costs that

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seeks to define “cost” in a manner that fully compensates the utility for the marginal costs of attachment once the statutory apportionments are applied.

<sup>429</sup> See, e.g., CHARLES F. PHILLIPS, JR., *THE REGULATION OF PUBLIC UTILITIES* 176–80 (1993).

<sup>430</sup> As discussed below, the rate telecom attachers actually would pay under this approach would either be equal to, or in certain cases higher than, the rate yielded by the current cable rate formula, which does include an allocation of capital costs.

<sup>431</sup> See, e.g., *Second Report and Order*, 72 FCC 2d at 72, para. 29 (noting that make-ready, or non-recurring costs, could include capital costs). Capital costs in the make-ready context differ from the way in which capital costs historically have been included in the telecom rate formula, where they have included depreciation expense and a return on investment.

<sup>432</sup> See *infra* Part V.B.4.

<sup>433</sup> Comcast Comments Attach. 1, Decl. of Timothy S. Pecaro at 9, para. 15 (Comcast Pecaro Decl.); Comcast Comments at 13 (citing Comcast *NPRM* Comments Exh. 1, Report of Patricia D. Kravtin at para. 79 (Comcast Kravtin Report)). See *infra* Part V.B.4. (addressing contrary comments filed by economists representing EEI/UTC). We agree with Pecaro, as explained below, that it would typically not be economically rational for utilities to build taller poles solely for the possibility of accommodating attachers and therefore incur unreimbursed capital costs: “[I]ninstalling a pole that is taller than necessary is strictly speculative and contrary to efficient capital management. . . . Therefore, it would be wholly irrational for the utility, as well as inconsistent with a utility’s capital preservation obligations, to risk non-recovery of these costs absent a direct economic benefit.” Comcast Pecaro Decl. at para. 17. Further, as discussed below, in the comparatively few instances where a pole is replaced to accommodate a new attachment, the attacher’s make-ready fees are designed to recover those costs even though the utility will own the pole. *Id.* Moreover, the utilities did not submit data demonstrating unreimbursed capital costs.

<sup>434</sup> The Commission’s cost methodology under its current application of the telecom rate formula requires an attacher to pay for a portion of the operating expenses, specifically a portion of the maintenance and administrative expenses. See, e.g., *2000 Fee Order*, 15 FCC Rcd at 6479–83, paras. 46–54. As noted above, for purposes of the lower-bound telecom rate, we likewise include operating expenses in the pole rental rate, which recovers the recurring costs of the pole, as opposed to the non-recurring costs recovered through make-ready charges. See generally *Second Report and Order*, 72 FCC 2d at 59 (distinguishing between non-recurring costs that are designed to be fully recovered through make-ready charges and ongoing, routine expenses incurred by the utility to maintain existing attachment facilities, which could be recovered through the pole rental rate).

would be included in the lower bound telecom rate, Congress' intention was that the Commission not "embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order" to establish pole rental rates.<sup>435</sup> Thus, under our methodology to determine the lower-bound telecom rate, we include maintenance and administrative expenses.<sup>436</sup>

146. *Determining the New Just and Reasonable Telecom Rate.* From within the range of possible interpretations of the term "cost" for purposes of section 224(e), we adopt a particular definition of cost, and therefore a particular rate as the appropriate just and reasonable telecom rate. The definition of cost we select is based on a balancing of policy goals. As discussed in greater detail below, we seek to ensure that the Commission's policies promote the availability of broadband services and efficient competition for those services.<sup>437</sup> We also recognize, however, that pole rental rates historically have helped support the investment utilities make in their pole infrastructure, and acknowledge utilities' policy concerns about shifting that burden to utility ratepayers.<sup>438</sup>

147. We agree with commenters who explain that today, the telecom rate is sufficiently high that it hinders important statutory objectives. For example, commenters explain that reducing the telecom rate would improve the business case for providing advanced services, because it will reduce the expected incremental cash outflows of providing such services, thereby increasing the likelihood that the present value of the expected incremental cash inflows will exceed the present value of the expected incremental cash outflows.<sup>439</sup> In addition to reducing barriers to the provision of new services, reducing the telecom rate can expand opportunities for communications network investment, as discussed in greater detail below.<sup>440</sup> We thus conclude that lowering the telecom rates will better enable providers to compete on a level playing field, will eliminate distortions in end-user choices between technologies, and lead to provider behavior being driven more by underlying economic costs than arbitrary price differentials.<sup>441</sup> We also find persuasive the views of consumer advocates in this respect. Notably, "NASUCA members are interested in keeping the costs of pole attachments down, so as to keep the costs of the[se] services . . .

<sup>435</sup> See 1977 Senate Report at 22, reprinted in 1978 U.S.C.C.A.N. at 130. The pole attachment methodology does not purport to be a precise ratemaking tool. Congress recognized there would be "difficulties . . . in determining some cost components associated with erecting and maintaining pole line plant, and allocating those costs," and understood that the considerable flexibility it gave to the Commission in making its "best estimate" of some costs for determining just and reasonable pole attachment rates also carries with it an element of imprecision. *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Notice of Proposed Rulemaking, 68 FCC2d 3, 9, 11, paras. 15, 20 (1978) (1978 Pole Attachment NPRM). In keeping with Congress's directive, our policy has been that not every detail of pole attachment cost must be accounted for, nor every detail of non-pole attachment cost eliminated from every account used. See, e.g., *2000 Fee Order*, 15 FCC Rcd at 6463-64, para. 12.

<sup>436</sup> See 1977 Senate Report at 22, reprinted in 1978 U.S.C.C.A.N. at 130.

<sup>437</sup> See *infra* Part V.B.3.

<sup>438</sup> See, e.g., Coalition Reply at 22; Letter from Aryeh B. Fishman, Director, Regulatory Legal Affairs, and John Caldwell, Director of Economics, EEI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, Supp. Decl. of Jonathan Orszag and Allan Shampine, at paras. 10-11 (filed Dec. 14, 2010) (EEI Orszag, Shampine Supp. Decl.).

<sup>439</sup> See *infra* paras. 174-177 (discussing commenters' evidence in this regard). Based on well-established economic principles, investment in offering a product or service is likely to be undertaken if the present value of the expected incremental cash inflows exceeds the present value of the expected incremental cash outflows, with present values calculated using a discount rate equal to a cost of capital that reflects the risk of the venture. See, e.g., JAMES C. VANHORNE, *FINANCIAL MANAGEMENT AND POLICY* 123-26, 131-39 (2d ed. 1971); THOMAS E. COPELAND AND J. FRED WESTON, *FINANCIAL THEORY AND CORPORATE POLICY* 25-41 (3d ed. 1988).

<sup>440</sup> See *infra* Part V.B.3.

<sup>441</sup> See generally *infra* Part V.B.3.

down. But NASUCA members also . . . are interested in ensuring that pole attachment rates appropriately compensate the owners of the poles, so that other services are not required to subsidize the attachments.”<sup>442</sup> Balancing these concerns, NASUCA recommends that the cable rate “should be used for all pole attachments.”<sup>443</sup>

148. We also observe that pole owners have the opportunity to recover through make-ready fees all of the capital costs actually caused by third-party attachers.<sup>444</sup> As a result, the pole owner need not bear any significant risk of unrecovered pole investment undertaken to accommodate a third-party attacher. Thus, permitting recovery of 100 percent of apportioned, fully-allocated costs through the pole rental rate seems unwarranted under the statute and could undermine furtherance of important statutory objectives.

149. Although we do not permit utilities to recover 100 percent of apportioned, fully-allocated costs through the new telecom rate, we find it appropriate to allow the pole owner to charge a monthly pole rental rate that reflects some contribution to capital costs, aside from those recovered through make-ready fees. As noted above, for example, regulated pole attachment rates historically have included such a contribution, and we are concerned that adopting a telecom rate that no longer permits utilities to recover such capital costs would unduly burden their ratepayers. We are also mindful of the possible adverse impact of other pole attachment reforms. For one, our regulation of rates for attachments by incumbent LECs could reduce the amount of costs that utilities are able to recover from other sources.<sup>445</sup> Moreover, in conjunction with the pole access reforms adopted above,<sup>446</sup> we are mindful of Congress’ expectation that the priority afforded an attacher’s access to poles would relate to its sharing in the costs of that infrastructure.<sup>447</sup> We balance these considerations by adopting, in most cases, the following definition of “cost” for purposes of section 224(e): (a) in urban areas, 66 percent of the fully allocated costs<sup>448</sup> used for purposes of the pre-existing telecom rate; and (b) in non-urban areas, 44 percent of the fully allocated costs used for purposes of the pre-existing telecom rate.<sup>449</sup> Defining cost in terms of a percentage of the fully allocated costs previously used for purposes of the telecom rate is a readily administrable approach, and consistent with Congress’ direction that the Commission’s pole attachment rate regulations be “simple and expeditious” to implement.<sup>450</sup> Further, the specific percentages we select

<sup>442</sup> NASUCA *NPRM* Reply at 2. NASUCA is a voluntary, national association of consumer advocates in more than 40 states and the District of Columbia. *Id.* at 1.

<sup>443</sup> *Id.* at 5. Based on these same policy considerations, we are unpersuaded by claims that consideration of the interests of utility ratepayers—who also stand to benefit from reductions in excessive costs of providing broadband and other communications services—requires a different outcome. *See, e.g.,* Coalition Comments at 9.

<sup>444</sup> As noted below, parties can seek Commission review of make-ready charges to the extent that they believe they are unjust or unreasonable. *See infra* note 572.

<sup>445</sup> *See infra* Part V.C.

<sup>446</sup> *See supra* Part III.

<sup>447</sup> 1977 Senate Report at 19, *reprinted in* 1978 U.S.C.C.A.N. at 127–28.

<sup>448</sup> As specified in the pre-existing telecom rate formula, this is the net cost of a bare pole times the carrying charge rate. 47 C.F.R. § 1.1409(e)(2).

<sup>449</sup> An urbanized service area has 50,000 or higher population, while a non-urbanized service area has under 50,000 population. 47 C.F.R. § 1.1417(c). “If any part of the utility’s service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.” *Id.* The *Further Notice* referred to these areas colloquially as “urban” and “non-urban” areas, and we do so again here. *See, e.g., Further Notice*, 25 FCC Rcd at 11913–14, para. 119.

<sup>450</sup> 1977 Senate Report at 21, *reprinted in* 1978 U.S.C.C.A.N. at 129; *see also* 1978 *Pole Attachment NPRM*, 68 FCC 2d at 4, para. 4 (“The supplemental regulation envisioned by the [Senate Committee] Report is to be simple and expeditious, necessitating a minimum of staff, paperwork and procedures consistent with fair and efficient (continued....)”).

provide a reduction in the telecom rate, and will, in general, approximate the cable rate, advancing the Commission policies identified above.<sup>451</sup>

150. We adopt a different definition of cost in non-urban areas—namely, 44 percent of fully allocated costs—to address the fact that there typically are fewer attachers on poles in non-urban areas, as reflected by the Commission’s presumptions. Given the operation of section 224(e), using the same definition of cost in both types of areas would increase the burden pole attachment rates pose for providers of broadband and other communications services in non-urban areas, as compared to urban areas. Such an outcome would be problematic given the increased challenges already faced in non-urban areas, where cost characteristics can be different and where the availability of, and competition for, broadband services tends to be less today than in urban areas.<sup>452</sup> By defining cost in non-urban areas as 44 percent of the fully allocated costs we largely mitigate that concern, particularly under the Commission’s presumptions.<sup>453</sup>

151. We observe that these definitions of cost, when applied pursuant to the cost apportionment formula in section 224(e), generally will recover a portion of the pole costs that is equal to the portion of costs recovered in the cable rate. In this regard, we note that for many years the majority of third-party pole attachments subject to Commission regulation have been priced at the cable rate, and there is nothing in the record to suggest that there is, or ever has been, a shortage of pole capacity arising from the utilities’ cost recovery at that level. In addition, because there are far more attachments by cable operators than by telecommunications carriers paying the telecom rate,<sup>454</sup> the number of attachments for which there is an actual change in utilities’ current pole attachment cost recovery by virtue of the new telecom rate is likely to be relatively modest. Accordingly, we conclude that the pole owner will have appropriate incentives to invest in poles and provide attachments to third-party attachers, carrying forward under our new approach to the telecom rate. Moreover, this approach will significantly reduce the marketplace distortions and barriers to the availability of new broadband facilities and services that arose from disparate rates.<sup>455</sup>

152. The Commission’s calculations show that the costs for urban and non-urban areas typically will be within the higher- and lower-bound range permissible under section 224(e), and in those circumstances, we adopt that definition of cost for establishing the just and reasonable telecom rate.<sup>456</sup>

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regulations. That regulation could be uniquely applicable to pole attachment matters . . . . Tariff filings and other aspects of the full panoply of Title II common carrier regulation need not apply, and the Commission is afforded discretion to select regulatory tools.”).

<sup>451</sup> See *supra* para. 147; see also *infra* paras. 174–177.

<sup>452</sup> See *infra* Part V.B.3; see also, e.g., SBA Comments, GN Docket No. 10-188 (filed Oct. 15, 2010) (discussing preliminary findings in an SBA report of a “rural-urban divide in broadband services” and recommending, among other things, that “the Commission [] examine the impact that increasing pole attachment rates for small cable broadband providers of comingled video and broadband services would have on these providers’ ability to compete and deploy broadband, especially in underserved areas”).

<sup>453</sup> Under the telecom rate formula, each attacher, other than the pole owner, pays approximately 11.2% of the relevant “cost” of a pole in urbanized service areas and about 16.9% in non-urban areas. See *Further Notice*, 25 FCC Rcd at 11913–14, para. 119. Under the definition of “cost” as 66% of fully allocated costs in urban areas, the new telecom rate recovers approximately 7.4% of the fully allocated costs of the pole. By defining “cost” as 44% of fully allocated costs in non-urban areas, the new telecom rate likewise recovers approximately 7.4% of the fully allocated costs of the pole in those areas.

<sup>454</sup> See, e.g., Coalition *NPRM* Comments at 17 (citing data on the aggregate number of poles with cable and competitive LEC attachments for certain utilities).

<sup>455</sup> See generally *infra* Part V.B.3

<sup>456</sup> See *Further Notice*, 25 FCC Rcd at 11923, paras. 140–41; *id.* at App. A. Nothing in the record here demonstrates that this expectation is incorrect. (We note that, although there was an error in the computation of the rates for (continued...))

However, if scenarios arise where the costs identified above would be *lower* than the 100 percent of administrative and operating expenses that serves as a lower bound for the zone of reasonableness, we adopt the higher definition of cost in those circumstances. In sum, the applicable cost for purposes of section 224(e) will be the costs identified above or 100 percent of administrative and operating expenses, whichever is higher.

153. *Wireless.* We also reaffirm that wireless carriers are entitled to the benefits and protection of section 224, including the right to the telecom rate under section 224(e). We do so in response to reports by the wireless industry of cases where wireless providers were not afforded the regulated rate.<sup>457</sup> Specifically, in the *1998 Implementation Order*, the Commission explained that it has authority under section 224(e)(1) to prescribe rules governing wireless attachments used by telecommunications carriers to provide telecommunications services.<sup>458</sup> The Commission also stated that Congress did not intend to distinguish between wired and wireless attachments and that there was no basis to limit the definition of telecommunications carriers under the statute only to wireline providers.<sup>459</sup> The Commission noted that, despite the “potential difficulties in applying the Commission’s rules to wireless pole attachments, as opponents of attachment rights have argued,” it did not see any need for separate rules.<sup>460</sup> Instead, it explained that “[w]hen an attachment requires more than the presumptive one-foot of usable space on the pole,” the presumption can be rebutted.<sup>461</sup> Accordingly, wireless attachments are entitled to the telecom rate formula, and where parties are unable to reach agreement through good faith negotiations, they may bring a complaint before the Commission.<sup>462</sup>

154. *Commingle Services.* We also address the role of the new telecom rate in the context of commingled services. Some cable operators<sup>463</sup> express concern that pole owners will seek to impose rates higher than both the cable rate and the new telecom rate where cable operators or telecommunications

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Georgia Power Co. in the *Further Notice*, the cable rate still exceeded the lower-bound telecom rate. *Id.* From top of the column to bottom in the chart, the correct rates for Georgia Power should be as follows: \$5.77, \$8.72, \$13.15, \$2.68, and \$4.04).

<sup>457</sup> DAS Forum Comments at 20 (“DAS Forum members report that they are . . . forced to pay monopoly rates for their attachments with complete disregard for the Commission’s formula.”); *id.* at iii, 22 (contending that, “[w]hile a wireless attachment may occupy more space than a wired attachment[,] . . . the wireless attachment rate should be equal to the telecom rate times that amount of usable space occupied above one foot,” and noting that “one DAS Forum member is paying . . . \$2,875 per pole per year to a utility” and others are being charged “from two to twenty times greater than the utility’s regulated telecommunications rate”); CTIA Comments at 16 (“To the extent that the Commission [adjusts] the Telecommunications rate, it should make clear that the adjustments apply to both wireline and wireless attachments.”).

<sup>458</sup> *1998 Implementation Order*, 13 FCC Rcd at 6798–99, para. 40 (citing 47 U.S.C. §§ 153(43), (44), (46); 224(a)(4), (d)(3), (e)(1)); see also *Gulf Power*, 534 U.S. 327; *Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, Public Notice, 19 FCC Rcd 24930 (WTB 2004).

<sup>459</sup> *1998 Implementation Order*, 13 FCC Rcd at 6798–99, para. 40 (citing 47 U.S.C. §§ 153(43), (44), (46); 224(a)(4), (d)(3), (e)(1)). The Commission also noted that it had already recognized that cellular telephone, mobile radio, and PCS are telecommunications services. *1998 Implementation Order*, 13 FCC Rcd at 6799, para. 40 (citing *Universal Service Order*, 12 FCC Rcd at 9175; *Local Competition Order*, 11 FCC Rcd at 15997).

<sup>460</sup> *1998 Implementation Order*, 13 FCC Rcd at 6799, para. 41 (noting that electric utilities argued then that wireless attachments have different kinds of equipment, which is similar to their arguments in this proceeding).

<sup>461</sup> *Id.* at 6799, para. 42.

<sup>462</sup> *Id.*

<sup>463</sup> See, e.g., Bright House Comments at 2, 12–14; Bright House Reply at 3–5.

carriers also provide services, such as VoIP, that have not been classified.<sup>464</sup> We agree that this outcome would be contrary to our policy goals, discussed below, of reducing the disparity in pole rental rates among providers of competing services and of minimizing disputes.<sup>465</sup> Consequently, we make clear that the use of pole attachments by providers of telecommunications services or cable operators to provide commingled services does not remove them from the pole attachment rate regulation framework under section 224. Rather, we will not consider rates for pole attachments by telecommunications carriers or cable operators providing commingled services to be “just and reasonable” if they exceed the new telecom rate.<sup>466</sup> This action does not disturb prior Commission decisions addressing particular scenarios regarding commingled services.<sup>467</sup>

## 2. The New Telecom Rate Is Consistent with the Act and Congressional Intent

155. We believe that section 224(e) provides the Commission sufficient latitude to adopt our definition of costs underlying the new telecom rate, as discussed in greater detail below. We note that from the earliest days of pole attachment regulation, Congress intended to give the Commission considerable flexibility in determining just and reasonable rates.<sup>468</sup> Indeed, Congress instructed the Commission to develop a “simple and expeditious” pole attachment program consistent with fair and efficient regulation, and “afford[ed] the Commission discretion to select the regulatory tools necessary to carry out” its responsibilities.<sup>469</sup> The Commission’s revised telecom rate formula gives full effect to the

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<sup>464</sup> The Commission only has addressed two situations regarding the statutory classification of IP-enabled services. *Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Order and Opinion, 19 FCC Rcd 3307 (2004) (*Pulver.com Order*) (classifying as an “information service” Pulver.com’s free service that did not provide transmission and offers a number of computing capabilities); *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 (2004) (*IP-in-the-Middle Order*) (finding certain “IP-in-the-middle” services to be “telecommunications services”); *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006) (*Prepaid Calling Card Order*) (same). Otherwise, the Commission thus far has expressly declined to address the statutory classification of VoIP services. *See, e.g., Connect America Fund et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket No. 01-92; GN Docket No. 09-51, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, para. 73 (rel. Feb. 9, 2011).

<sup>465</sup> *See infra* paras. 173–174.

<sup>466</sup> To the extent that a telecommunications carrier or cable operator provides particular services that the Commission has not expressly classified, but which ultimately are telecommunications services, the attachments would be subject to section 224(e) and the new telecom rate adopted in this order. Except as discussed below, *see infra* note 467 and accompanying text, we do not determine more precisely the specific rate (new telecom rate or cable rate) that should apply in the context of any particular commingled services scenario.

<sup>467</sup> *See, e.g.,* Comcast Comments at 4 (noting that the Commission previously specified that the cable rate would apply to commingled video and Internet access services); ACA Reply at 3–6 (noting the same and arguing that the Commission should not increase the rates that apply in such circumstances). *See also Gulf Power*, 534 U.S. at 339. To the extent that there are disputes about the application of pre-existing law to particular scenarios regarding commingled services that were not already addressed by the Commission, we do not address them here.

<sup>468</sup> *See 1978 Pole Attachment NPRM*, 68 FCC 2d at 11, para. 20 (referring to Congress’s approach to using the best estimate of less readily identifiable costs) (“Novelty, however, is not reason enough to find an approach incompatible with determining just and reasonable rates. In this regard, we also note that the considerable flexibility which Congress intended to give us in determining just and reasonable pole attachment rates also carries with it an element of imprecision.”).

<sup>469</sup> 1977 Senate Report at 21, *reprinted in* 1978 U.S.C.C.A.N. at 129; *see also 1978 Pole Attachment NPRM*, 68 FCC 2d at 4, para. 4 (“The supplemental regulation envisioned by the [Senate Committee] Report is to be simple and expeditious, necessitating a minimum of staff, paperwork and procedures consistent with fair and efficient regulations. That regulation could be uniquely applicable to pole attachment matters . . . . Tariff filings and other (continued. . . .)”).

statutory requirements established in section 224(e) of the Act, including the specific cost apportionment provisions applicable to attachers.

156. *“Cost” Is Not Defined in Section 224(e)*. Our new telecom rate reflects a reasonable interpretation of the ambiguous statutory language of section 224(e). Congress established a rate formula for charges for pole attachments used by telecommunications carriers to provide telecommunications services in section 224(e) based on the “cost of providing space on a pole.”<sup>470</sup> Although section 224(e) specifies how the pole space costs are to be allocated between the owner and attacher, it does not specify a cost methodology. Specifically, section 224(e)(1) states that the Commission shall prescribe regulations “in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services,” and that “[s]uch regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates.”<sup>471</sup> In particular, section 224(e)(2) and (3) describe how “[a] utility shall apportion the cost of providing space” on a pole – whether usable or unusable – but does not define the term “cost.” We therefore find the term “the cost of providing space” to be ambiguous.<sup>472</sup> By contrast, under section 224(d)(1) of the cable formula, Congress established a specific range of rates. This zone of reasonableness for cable attachment rates ranges from “the additional costs of providing pole attachments,” known as the incremental cost, to a percentage (based on usable space) of “the sum of the operating expenses and capital costs of the utility attributable to the entire pole,” known as fully allocated costs.<sup>473</sup>

157. The Commission initially implemented section 224(e) by interpreting “cost” to include the same cost categories that it was using in the cable rate formula, relying on a fully-allocated cost approach. This initial approach was reasonable since, when the 1996 Act was enacted, it was consistent with – and allowed the Commission to continue – the traditional cost methodology that had been in effect at the time for the cable rate formula.<sup>474</sup> Experience has shown, however, that this approach has resulted in higher rates than necessary, as well as rate disparities and disputes over whether the cable or telecom formula applies, negatively impacting communications service providers’ investment decisions to expand their networks and services.<sup>475</sup> As discussed below, that outcome has proved to be inconsistent with Congress’ policies underlying the 1996 Act to encourage the widest deployment possible of advanced

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 aspects of the full panoply of Title II common carrier regulation need not apply, and the Commission is afforded discretion to select regulatory tools.”) (emphasis added).

<sup>470</sup> 47 U.S.C. § 224(e)(2).

<sup>471</sup> 47 U.S.C. § 224(e)(2).

<sup>472</sup> In particular, section 224(e)(2) provides: “A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.” 47 U.S.C. 224(e)(2). Section 224(e)(3) provides: “A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.” 47 U.S.C. 224(e)(3). The term unusable space “means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.” 47 C.F.R. § 1.1402(l). Usable space, in turn, “means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility.” 47 C.F.R. § 1.1402(c).

<sup>473</sup> 47 U.S.C. § 224(d)(1).

<sup>474</sup> See 1998 Implementation Order, 13 FCC Rcd at 6800, para. 43 n.160; Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Notice of Proposed Rule Making, 12 FCC Rcd 11725, 11737, para. 33 (1997) (*Telecom Rate NPRM*).

<sup>475</sup> See *infra* para. 174.

communications services, such as broadband Internet access, by promoting competition and removing barriers to infrastructure investment.<sup>476</sup>

158. At the same time, our new interpretation of section 224(e), described above, recognizes the limitations of the statutory framework Congress created when it delegated the authority to the Commission to interpret and apply the telecom rate formula. We agree with commenters that the Commission has discretion to reinterpret the undefined term “cost” and the ambiguous phrase “cost of providing space” in section 224(e) in the manner proposed.<sup>477</sup> As the Supreme Court has recognized in other contexts, “without any better indication of meaning than the unadorned term, the word ‘cost’ . . . is ‘a chameleon’ . . . a ‘virtually meaningless’ term . . . . As Justice Breyer put it in *Iowa Utilities Bd.*, words like ‘cost’ ‘give ratesetting commissions broad methodological leeway; they say little about the ‘method employed’ to determine a particular rate.’”<sup>478</sup> Courts have granted agencies like the Commission substantial leeway in defining the term “cost” in other contexts, as well.<sup>479</sup> As a result, we reconsider the “fully allocated cost” methodology previously used to implement the telecom attachment rate formula in section 224(e). Instead, we conclude that we have flexibility to adopt a new pricing approach that complies with the statute’s requirements, yet also produces efficient pricing signals for infrastructure investment and new service deployment by providers. Our decision to adopt a new methodology recognizes the bounds Congress set in section 224(e), but also the Commission’s duty to continually review its rules and policies in light of changing circumstances, and make reasonable changes that in our experience will better serve the pro-competitive goals Congress established in the Act.

159. It is readily apparent from other provisions of section 224 that when Congress wanted to limit the Commission’s discretion, it explicitly did so. For example, Congress specifically included “operating expenses and actual capital costs” in the carrying charges for the cable rate formula (thus incorporating a fully allocated cost methodology) in the upper limit of just and reasonable rates for section 224(d).<sup>480</sup> The statute also sets forth how the costs of usable and unusable space (however defined) should be allocated among pole owners and attachers in the section 224(e) telecom formula.<sup>481</sup> Congress, however, did not establish in section 224(e) any other parameters for the Commission to follow in defining “cost” or determining the “cost of providing space” on a pole. In the face of statutory ambiguity, the Commission, therefore, has the authority – and responsibility – to fill in any “gaps” with

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<sup>476</sup> *See id.*

<sup>477</sup> *See, e.g.*, NCTA Reply at 23 (asserting that “[i]t is well-established that the term ‘cost’ is a ‘chameleon’ that gives agencies ‘broad methodological leeway’ in determining a particular rate” and citing *Verizon v. FCC*, 535 U.S. at 500–01, quoting *Strickland v. Comm’r, Maine Dep’t of Human Servs.*, 96 F.3d 542, 546 (1st Cir. 1996) and *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 423 (1999) (Breyer, J., concurring in part and dissenting in part)); TWTC White Paper at 18 (citing *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984) (*Chevron*); EEI/UTC Comments at 93–94 (advocating a proposal to modify implementation of the telecom rate formula and citing *Gulf Power* and *Chevron*).

<sup>478</sup> *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 500–01 (2002) (citations omitted).

<sup>479</sup> *See, e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) (“[C]ourts are without authority to set aside any rate selected by the [Federal Power] Commission which is within a ‘zone of reasonableness.’” (citing *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) (“No other rule would be consonant with the broad responsibility given to the Commission by Congress; it must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests.”))).

<sup>480</sup> 47 U.S.C. § 224(d). Likewise, as the lower bound of just and reasonable pole rental rates under section 224(d), the Act defines cost as the “additional costs of providing pole attachments.” *Id.*

<sup>481</sup> 47 U.S.C. § 224(e).

its own interpretation of the meaning of “cost” in Section 224(e), and we do so in a manner that is consistent with the statutory framework and the broader purposes of the Act.<sup>482</sup>

160. We reject certain electric utilities’ argument that because section 224(e) does not expressly define “cost” as the “additional costs of providing space” – as was done in defining the lower limit of reasonable rates under section 224(d) – the Commission is precluded from adopting a definition of cost that yields a rate more closely approximating the “additional” or incremental cost of a pole attachment.<sup>483</sup> Although section 224(e) does not expressly define cost as “additional” or “incremental” cost, it also does not otherwise constrain the definition of the ambiguous term “cost,” as discussed above. Likewise, given the Commission’s flexibility in interpreting the ambiguous term “cost,” we are unpersuaded by arguments that the “cost of providing space” under section 224(e) must be defined as fully allocated costs, as was done in defining the upper limit of reasonable rates under section 224(d).<sup>484</sup>

161. Nor does the Commission’s alternative approach fail to give meaning to the methodology for allocating costs under sections 224(e)(2) and (e)(3), as some allege.<sup>485</sup> Congress left it up to the Commission to define “costs” and required that the allocators in section 224(e) be used to allocate the costs. The Commission’s approach does both. As discussed above, in the majority of cases, the relevant costs will be defined as 66 percent of fully allocated costs in urban areas, and 44 percent in non-urban areas.<sup>486</sup> However, if scenarios arise where those costs would be lower than the 100 percent of

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<sup>482</sup> See, e.g., *Chevron*, 467 U.S. at 843–44; see also *Iowa Utilities Board*, 525 U.S. 366, 397 (1999) (reviewing Commission statutory interpretations) (“[T]he 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction . . . . But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency.”); *Gulf Power*, 534 U.S. at 339 (“[T]he subject matter here is technical, complex and dynamic, and as a general rule, agencies have authority to fill gaps where the statutes are silent.”). Section 224(b)(1), itself, is framed as a grant of ratemaking authority to the Commission. It provides a general mandate to set just and reasonable rates for pole attachments. 47 U.S.C. § 224(b)(1). Similarly, section 224(e) requires the Commission to prescribe regulations “to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services” and to “ensure that a utility charges just, reasonable, and nondiscriminatory rates.” 47 U.S.C. § 224(e)(1).

<sup>483</sup> See, e.g., EEI/UTC Comments at 65 n.113. Although EEI and UTC assert that “it makes very little sense to ‘apportion’ the incremental costs between the amount of space occupied by an attacher or by the number of attachers,” *id.*, that is not how we define “cost” for purposes of the lower end of the range of permissible rates under section 224(e). Rather, we find that defining “cost” as “incremental cost” is a shortcoming of TWTC’s original rate proposal, and thus define cost in a manner that—once apportioned pursuant to the section 224(e) methodologies—yields a rate that comes closer to approaching the incremental costs of attachment (although the actual rate charged under the new telecom rate typically will be higher than that). See *supra* paras. 142–145; *Further Notice*, 25 FCC Rcd at 11916–17, para. 126.

<sup>484</sup> See, e.g., EEI/UTC Comments at 65. Similarly, other commenters argue more generally that the Commission must interpret the “cost of providing space” under section 224(e) to mean the costs associated with the pole itself, rather than just those costs caused by the presence of a pole attachment. See, e.g., Florida IOUs Comments at 62; Alliance Reply at 23–24. Moreover, if the provisions of section 224(d) were to bind the Commission’s adoption of a telecom rate under section 224(e) at all, certain cable commenters argue that they should be read to establish the limits for *all* pole attachment rates regulated under section 224, effectively capping all rates at the level of the cable rate. See, e.g., TWC Comments at 13–14 (arguing that section 224(d)(1) defines the range of “just and reasonable” pole attachment rates for all attachments regulated under section 224(b)(1) and thus constrains the maximum telecom rate that could be imposed under section 224(e)); Letter from Daniel L. Brenner on behalf of Bright House to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245, Attach. 2 at 4–5 (same) (filed Dec. 9, 2010) (Bright House Dec. 9, 2010 *Ex Parte* Letter). The new telecom rate clearly is more consistent with that interpretation than either the prior telecom rate or the electric utilities’ proposals.

<sup>485</sup> See, e.g., Alliance Reply at 23–24.

<sup>486</sup> See *supra* para. 149.

administrative and operating expenses, we adopt the higher definition of cost in those circumstances.<sup>487</sup> In each scenario, the section 224(e) allocators are then applied to the Commission’s definition of cost. As a result, the Commission’s approach gives meaning to section 224(e) of the Act.

162. *Legislative History Does Not Require Fully Allocated Costs.* Beyond the terms of section 224 of the Act itself, electric utilities argue that section 224(e) must be read in a manner that mandates use of a fully allocated cost methodology based on the legislative history of section 224.<sup>488</sup> Primarily, they cite to language in the legislative history of the House bill endorsing a fully allocated cost methodology and other discussions in the legislative history attempting to link the benefits attachers receive from pole attachments to pole rental rates. We are not persuaded that the legislative history precludes the Commission’s approach, however. Indeed, commenters here express contradictory interpretations of the Conference Report’s discussion of the provisions amending Section 224 at issue here.<sup>489</sup>

163. To the extent that we draw any conclusions from the Conference Report, we find that it undercuts the electric utilities’ argument that Congress intended to require the use of fully allocated costs. As the electric utilities note, the legislative history of the House bill amending section 224 would have directed “the Commission to regulate pole attachment rates based on a ‘fully allocated cost’ formula.”<sup>490</sup> The conference agreement did not adopt the House version, however; instead it adopted “the Senate version with modifications.”<sup>491</sup> The formula itself and the basis for Congress’ selection of the two-thirds allocator for unusable space are not explained in the legislative history; rather it appears to be the unexplained result of a political compromise.<sup>492</sup> Moreover, the “fully allocated cost” language, which is at the heart of the controversy, was not in the summary of the Senate bill, nor in the language of the conference agreement itself.<sup>493</sup> Indeed, most telling is that no express language requiring fully allocated costs was made part of the final statute.

164. Certain utilities contend that the legislative history of the House bill, although not adopted, is still relevant in determining Congress’s intent because it contains language describing cost terminology that is similar to that used in the Senate version, and the final statute and “the ultimate

<sup>487</sup> See *supra* para. 152.

<sup>488</sup> See, e.g., APPA Comments at 8–9; Oncor Comments at 62.

<sup>489</sup> See, e.g., Florida IOUs Comments at 61, Bright House Comments at 18–19 (both discussing H.R. Rep. No. 104-458, 104th Cong., 2nd Sess. at 205–07 (section on pole attachments) (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 220–21 (Conference Report)). The Conference Report, which accompanied S. 652, is identical to S. Rep. No. 104-230.

<sup>490</sup> H.R. Rep. No. 104-458 at 206, *reprinted in* 1996 U.S.C.C.A.N. at 220 (stating “[t]he new provision directs the Commission to regulate pole attachment rates based on a ‘fully allocated cost’ formula.”).

<sup>491</sup> H.R. Rep. No. 104-458 at 207, *reprinted in* 1996 U.S.C.C.A.N. at 221 (briefly explaining new subsections 224(e)(1)–(2), (g), (h), and (i)) (“The conference agreement adopts the Senate provision with modifications. The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms, and conditions for attaching to poles . . . New subsection 224(e)(2) establishes a new rate formula charged to telecommunications carriers for the non-useable space of each pole. Such rate shall be based upon the number of attaching entities.”).

<sup>492</sup> Coalition *NPRM* Comments at 35–36 & nn.78–79 (citing Telecommunications Act of 1996 conference report S. Rep. 104-230 at 89–90 (Feb. 1, 1996) and explaining that the U.S. House of Representatives had voted to adopt a pole attachment rate methodology but that “it was rejected without explanation by the House-Senate Conference Committee in favor of the existing FCC Telecom Rate” when the 1996 Act was passed) (citing *TCI Cablevision of Washington, Inc. v. City of Seattle*, No. 97-2-02395-5SEA (May 20, 1998)). The Coalition stated “the court concluded that Congress’s final adoption of the FCC Telecom Rate allocation was ‘primarily a political compromise, and not based on cost accounting issues.’” Coalition *NPRM* Comments at 36 n.79 (citing findings of fact).

<sup>493</sup> H.R. Rep. No. 104-458 at 205–07, *reprinted in* 1996 U.S.C.C.A.N. at 220–21.

meaning remained the same” in the various versions of the bill.<sup>494</sup> These parties also argue that legislative history shows that Congress intended the formula to be based on who benefits from the pole.<sup>495</sup> For example, the Florida IOUs assert that “[t]he legislative history shows that the various versions of the bill embodied a variety of positions on which entities benefit, and how much they benefit. But all versions focused on the beneficiary-based approach.”<sup>496</sup> These utilities believe that this means Congress intended fully allocated costs to be used.<sup>497</sup> By contrast, certain cable commenters’ interpretation of the legislative history is that there were significant differences in the “cost” and “beneficiary” language of the various bills, and that, “[i]n contrast to the House, the Senate’s telecom rate formula never required ‘fully allocated costs.’”<sup>498</sup>

165. We are not persuaded that the legislative history shows that the House’s interpretation of “costs” for purposes of its proposed amendments applied equally to the interpretation of language in the Senate bill – let alone the final language adopted in the conference agreement. In contrast to the legislative history of the House bill, which expressly provided that “[t]he new provision directs the Commission to regulate pole attachment rates based on a ‘fully allocated cost’ formula,” legislative history of the Senate bill was silent on the definition of the “costs” at issue. We also note that the House’s interpretation of “costs” is summarized among “the differences between the Senate bill, the House amendment, and the substitute agreed to in conference” in the Conference Report.<sup>499</sup> In any event, the statutory language describing the costs at issue was different in the conference agreement than in either the House or Senate versions. In particular, the House and Senate versions referred to pole rate setting based on “the cost of space,”<sup>500</sup> whereas the adopted language of section 224(e) refers to “the cost of *providing* space.”<sup>501</sup> As discussed above, in defining the lower end of the range of reasonable rates under section 224(e), we focus on those costs arising from the actual provision of space for pole attachments, as opposed to costs that arise regardless of the absence or presence of attachments.<sup>502</sup> We find our approach consistent with the statutory language actually adopted, regardless of the House’s interpretation of “cost” for purposes of its unadopted amendments to section 224.

<sup>494</sup> Florida IOUs Reply at 44–45; Letter from Eric B. Langley on behalf of Florida IOUs to Ms. Marlene Dortch, Secretary, FCC, WC Docket No. 07-245, at 3–6 nn.12 & 13 (filed Nov. 8, 2010) (Florida IOUs Nov. 8, 2010 *Ex Parte* Letter). Florida IOUs also argue that, “Importantly, *every* version of section 224(e) . . . used the term ‘space’ to modify ‘cost’ and included unusable space in the formula.” *Id.* at 3 (emphasis in original).

<sup>495</sup> See, e.g., Florida IOUs Nov. 8, 2010 *Ex Parte* Letter at 4–5 (“Congress intended the formula to be based on who was *benefiting* from the pole, not based on who *caused* the incremental cost of attachment.”) (emphasis in original).

<sup>496</sup> Florida IOUs Nov. 8, 2010 *Ex Parte* Letter at 4.

<sup>497</sup> See, e.g., Florida IOUs Nov. 8, 2010 *Ex Parte* Letter at 4–5.

<sup>498</sup> Comcast Reply at 9 (“In fact, S. 652 initially recognized ‘that the entire pole . . . other than the usable space is of *equal benefit* to all attachments of entities *that hold an ownership interest in the pole*. . . and therefore [the Commission must] apportion the *cost of the space* other than the usable space equally *among all such attachments*.”) (emphasis in original) (citing S. 652, § 205(b)(2)(A)). Comcast also points to another version of the Senate bill that references an allocation based on “cost of providing space” and “cost of space” without defining either, which Comcast contends, indicates the bill did not equate the two phrases. Comcast Reply at 10 n.26.

<sup>499</sup> H.R. Rep. No. 104-458 at 113, *reprinted in* 1996 U.S.C.C.A.N. at 124 (Joint Explanatory Statement of the Committee of Conference) (“The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.”).

<sup>500</sup> See Communications Act of 1995, H.R. Rep. No. 104-204, 104th Cong. 1st Session, at 24 (1995); Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 104-23, 104th Cong. 1st Session, at 87 (1995).

<sup>501</sup> 47 U.S.C. §§ 224(e)(2), (e)(3) (emphasis added).

<sup>502</sup> See *supra* para. 161.

166. Likewise, the legislative history does not demonstrate that the Commission's rate setting must focus on the "benefits" parties receive from attachments, rather than on the costs associated with attachment. For one, the discussion of "benefits" in the House and Senate bills focused on how to allocate costs among pole owners and attachers, rather than the meaning of the "costs" to be allocated, as even some utilities concede.<sup>503</sup> Further, the House and Senate bills took starkly different approaches, with the House bill requiring third-party attachers to bear a greater share of the unusable space on the pole than required under the Senate bill.<sup>504</sup> Ultimately, moreover, we note that none of the "benefit" language from either the House or Senate bills was adopted in the conference agreement's amendments to section 224.

167. *Telecom Rate Relative to Cable Rate.* Contrary to certain utilities' arguments, neither differences in the text of section 224(d) and (e) nor legislative history require that the telecom rate be higher than the cable rate.<sup>505</sup> For example, some commenters cite the fact that section 224(e) does specify a methodology for allocating costs that is not present in section 224(d).<sup>506</sup> Others argue that the temporary, initial use of section 224(d) to establish pole rental rates for telecom carriers pending Commission implementation of section 224(e) implies that those rates must be different, or that the telecom rate must be higher than the cable rate.<sup>507</sup> Section 224(e) gave the Commission two years to adopt regulations "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services,"<sup>508</sup> and in the interim, pole rental rates for telecom carriers would be based on section 224(d).<sup>509</sup> Section 224(e) further provided that, following the adoption of implementing regulations, "[a]ny increase in the rates for pole attachments that result from the adoption of the regulations . . . shall be phased in equal annual increments over a period of five years."<sup>510</sup>

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<sup>503</sup> See, e.g., Florida IOUs Nov. 8, 2010 *Ex Parte* Letter at 4–5 & n.18 (arguing that "the early legislative history indicates that the general understanding of 'costs' included both capital and O&M costs, and the disagreement was over *apportionment* of those 'costs.')" (emphasis in original). Insofar as those arguments reflect an underlying assumption that the costs at issue must be fully allocated costs, we reject the view that the legislative history compels us to adopt such an interpretation of "costs" under section 224(e). See *supra* paras. 162–165. Nor does Florida IOUs citation to certain statements of Sen. Hollings lead us to reach a different conclusion. Although Florida IOUs cite Sen. Hollings's comment in S. Rep. 104-23 that "utilities . . . continue to express concern that the revised formula will not compensate them adequately for their *costs of building and maintaining the poles*" (emphasis in original), he also said that "The current law sets the rates charged to cable companies for using these poles. The new language in the bill expands the scope of the provisions to include other providers of telecommunications services. The purpose of the provisions is to ensure that all users pay the same amount." Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 23, 104th Cong. 1st Session at 65 (1995). Thus, we do not view Sen. Hollings's statements, taken as a whole, to demonstrate a clear view on the "costs" (or "benefits") to be used in setting pole rental rates, particularly because they reflect the views of a single Senator.

<sup>504</sup> Comcast Reply at 9 n. 24 ("Thus, from the outset, the Senate view was that the 'cost' of unusable space was of equal benefit to the *pole owners'* attachments (not third party attachments as the House bill provided) and directs that the cost of that pole space be divided equally among 'such attachments' (i.e., the pole owner attachments, *not* third party attachments). This early version of the Senate bill went on to explain that a third party attacher benefits from the unusable space on a pole 'in the same proportion as it benefits from the usable space'—directly contrary to the House approach.").

<sup>505</sup> See, e.g., Alliance Comments at 83–85; EEI/UTC Comments at 71–73 (citing section 224(e)(4), (d)(3)); Oncor Comments at 61.

<sup>506</sup> See, e.g., Alliance Reply at 23.

<sup>507</sup> See, e.g., Alliance Comments at 85; EEI/UTC Comments at 71–74; Oncor Comments at 60.

<sup>508</sup> 47 U.S.C. § 224(e)(1).

<sup>509</sup> *Id.* at § 224(d)(3).

<sup>510</sup> *Id.* at § 224(e)(4) (emphasis added).

168. These provisions suggest that the telecom rate and cable rate could be different, but not that they must always be different or that the telecom rate necessarily must be higher.<sup>511</sup> For example, section 224(e) provided for the gradual phase-in of “[a]ny increase” in pole rental rates for telecom carriers following the implementation of section 224(e), indicating that there might not be such an increase.<sup>512</sup> In fact, the rules originally adopted by the Commission recognized that the telecom rate could go down as well as up, and thus provided that “[t]he five-year phase-in is to apply to rate increases only. Rate reductions are to be implemented immediately.”<sup>513</sup> Likewise, the new telecom rate we adopt in this order could, in some circumstances, be higher than the cable rate,<sup>514</sup> and in other circumstances, lower.<sup>515</sup>

169. Further, the use of a transition mechanism to phase-in section 224(e) rates is consistent with our recognition that section 224(e) is ambiguous and could result in a range of permissible rates because the “cost” at issue is subject to a range of interpretations.<sup>516</sup> In addition, other factors also create uncertainty regarding the potential difference (if any) between the rates yielded under section 224(d) and section 224(e), including the number of attachers that might emerge over time (which affects the allocation of costs under section 224(e))<sup>517</sup> and the potential for section 224(d) rates themselves to fall anywhere within a range (rather than only at the upper bound).<sup>518</sup> By providing that section 224(d) rates initially be used for telecommunications attachments, section 224 can reasonably be interpreted as responding to the variability in the Commission’s possible implementation of section 224(e) by minimizing the administrative burden and providing greater certainty during the transition.

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<sup>511</sup> For the same reasons, we reject assumptions made by utilities that, if Congress had intended for the telecom rate to be equal to or lower than the cable rate, there would have been no need for Congress in section 224(d)(3) to provide that the cable formula be used for attachments “solely to provide cable service.” See EEI/UTC Comments at 71–74.

<sup>512</sup> 47 U.S.C. § 224(e)(4) (emphasis added).

<sup>513</sup> 47 C.F.R. § 1.1409(f).

<sup>514</sup> See *supra* paras. 146–152.

<sup>515</sup> The rate could be lower if, for example, the attacher demonstrated that there were more attachers on the relevant poles than reflected by the Commission’s presumptions.

<sup>516</sup> See *supra* paras. 140–145.

<sup>517</sup> Both pole owners and attachers appear to agree that everyone expected the number of facilities-based competitors to increase over time. See, e.g., Alliance Reply at 12; Comcast Comments at 7. Although the number of new facilities-based competitors was uncertain, the clear impact of such entry was that the telecom rate would decline as the number of attachers increased. *1998 Implementation Order*, 13 FCC Rcd at 6800, para. 45 (“Under Section 224(e)(2), the number of attaching entities is significant because the costs of unusable space assessed to each entity decreases as the number of entities increases.”). The Coalition asserts “that the Commission expected no more than five attaching entities for urbanized areas and three for non-urbanized areas, since these are the presumptions” it made. Coalition Reply at 26. First, the Commission established these numbers as *rebuttable* presumptions, recognizing that they could vary. It did so in large part for administrative reasons to “expedite the process,” establish a degree of certainty, and give utilities the option of avoiding expenses for studies to develop their own location-specific averages. *2001 Order on Reconsideration*, 16 FCC Rcd at 12134–40, paras. 62–72. The Commission also established the right of attaching entities to challenge the average number of attaching entities set by utilities and expected a good faith effort by a utility to modify its presumptive average if the number of attachers increased. *Id.* at 12135, para. 63 n.211.

<sup>518</sup> The Commission has discretion under section 224(d) to determine the cable rate within a range between the additional cost and fully allocated cost of an attachment. See 47 U.S.C. § 224(d). The difference between the telecom rate and the cable rate would be impacted by how the Commission exercised its ratemaking discretion in implementing the two rates.

170. Nor does section 224's legislative history demonstrate that the telecom rate must always be higher than the cable rate.<sup>519</sup> The utilities principally rely on statements drawn from the legislative history of the House proposal to amend section 224.<sup>520</sup> As discussed above, however, it was the Senate version that formed the basis for the conference agreement, and even that language was subject to revision in relevant respects.<sup>521</sup> We are not persuaded that certain isolated statements by individual Senators compel a different result.<sup>522</sup> Rather, as explained above, we find the legislative history taken as a whole does not clarify Congress's intent, nor does it compel an interpretation of section 224(e) that is contrary to the one we adopt here.<sup>523</sup>

171. Finally, utility references to Commission and court decisions acknowledging that the telecom rate is higher than the cable rate do not establish that section 224(e) *required* a higher telecom rate.<sup>524</sup> In 1998, the Commission selected a fully allocated cost approach, which was one of the permissible outcomes under section 224(e).<sup>525</sup> The subsequent Commission and court statements thus were simply accurate characterizations of the mathematical result of the Commission's initial decision to use fully allocated costs in the telecom rate formula.<sup>526</sup> To the extent that there is any *dicta* in prior Commission decisions to the contrary, we reject such statements in light of the statutory interpretation we adopt here, and because they were at odds with the Commission's contemporaneous recognition in the text of its rules that, even as initially implemented, the telecom rate theoretically could be higher *or lower* than the cable rate.<sup>527</sup>

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<sup>519</sup> See, e.g., Oncor Comments at 60–61 (arguing “legislative intent to create a separate and distinct rate that would yield a higher rate than the pre-existing Cable Rate”) (citing H. Rep. No. 104-204 at 92 and H. Conf. Rep. No. 104-458 at 206 (1966)).

<sup>520</sup> See, e.g., Alliance Comments at 86; Alliance Reply at 20, 34; Oncor Comments at 60–61; APPA Reply at 9.

<sup>521</sup> See *supra* paras. 162–166.

<sup>522</sup> The Florida IOUs cite a statement by Senator Hollings suggesting his view that the telecom rate would be higher than the cable rate. See Florida IOUs Nov. 8, 2010 *Ex Parte* Letter at 6 (citing 142 Cong. Rec. S. 689) (Feb. 1, 1996) (quoting Sen. Hollings's statement that “[c]able companies may continue to pay the same [pole attachment] rate as long as they provide only cable service; once cable companies start to provide telephone service, a higher rate will phase in over ten years”).

<sup>523</sup> See *supra* paras. 162–166.

<sup>524</sup> See, e.g., Florida IOUs Comments at 61.

<sup>525</sup> See *1998 Implementation Order*, 13 FCC Rcd at 6800 n.160; *Telecom Rate NPRM*, 12 FCC Rcd at 11737, para. 33.

<sup>526</sup> Thus, contrary to the Florida IOUs assertion, the following statement in a Commission order does not mean that fully allocated costs are *required*: “The end result of the application of the telecommunications pole attachment formula is a rate which reflects the fully allocated costs of the pole-related expenses.” *Alabama Cable Order*, 16 FCC Rcd at 12231, para. 49.

<sup>527</sup> See 47 C.F.R. § 1.1409(f). In particular, utilities argue that some Commission decisions stated that section 224(e) requires “fully allocated costs” be used in the telecom rate. See, e.g., Florida IOUs Nov. 8, 2010 *Ex Parte* Letter at 2–3 (citing *Implementation of Section 703 of the Telecommunications Act of 1996*, CS Docket No. 96-166, Order, 11 FCC Rcd 9541, 9544, para. 6 (1996)). The statement at issue, however, was made in passing in the background discussion of an item that did not involve the implementation of the telecom rate formula or any meaningful statutory analysis in that regard. Similarly, Commission statements in the *1998 Implementation Order* anticipating that the telecom rate would be higher than the cable rate were not based on any actual statutory analysis there, and are more properly understood as flowing simply from the fact that, as the Commission initially had implemented 224(e), it generally resulted in a higher rate. See *1998 Implementation Order*, 13 FCC Rcd at 6795–96, para. 34; see also *Alabama Cable Order*, 16 FCC Rcd at 12231, para. 49. We also disagree with an assertion by Alliance that a prior Commission statement regarding the use of historical costs necessarily implies an intent by Congress to “use a capital cost-based methodology for calculating the telecom rate.” Alliance Reply at 18 (citing *2001 Order on Reconsideration*, 16 FCC Rcd at 12117, para. 22). There was no mention of capital costs by the Commission there. (continued...)

### 3. New Telecom Rate Promotes Broadband Competition and Availability

172. The record here demonstrates that pole rental rates play a significant role in the deployment and availability of voice, video, and data networks. Several commenters recognize the value of the Commission's approach to lower and make more uniform pole attachment rates to "eliminate barriers to broadband deployment,"<sup>528</sup> provide "regulatory certainty,"<sup>529</sup> "promote broadband deployment and competition,"<sup>530</sup> "spur investment,"<sup>531</sup> and "reduc[e] significant indirect costs caused by the existing differences between" the rates paid by competitors.<sup>532</sup> At the same time, the revised telecom rate methodology remains readily administrable,<sup>533</sup> consistent with Congress' instruction to develop a regulatory framework that may be applied in a "simple and expeditious" manner with "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."<sup>534</sup> We are unpersuaded by electric utilities' claims that the new telecom rate will not promote broadband deployment and is not good public policy.<sup>535</sup>

173. *New Telecom Rate Promotes Act's Goals.* Specifically, the action we take will advance the pro-competitive policies underlying the Act.<sup>536</sup> Under section 706 of the 1996 Act, Congress directed the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans by utilizing, in a manner consistent with the public interest . . . measures that promote

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In rejecting utility arguments that the Commission should "abandon our use of regulatory accounts based on historical costs" in favor of a forward-looking cost methodology, the Commission noted that Congress did not "instruct the Commission to deviate from the use of historical costs when it amended the Pole Attachment Act in 1966." *2001 Order on Reconsideration*, 16 FCC Rcd at 12114, 12117, paras. 16, 22. Contrary to Alliance's assertion, the new telecom rate uses a historic cost methodology based on the same regulatory accounts the Commission has used in the past.

<sup>528</sup> Charter Comments at v.

<sup>529</sup> NCTA Comments at 9.

<sup>530</sup> Comcast Comments at 25.

<sup>531</sup> CTIA Comments at 16.

<sup>532</sup> TWC Comments at 4–5 (arguing the existing rate differences cause litigation costs by utilities seeking to impose the existing telecom rate on new and innovative services that are introduced by cable operators and also administrative costs of separately tracking pole attachments used to provide telecom services, which is "incredibly complex . . . in an integrated voice, video and data network").

<sup>533</sup> For example, it uses publicly filed cost data, such as FERC 1 data, that are verifiable and comply with the uniform system of accounts of the Commission and FERC. We note that AT&T, Qwest, and Verizon committed to continue filing pole attachment data publicly and annually that had been in ARMIS Report 43-01 as a condition of the Commission's forbearance from ARMIS financial reports. *Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c)*; *Petition of Verizon for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain of the Commission's Recordkeeping and Reporting Requirements*; WC Docket Nos. 07-204, 07-273, Memorandum Opinion and Order, 23 FCC Rcd 18483, 18490, para. 13 (2008), *pet. for recon. pending, pet. for review pending NASUCA v. FCC*, Case No. 08-1353 (D.C. Cir. filed Nov. 4, 2008).

<sup>534</sup> S. Rep. No. 95-580, *reprinted in* 1978 U.S.C.C.A.N. 109, at 21. *See also* TWTC/Comptel Reply App. A, Decl. of Don J. Wood at 24 (TWTC/Comptel Wood Decl.) (describing the Commission new methodology as a "refinement of, not a radical departure from" the present methodology and "would not require the utilities to undertake radically new calculations or to change their data collection and accounting methods.").

<sup>535</sup> *See, e.g.*, Alliance Reply at 11; APPA Reply at 15–16.

<sup>536</sup> A major impetus of the 1996 Act was "to accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." Preamble to the 1996 Act. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

competition . . . or other regulatory methods that remove barriers to infrastructure investment.”<sup>537</sup> Further, Congress declared in the Act that “[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media.”<sup>538</sup> Consistent with those goals, the telecom rate we adopt today helps to ensure that our policies regarding pole attachment rates promote competitive and technological neutrality, and hence more effective competition, resulting in more efficient investment, innovation, and service provision.

174. As the *Further Notice* explained, cable operators have been arbitrarily deterred from offering new, advanced services that potentially could be classified as telecommunications services, such as high-capacity connections to anchor institutions or wireless towers, based on the possible financial impact of having to pay the currently higher telecom rate for all their pole attachments.<sup>539</sup> The record here likewise confirms that a low and more uniform rate will reduce disputes and costly litigation about the applicability of “cable” or “telecommunications” rates to broadband, voice over Internet protocol, and wireless services that distort attachers’ deployment decisions.<sup>540</sup> Narrowing the range of potential prices attachers face reduces the gains each party can obtain through winning a dispute. This benefits the parties and economic efficiency by reducing risk (the range of potential outcomes due to a dispute are narrowed). Economic efficiency is further improved because there are fewer rents to be fought over and hence rent seeking, which results in efficiency losses, also is reduced. Further, several commenters argue that reducing the current disparity in cable and telecom rates, which distort investment decisions for telecommunications carriers and cable operators, represents “the most effective means of promoting broadband deployment.”<sup>541</sup>

175. This approach also is consistent with prior Commission policy regarding pole rental rates. In the *1998 Implementation Order*, the Commission anticipated that rates higher than the cable rate

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<sup>537</sup> 47 U.S.C. § 1302(a). Advanced telecommunications capability is defined as “high speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” 47 U.S.C. § 1302 (d)(1).

<sup>538</sup> 47 U.S.C. § 230.

<sup>539</sup> See, e.g., *Further Notice*, 25 FCC Rcd at 11912, para. 116 (citing Letter from Daniel L. Brenner, Counsel, Bright House Networks, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 (filed Feb. 16, 2010) Attach. (Affidavit of Nick Lenochi) (providing example of how application of higher telecommunications rate for poles would increase expense of deploying Fast Ethernet connections to a large school district by \$220,000 annually); NCTA Comments at 17 (filed Sept. 24, 2009); Letter from Jill M. Valenstein, Counsel for the Arkansas Cable Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 1–2 (filed July 11, 2008)).

<sup>540</sup> See, e.g., Charter Comments at iii, 5 (explaining that disputes and litigation with pole owners about whether the telecom rate is applicable negatively affect deployment of integrated voice, data, and video services, and waste “critical resources that could have been spent on deploying advanced services to consumers,” and noting that “[a]pplication of the telecom rate to Charter’s attachments is especially disadvantageous because Charter typically serves areas that are more rural and non-urbanized with fewer attachers (the lower the number of attaching entities, the higher the telecom rate)”; see also Bright House Comments at 3–7 (explaining that it is attached to more than one million poles across its service areas, pays more than \$11 million in annual pole rents, has incurred litigation expenses during the past four years over the characterization of its attachments, and that a higher rate can frustrate competitive entry in new, innovative services); Comments of the Office of Advocacy, U.S. Small Business Association, GN Docket No. 10-188 at 8 (filed Oct. 15, 2010) (observing that “small cable broadband providers are concerned about possible increases in rates for comingled Internet and video services,” and that the Office of Advocacy “encourages the Commission to examine the impact that increasing pole attachment rates for small cable broadband providers of comingled video and broadband services would have on these providers’ ability to compete and deploy broadband, especially in underserved areas”).

<sup>541</sup> See TWTC/Comptel Wood Decl. at 5 (“In addition to being compensatory, a rate based on a proper calculation of incremental costs would provide the clearest signals to the marketplace (thereby minimizing any distortion to carrier deployment decisions) and would represent the most effective means of promoting broadband deployment.”).

deterred cable operators from offering new services, and therefore applied the cable rate to cable operators' attachments used for both video and Internet services.<sup>542</sup> The Commission recognized that there were strong policy reasons for this approach, concluding it "will encourage greater competition in the provision of Internet service and greater benefits to consumers."<sup>543</sup> Indeed, cable operators described the significant negative effect that raising cable pole attachment rates to the telecom rate would have on broadband investment in rural areas given the already higher costs to serve those areas.<sup>544</sup> For poles subject to Commission-regulated rates used by the cable industry, NCTA noted a \$3 difference between the cable rate and the present telecom rate could amount to approximately \$90 million to \$120 million per year, which could ultimately affect subscribers and future infrastructure investment, including broadband deployment.<sup>545</sup>

176. The Commission's policy has provided pole owners with a compensatory rate and successfully spurred investment by cable operators in networks capable of delivering advanced communications services and the growth of facilities-based competition, both to the benefit of consumers.<sup>546</sup> For example, the American Cable Association explains that low attachment rates have been "instrumental in the ability of smaller cable operators to deploy broadband facilities and offer advanced communications services."<sup>547</sup> Moreover, we agree with commenters that extending this policy by implementing a low and more uniform rate that will be applicable to attachments used by telecommunications carriers will eliminate competitive disadvantages that carriers like TWTC face by having to pay higher rates for these key inputs to communications services.<sup>548</sup> At the same time, based on the views of consumer advocates discussed above,<sup>549</sup> we believe that our new telecom rate appropriately acknowledges the policy interests in utility pole investment and of utility ratepayers.

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<sup>542</sup> *1998 Implementation Order*, 13 FCC Rcd at 6794, para. 32. In 2000, the Supreme Court upheld this decision, finding that section 224(b) gives the Commission authority to adopt just and reasonable rates for attachments within the general scope of section 224 of the Act, but outside the "self-described scope" of the telecom rate formula or cable rate formula as specified under sections 224(d) and (e). *Gulf Power*, 534 U.S. at 335–36, 338–39.

<sup>543</sup> *1998 Implementation Order*, 13 FCC Rcd at 6794, para. 32.

<sup>544</sup> See, e.g., Charter *NPRM Comments* at 3–6 (stating that monthly Internet rates would increase by \$2.47–\$4.33 per customer) ("[T]he presence of one Internet customer would 'contaminate' the entire system and thus all pole attachments with a higher rate . . . . In the areas that Charter serves with 10–15 subscribers per mile, the impact . . . would be devastating given the already higher costs in rural areas. . . . The increases will be so significant and the cost pressure so intense that many competitors will forego providing service in rural areas as the domino effect on projected take rates by rural customers will further reduce such providers' expectation of a return on investment that would outpace capital debt reimbursement obligations.").

<sup>545</sup> *Further Notice*, 25 FCC Rcd at 11912, para. 116 (citing NCTA Comments, Pelcovits Decl. at para. 13 (filed Sept. 24, 2009) (based on the estimated 30–40 million poles with cable attachments subject to Commission regulation)). Cable commenters estimate an even greater difference between the two rates of \$208 million to \$672 million annually for the cable industry as a whole. NCTA Comments, Pelcovits Decl. at para. 22. Likewise, in the case of just one state—West Virginia—a difference of approximately \$4 million in pole attachment expenses per year between the current cable and telecom rates was estimated. NCTA Comments, Attach. Gregg Decl. at para. 14 & tbl. 2.

<sup>546</sup> NCTA Comments at 1.

<sup>547</sup> See, e.g., ACA Comments at 3.

<sup>548</sup> TWTC explains that it "provides broadband information and telecommunications services over fiber that it deploys" and "[a]ccess to poles is usually the most efficient and often the only means of deploying these fiber transmission facilities." TWTC White Paper, RM-1293, at 2.

<sup>549</sup> See *supra* Part V.B.1.

177. Furthermore, we find informative the actions taken by state regulators that have elected to exercise jurisdiction over pole attachments in lieu of the Commission.<sup>550</sup> Commenters report that many of these states apply a uniform rate for all attachments used to provide cable and telecommunications services, and have done so by establishing a rate identical or similar to the Commission's cable rate formula.<sup>551</sup>

178. We are not persuaded by utilities' arguments that question the impact of the new telecom rate on broadband deployment.<sup>552</sup> Utilities assert that broadband already is available to the vast majority of the U.S. population, and that factors other than the costs of pole attachments are more important to decisions to deploy in rural areas.<sup>553</sup> These arguments, however, overlook the documented reluctance on the part of cable providers to expand their networks and provide new high-capacity services to customers such as anchor institutions or wireless providers – whether in urban or rural areas – because of the risk that some of those services could potentially be classified as “telecommunications services,” triggering disputes as to whether the higher, telecom rate should be applied over their entire pole attachment network. As discussed above, the record indicates this problem is a barrier to the deployment of integrated voice, data, and video services, including the provision of broadband services to anchor institutions.<sup>554</sup> By minimizing this disparity, the Commission will promote competition that will lead to more and better service offerings at lower prices.

179. Even beyond the effects of the rate disparity, we anticipate that the absolute level of pole rental rates also is likely to be relevant to decisions regarding what services are provided. In addition to the comments in the current record,<sup>555</sup> the National Broadband Plan cited cost information suggesting that higher pole attachment costs can affect broadband deployment.<sup>556</sup> Reducing input costs improves the business case for broadband deployment at the margin, expanding opportunities for investment. The effect of a reduction in one type of input cost becomes even more significant as the Commission

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<sup>550</sup> These states, listed in Appendix C, certify that they meet certain statutory requirements. 47 U.S.C. § 224(c)(2)(B), (c)(3)(B) (the state regulatory commission must “consider the interests of the subscribers of the services offered via such attachments as well as the interests of the consumers of the utility services,” and it must provide prompt action on complaints).

<sup>551</sup> Comcast Comments at 18–20; NCTA Comments at Attach. B; TWC Comments at 3; Verizon Reply at 10–11 (stating that “[f]or example, in New York ‘there is one pole attachment rate, which applies to all attachments regardless of the type of company’ and that rate is ‘based on the federal formula for cable television attachments’”). *But see* Coalition *NPRM* Comments at 36 (citing to three states and one city that adopted higher attachment rates).

<sup>552</sup> *See, e.g.*, EEI/UTC Orszag, Shampine Decl. at 13–15 (arguing that most of the poles in areas without broadband would not be affected by the Commission's proposed rate and this rate is a relatively small fraction of network costs).

<sup>553</sup> *See, e.g.*, APPA Reply at 19; Coalition Comments at 120; NRECA Comments at 27 (arguing low pole rates are not enough to promote broadband deployment and that there are not enough consumers that can generate sufficient revenue for broadband service providers to deploy in very low density areas).

<sup>554</sup> We note that, under existing Commission precedent, cable operators that provide commingled Internet access services do not trigger the higher telecom rate on that basis, and our actions here do not alter that holding. *See supra* note 464.

<sup>555</sup> Letter from Craig A. Gilley, Counsel for Suddenlink Comm. and Mediacom Comm. Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 1 (Feb. 10, 2011).

<sup>556</sup> *See, e.g.*, NATIONAL BROADBAND PLAN at 110 n.7 (citing to NCTA *NPRM* Comments App. B, Decl. of Dr. Michael D. Pelcovits). That study found that an increase in the cable rate to the telecom rate for cable companies would translate to a cost increase ranging between \$10.46 and \$33.75 annually per broadband subscriber, and such an “increase in pole attachment rates is likely to make it unprofitable for cable companies to enter new markets or continue to offer broadband service in some rural areas.” NCTA *NPRM* Comments App. B, Decl. of Dr. Michael D. Pelcovits at 21.

undertakes additional steps to accelerate broadband deployment. Scarce resources and the fact that up to 24 million Americans do not have access to broadband today lend greater urgency to the Commission's efforts to ensure that policies regarding key inputs that bear on broadband deployment and availability are designed to facilitate utilization of those resources to promote broadband.<sup>557</sup>

180. In arguing to revise the present telecom rate upward and make it the uniform rate for attachments, electric utilities assert that the telecom rate is based on “unrealistic presumptions” for the average number of attaching entities on a pole and the classification of “safety space” as “usable space.”<sup>558</sup> The Commission has given extensive consideration to these issues in prior decisions, and we find no basis for revisiting them.<sup>559</sup> Indeed, as we noted above, we find instructive consumer advocates' position supporting the cable rate as the just and reasonable rate for all pole attachments and stating that increasing attachment rates for broadband services would be “contrary to ‘the nation’s commitment to achieving universal broadband deployment and adoption.’”<sup>560</sup>

181. In sum, we conclude that there are substantial benefits that will be derived from adoption of the revised telecom rate, and that these benefits substantially outweigh any costs associated with the rule. Although it is not possible to quantify with precision the benefits and costs based on the information we have before us, and although some of the benefits are not subject to quantification, several sources of gain stand out. For one, largely eliminating the difference in prices charged to cable operators and telecommunications carriers will significantly reduce the extent to which investment and deployment choices by such providers, and competition more generally, are distorted based on regulatory classifications.<sup>561</sup> Reducing the telecom rate to make it closer to uniform with the cable rate will enable more efficient investment decisions in network expansion and upgrades, most notably in the deployment of modern broadband networks.<sup>562</sup> In addition, the change reduces the uncertainty facing third party attachers, and in particular cable companies, as to what charges they are likely to face when they engage

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<sup>557</sup> *Sixth Broadband Deployment Report*, 25 FCC Rcd at 9574, para. 28 (“[A]pproximately 14 to 24 million Americans do not have access to broadband today. [This] group appears to be disproportionately lower-income Americans and Americans who live in rural areas. The goal of the statute, and the standard against which we measure our progress, is universal broadband availability.”).

<sup>558</sup> See, e.g., EEI/UTC Comments at 75; Florida IOUs Reply at 46 (contending that safety space (usually 40 inches) on a pole, currently included as “usable space” in the rate formula, is only necessary because of communications attachers and should be treated as “unusable” space so that electric utilities are not bearing the full cost of providing the space); Florida IOUs Reply at 68–69.

<sup>559</sup> *2001 Order on Reconsideration*, 16 FCC Rcd at 12130, para. 51 (rejecting utility arguments to remove the 40-inch safety space from the presumptive 13.5 feet of usable space and affirming the *2000 Fee Order*, 15 FCC Rcd at 6467–68, para. 22 (finding that “the presence of the potentially hazardous electric lines . . . makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers,” and further that this “space is usable and is used by the electric utilities”)). See *supra* note 517 in response to utility assertions about the presumptive number of attachers. We also decline to adopt the USTelecom and AT&T/Verizon proposals for pole attachment rates. See *Further Notice*, 25 FCC Rcd at 11913–14, para. 119 (describing those proposals). Even beyond the questions about whether those proposals are consistent with section 224, *id.* at 11914, para. 120, we are not persuaded that it will advance our broadband policies to increase the input costs for some providers, as both proposals would do. *Id.* at 11914–15, para. 121.

<sup>560</sup> NASUCA Reply at 5.

<sup>561</sup> As discussed above, this will directly lead to better resource allocation on an ongoing basis, see *supra* paras. 174–176, the benefits of which will be large when summed across the nation and over time.

<sup>562</sup> See *supra* paras. 174–176. In addition, pole attachments are commonly an essential input, and hence critical to the competitive process. See, e.g., *supra* paras. 172, 179. The cumulative efficiency benefit of improved competition across the nation and over time can be expected to be significant.

in the provision of new advanced services or network upgrades.<sup>563</sup> The new telecom rate also will substantially reduce the incentives for costly disputes by substantially reducing the potential gains that a party can claim by arguing for a favorable attachment definition.<sup>564</sup> At the same time, in defining the new telecom rate we have been mindful of the potential burden of reform on utility ratepayers and the incentives of utilities to continue investing in pole infrastructure, and have accounted for that in setting the new telecom rate.<sup>565</sup>

#### 4. The Commission's Approach Permits Utilities to Recover Their Costs

182. We are not persuaded by claims of utilities that the new telecom rate will not enable them to recover their costs. The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers, as it ensures that utilities will recover more than the incremental cost of making attachments. The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate.

183. *New Telecom Rate Is Compensatory.* Under our new approach, the lower-bound telecom rate excludes capital costs – the depreciation, rate of return, and tax components of the carrying charges<sup>566</sup> – consistent with economic, cost causation principles. Pole owners would continue to recover up-front, through make-ready fees, the entire amount of the capital costs incurred to accommodate an attacher. As Comcast points out, this approach is also consistent with Congress's understanding that pole attachments generally do not impose any capital costs on utilities that are not recovered fully in make-ready charges: "Thus, the only added cost to the utility resulting from the pole attachment would be administrative costs."<sup>567</sup> Significantly, the lower-bound telecommunications rate, the new telecom rate, and the cable rate each are fully compensatory to utilities because these rates meet or exceed incremental cost, and satisfy all constitutional compensation requirements.<sup>568</sup> The cable rate formula has been upheld by the courts as just, reasonable, and fully compensatory, and in virtually all cases the new telecom rate will recover at least an equivalent amount of costs.<sup>569</sup> Further, if the lower-bound telecom rate is applied, it will be because it is *higher* than the (already compensatory) rate yielded by the cable rate formula.

<sup>563</sup> Attachments to a particular utility pole by cable operators and telecommunications carriers are a near identical input, so any price difference directly treats competitors differently.

<sup>564</sup> Thus, under the new telecom rate, fewer resources can be profitably wasted in such disputes. *See supra* para. 174 (discussing how a low and more uniform rate will reduce disputes and litigation about the applicability of "cable" or "telecommunications" rates). The efficiency gains due to reduced rent seeking are likely to be significant because they are of a first-order magnitude (that is, they apply to every attachment sold), rather than applying to marginal changes in attachments made.

<sup>565</sup> *See supra* paras. 146–152.

<sup>566</sup> *See supra* note 419.

<sup>567</sup> Comcast Comments at 13 (citing 123 Cong. Rec. 5080 (1977) (statement of Rep. Wirth) and 1977 Senate Report at 19 ("[A utility's] avoidable costs... could be expected to be minimal since most of those costs are the outlays that should be fully recovered in the make-ready charges.")).

<sup>568</sup> The new telecom rate would be equal to the higher of either the lower-end telecom rate or the cable rate; generally this will result in the cable rate.

<sup>569</sup> *See, e.g., Alabama Power Co. v. FCC*, 311 F.3d at 1370–71 ("[A]ny implementation of the [Commission's cable pole attachment rate] (which provides for much more than marginal cost) necessarily provides just compensation."); *FCC v. Florida Power Corp.*, 480 U.S. at 253–54 (finding that it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory"). *See also* NATIONAL BROADBAND PLAN at 110 ("[The cable rate] has been in place for 31 years and is 'just and reasonable' and fully compensatory to utilities."); Comcast *NPRM* Comments Exh. 2, Decl. of Harold W. Furchtgott-Roth at 1, 10–11 (Furchtgott-Roth Report); Comcast Kravtin Report at paras. 38–40, 67–72).

184. *No Evidence of Utility Subsidy.* We find no evidence in the record that supports the utilities' assertions that the lower-bound telecom formula results in rates so low that it forces electric ratepayers to subsidize third-party attachment rates.<sup>570</sup> Under economic and legal principles, a given service is not subsidized by other services if the rate for the service produces revenues that cover all of the costs caused by the service.<sup>571</sup> In this case, neither the firm that provides the given service and other services, nor the customers of those other services, are made worse off by the firm incurring costs to supply the service. The given service (*e.g.*, access to poles) does not subsidize other services (*e.g.*, electric service) if its rate produces revenues that cover the incremental costs of providing the service.

185. *Capital Costs.* We next discuss the specific costs – capital, maintenance, and administrative costs -- caused by third-party attachers, and why the amount of each particular cost reflected in the lower-bound rate is not a subsidized amount. The capital costs of a pole are for the physical material of the pole itself and for the labor and engineering needed to install it. The attacher causes the pole owner to incur costs if measures such as rearrangement or bracketing are performed, or if there is no space available on an existing pole to accommodate an attachment. The attacher causes the pole owner to incur the costs for rearranging existing attachments, adding brackets, installing a new pole, or for otherwise incurring costs to accommodate the attacher's demand. Pole owners have the opportunity to recover through make-ready fees all of the capital costs caused by third-party attachers. Importantly, the utility itself sets these fees as are appropriate – they are not subject to any mandatory rate formula set by the Commission.<sup>572</sup>

186. As discussed below, the record demonstrates that attachers do not cause pole owners to incur capital costs if there is space available on an existing pole to accommodate an attachment. For that reason, none of the capital cost of a pole is included in the lower-bound telecom recurring pole rental rate (and none is recovered through the make-ready fees). In accordance with the economic and legal principles set forth above, the lower-bound rate is not a subsidized rate, even though it excludes capital costs, because the attacher does not cause the utility to incur capital costs in this case. Excluding capital costs from the lower-bound rate, while at the same time allowing recovery of all of the capital costs caused by third-party attachers through the make-ready fees, prevents a subsidy that would result from under-recovery of capital costs.

187. Moreover, as one party points out, in cases where an attacher pays make-ready fees to upgrade or to add capacity to an existing pole, or for a new, taller pole to accommodate that attacher's

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<sup>570</sup> See, *e.g.*, APPA Reply at 15–16; Coalition Comments at 112–13; EEI/UTC Comments at 71–73; Letter from Aryeh B. Fishman, Director, Regulatory Legal Affairs, and John Caldwell, Director of Economics, EEI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, Report of Kaustuv Chakrabarti *passim* (filed Dec. 14, 2010) (EEI/UTC Chakrabarti Report).

<sup>571</sup> *Alabama Power Co. v. FCC*, 311 F.3d at 1370. See also William J. Baumol and Dietrich Fischer, *Super Fairness: Applications and Theory*, Ch. 6 (1986); Gerald R. Faulhaber, *Cross-Subsidization: Pricing in Public Enterprises*, 65 AM. ECON. REV. 966, 966–77 (1975). The economic test developed by Faulhaber requires that the revenues a firm derives from each service or group of services cover their own individual incremental costs. *Faulhaber, id.* The complexity of the calculations and the voluminous information required to even roughly approximate the incremental revenues and costs for each group of services precludes such an analysis here, especially given Congress' instruction that the Commission institute a "simple and expeditious" pole attachment regulatory program rather than requiring protracted proceedings and complicated pricing investigations. See *1977 Senate Report* at 21.

<sup>572</sup> We note that parties can seek Commission review of make-ready charges to the extent that they believe such charges are unjust or unreasonable. See, *e.g.*, *Knology v. Georgia Power*, 18 FCC Rcd 24615 (2003) ("Utilities are entitled to recover their costs from attachers for reasonable make-ready work necessitated by requests for attachment. Utilities are not entitled to collect money from attachers for unnecessary, duplicative, or defective make-ready work."); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 (Cable Serv. Bur. 1999) (attacher responsible only for cost of work made necessary because of its attachments).

demand, the utility, not the attacher, owns the pole.<sup>573</sup> The utility therefore benefits from this situation in a number of ways, including its recovery upfront of all of the costs the third-party attacher causes it to incur. In particular, because poles typically come in standard sizes, the utility is likely to obtain, at no cost to itself, capacity above and beyond the additional foot of pole space needed to accommodate the typical third-party attachment. The utility benefits from the extra capacity because it can use that capacity to supply its own services, rent the capacity to other third-party attachers and realize additional revenues, and/or save or defer some of the cost of periodic pole replacement needed to provide its own service.

188. *Rational Firm Behavior.* We find that a third-party pole attacher causes none of the capital cost of the available space on an existing pole used to satisfy the attachment demand. We base this finding on basic economic theory and the absence of evidence in the record to support a contrary conclusion. We first discuss economic theory. As we noted in the *Further Notice*, section 224 imposes no obligation on pole owners to anticipate the need to accommodate communications attachers when deploying poles.<sup>574</sup> We agree with commenters who claim that there is uncertainty surrounding future attachment demand, and therefore there is the risk that the additional cost of extra pole capacity installed in anticipation of additional demand would not be recovered.<sup>575</sup> Moreover, as discussed, the rules we adopt would impose no unrecoverable cost on the utility, but rather would provide a benefit to the utility, insofar as a utility that has not considered third party demand is able to install a new pole at the new attacher's expense. Therefore, we agree with TWTC that utilities typically would not install such extra capacity in advance purely to accommodate possible telecommunications carrier or cable attachers.<sup>576</sup> Rather, we conclude that utilities would install poles based on an assessment of their own needs and, to the extent that future attachments could not be accommodated on such poles, leave it to the new attacher to pay the cost of the new pole.<sup>577</sup> In this manner, utilities are certain to recover the full cost of the additional capacity through make-ready charges.

189. We next discuss assertions by the utilities that third-party attachers cause some of the capital costs of a pole that has space available to accommodate an attachment. In the *Further Notice*, the Commission requested that pole owners, to the extent that they contend they incur significant capital costs outside the make-ready context solely to accommodate third party attachers, provide the nature and extent of those costs.<sup>578</sup> The Commission noted that the Coalition of Concerned Utilities argues that: (a) communications attachers are responsible for incremental capital costs for the extra space on taller poles; and (b) those costs exceed the attachers' share of the capital costs for an entire pole that the attachers bear under the fully distributed cost methodology reflected in the Commission's existing rate formulas.<sup>579</sup> In particular, the Coalition argues that utilities install taller poles routinely throughout their networks to satisfy their own needs and anticipated third-party attachment demand, and that they do not receive sufficient compensation for this option.<sup>580</sup> The Commission questioned whether such practices

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<sup>573</sup> Comcast Kravtin Report at 30.

<sup>574</sup> *Further Notice*, 25 FCC Rcd at 11920 n.365.

<sup>575</sup> Comcast Pecaro Decl. at 9–11.

<sup>576</sup> *Id.*

<sup>577</sup> *Id.*

<sup>578</sup> *Further Notice*, 25 FCC Rcd at 11921, para. 136.

<sup>579</sup> Letter from Jack Richards on behalf of the Coalition of Concerned Utilities to Edward P. Lazarus, Chief of Staff, FCC, WC Docket No. 07-245 at 2 (filed May 4, 2010) (Coalition May 4, 2010 *Ex Parte* Letter) (contending that utility pole owners are not reimbursed for “the considerable additional costs (\$180–\$310 per pole) required to construct pole distribution systems that are taller and more expensive than the utilities need for their own purposes. These additional capital costs are caused directly by the communications attachments, but they are not recoverable by the utilities since the rate formula does not allow for recovery of incremental capital costs.”).

<sup>580</sup> Coalition May 4, 2010 *Ex Parte* Letter at 1–2.

indeed were routine or widespread,<sup>581</sup> but nevertheless invited parties to submit studies that isolate and quantify the effect of third-party attachment demand on pole height and therefore pole investment.<sup>582</sup>

190. Electric utilities in response to the *Further Notice* did not provide any cost study, let alone one that might demonstrate that pole owners incur capital costs outside the make-ready context solely to accommodate third-party attachers. The utilities are in the best position to develop the most credible studies because they possess the required data and information regarding the costs of owning, installing, and maintaining poles. We find it reasonable to conclude, therefore, based on our analysis of rational firm behavior and the lack of any evidence provided by the utilities to refute it, that pole owners do not incur such costs.<sup>583</sup>

191. *Maintenance and Administrative Costs.* We find, based on the record, that the amount of maintenance and administrative costs reflected in the lower-bound telecom rate is not subsidized. The lower-bound rate includes a share of the fully allocated amount of these costs, based on both the usable and the unusable space allocators in section 224(e)(2) and (3).<sup>584</sup> In fact, the lower-bound rate includes a greater proportion of maintenance and administrative costs than does the existing cable rate. That is because the allocation of maintenance and administrative costs attributed to unusable space by the lower-bound rate formula is greater than the allocation of maintenance and administrative costs attributed to unusable space in the cable rate formula.<sup>585</sup> Courts have upheld the existing cable rate, finding it to be a fully compensatory rate.<sup>586</sup> It follows that the amount of maintenance and administrative costs included in the lower-bound rate also fully compensate the pole owner for costs caused by third-party attachments, based on the same legal reasoning the courts applied in evaluating the existing cable rate.

192. *Unusable Space.* The utilities are incorrect in their assertions that the section 224(e)(2) allocator apportions too little of the cost of unusable space to third-party attachers and creates a subsidized rate.<sup>587</sup> This allocation does not create a subsidized rate because unusable space costs are

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<sup>581</sup> *Further Notice*, 25 FCC Rcd at 11920–21, paras. 135–36 & n.365.

<sup>582</sup> *Further Notice*, 25 FCC Rcd at 11921, para. 136 & n.371. The Commission provided specific guidance on how commenters might demonstrate that investment in taller poles, if any, would not have been made ‘but for’ the communications attachers. *Id.* (requesting cost studies that keep certain variables constant, separately quantify any additional investment not recovered in make-ready fees, include calculations on a per pole basis and on a per pole per attacher basis, describe analytical techniques used, and explain what data was sampled).

<sup>583</sup> We note that the Coalition provides only an anecdotal assertion of additional capital costs that would not be incurred “but for” communications attachers. *See* Coalition Comments at 109–12 (asserting that four Coalition members install taller poles than would be needed if the electric utility were the only attacher and alleging that pole replacements can be more frequent and/or more costly when poles have communications attachers). As we stated, without a cost study, we are unable to find that these represent “substantial incremental capital expenditures” or that “[c]ommunications attachers demonstrably add significantly to electric utility capital expenditures,” as utilities claim. *See* Coalition Comments at 109–11. *See also* TWTC/Comptel Wood Decl. at 16–23 (refuting each of the Coalition’s claims).

<sup>584</sup> 47 U.S.C. § 224(e)(2)–(3).

<sup>585</sup> *See supra* note 397. The allocation of unusable space costs in the existing telecom rate exceeds the allocation of these costs in the cable rate, given the Commission’s rebuttable presumptions. The allocation of maintenance and administrative costs attributed to unusable space is the same in the existing telecom rate and the lower-bound rate because the formulas for both rates apportion the same fully allocated amount of maintenance and administrative costs and do so using the same unusable space allocator. Accordingly, the allocation of maintenance and administrative costs attributed to unusable space in the lower-bound rate exceeds the allocation of these costs in the cable rate.

<sup>586</sup> *See generally* *FCC v. Florida Power Corp.*, 480 U.S. 245; *Alabama Power Co. v. FCC*, 311 F.3d 1357.

<sup>587</sup> EEI/UTC Chakrabarti Report at 5, 7 n.6.

common costs, as certain utilities point out.<sup>588</sup> These common costs do not vary with the number of attachers on a pole.<sup>589</sup> Thus, none of these costs is caused by the attacher. Based on the legal and economic principles discussed above, the entire amount of these costs could be excluded from the lower-bound rate without resulting in a subsidized rate.<sup>590</sup>

193. *Usable Space.* We also conclude that the attacher's share of the fully allocated maintenance and administrative costs relating to usable space reasonably represents the extent to which the attacher causes these costs.<sup>591</sup> The relative use allocator in section 224(e) aligns with cost causation principles because it apportions these costs on the basis of the fraction of the pole occupied by the attacher, thereby producing an allocation that is commensurate with use. Moreover, the share of usable space is the allocator that Congress specified for both the cable rate formula and the existing telecom rate formula. Likewise, courts have upheld rates reflecting costs apportioned using this allocator.<sup>592</sup>

194. We noted in the *Further Notice* that the Coalition of Concerned Utilities argues that the incremental operating costs for attachments, which utilities contend are caused by communications attachers, exceed the operating costs for a pole that the attachers bear under the Commission's pre-existing implementation of the telecom rate.<sup>593</sup> We remain skeptical of this claim because we would expect that a significant portion of the pole-related maintenance and administrative expenses would be incurred for routine activities unrelated to the number of attachments. We nevertheless invited parties wishing to rebut that position to "submit studies that isolate and quantify the effect of third-party attachment demand on operating expenses."<sup>594</sup> Utilities, in response to the *Further Notice*, did not provide a study that might demonstrate that the maintenance and administrative costs caused by third-party attachers exceed the share of these costs the attachers bear under the fully distributed cost methodology reflected in the Commission's existing telecom rate formula, which, in turn, is equal to the share reflected in the lower-bound rate. Given the absence of such evidence in the record, we find the maintenance and administrative costs reflected in the lower bound rate are not subsidized amounts.

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<sup>588</sup> Alliance Comments at 78 n.157; EEI/UTC Chakrabarti Report at 5. Common costs are incurred in the production of multiple products or services, and remain unchanged as the relative proportion of those products or services varies. See *Local Competition First Report and Order*, 11 FCC Rcd at 15845, para. 676.

<sup>589</sup> Kahn, *supra* note 422.

<sup>590</sup> See *supra* para. 184.

<sup>591</sup> Utilities do not argue that the relative use allocator specified in section 224(e) apportions too little of the usable space costs to third-party attachers. Rather, their position is that the Commission's rebuttable presumptions, if used as inputs for that allocator, result in an under-allocation of usable space costs to third-party attachers. In particular, the utilities argue that the rebuttable presumptions regarding usable space and unusable space, and the Commission's treatment of worker safety space that affects these presumptions, produce this under-allocation. See EEI/UTC Chakrabarti Report at 6-9. We reject these assertions above. See *supra* para. 180.

<sup>592</sup> See generally *FCC v. Florida Power Corp.*, 480 U.S. 245; *Alabama Power Co. v. FCC*, 311 F.3d 1357.

<sup>593</sup> *Further Notice*, 25 FCC Rcd at 11922, para. 138 (citing Coalition May 4, 2010 *Ex Parte* Letter at 2 (contending that "annual operating expenses that are caused solely by communications attachers" add considerable costs, and "[t]he Commission's rate formulas allow recovery of only a small fraction of these costs. . . . [F]or instance, the mechanics of the pole attachment formula reduce recovery to a minute percentage, far less than even the tiny 7.4% responsibility percentage for cable companies under the Commission's rules.")). Although the precise argument is somewhat unclear, presumably the Coalition believes that more operating costs should be included in the relevant definition of costs allocated pursuant to the section 224(e) methodology.

<sup>594</sup> *Further Notice*, 25 FCC Rcd at 11922, para. 138 & n. 377 (discussing elements of such a study). The Commission provided specific guidance on how commenters might demonstrate the amount of operating expenses, if any, that would not have been incurred "but for" the communications attachers. *Id.* (requesting cost studies that keep certain variables constant, include calculations on a per pole basis and on a per pole per attacher basis, describe analytical techniques used, and explain what data was sampled).

195. In conclusion, we find that the lower-bound telecom rate and the make-ready fees together do not subsidize third-party pole attachers because these rates recover more than the costs caused by attachers. Specifically, these rates recover all the capital costs caused by attachers, and an amount of maintenance and administrative costs that exceeds the amount caused by attachers. Moreover, the pole owner benefits from the extra capacity it obtains for free in the make-ready process, in addition to recovering an amount greater than the costs caused by the attachers.

196. *Taxes.* In the *Further Notice*, the Commission stated that, under its proposal, taxes would be treated as part of the capital costs that are excluded from the lower-bound telecom rate.<sup>595</sup> Parties identified and commented on two types of relevant taxes: income taxes<sup>596</sup> and property taxes.<sup>597</sup> As discussed below, we find it appropriate to exclude both types of taxes from the lower-bound rate.

197. Consistent with the cost-causation principles underlying our lower-bound telecom rate, we exclude income taxes because third-party attachers do not cause utilities to incur these expenses.<sup>598</sup> As we stated in the *Further Notice*, income taxes are capital costs because they apply to the return stockholders receive for providing funds used to pay for the pole.<sup>599</sup> Under our approach, if a new attachment would give rise to capital costs, the attacher bears those costs through make-ready fees.<sup>600</sup> Where no capital costs arise from a new attachment, the new attacher has “caused” none of the capital outlay on which stockholders earn a return and therefore none of the corporate income taxes on that return. Accordingly, income taxes are excluded from the lower-bound rate.

198. We likewise find that property taxes should be excluded from the lower-bound telecom rate because there is no evidence in the record that third-party attachers cause pole owners to incur these expenses. In theory, if a pole owner places a new pole to accommodate a third-party attachment, the value of that owner’s pole stock could increase. That increase, in turn, could increase the pole owner’s property taxes, if property taxes are assessed based on an estimate of property values. We are persuaded by the record, however, that such a theoretical property tax increase, if any, would be insignificant. For one, the record indicates that new poles seldom are installed to accommodate third-party attachment demand.<sup>601</sup> Moreover, the magnitude of any increase in value of the owner’s stock of poles arising from a new pole would be expected to reflect only the *extra* capacity provided by the new pole. Commenters did not provide data demonstrating the increase in value – if any – likely to result under these circumstances;

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<sup>595</sup> *Further Notice*, 25 FCC Rcd at 11922 n.372. Income taxes are capital costs because they apply to the return equity holders receive for providing funds used to pay for the pole. ROGER A. MORIN, REGULATORY FINANCE: UTILITIES’ COST OF CAPITAL 409–11 (1994).

<sup>596</sup> Kravtin refers to “revenue-related” taxes without distinguishing these from income taxes. See NCTA Comments Attach. A, Patricia D. Kravtin Report at 36 (NCTA Kravtin Report).

<sup>597</sup> Pecaro notes possessory interest taxes, which are similar to the property taxes the owner of private property pays. See Comcast Pecaro Decl. at 13. A possessory interest tax is paid by an entity that uses government property and typically is based on the assessed value of that property.

<sup>598</sup> See Comcast Pecaro Decl. at 12–13; NCTA Kravtin Report at 36; Mahanger Reply at 17–18.

<sup>599</sup> A stockholder is a legal owner of one or more shares of the capital stock of a corporation. See Eric L. Kohler, *A Dictionary for Accountants* at 457 (5th Ed.) (1975). Capital stock, in turn, refers to the ownership shares of a corporation authorized by its articles of incorporation. *Id.* at 84.

<sup>600</sup> See *supra* paras. 144, 161.

<sup>601</sup> For example, data provided by Oncor indicates that only 0.9% and 0.5% of the poles for which attachers requested access were replaced at the attachers’ expense through make-ready fees in 2008 and 2009, respectively. See EEI/UTC Chakrabarti Report at 9–10. See also *Ex Parte* Letter from Joseph A. Lawhorn, Counsel to Georgia Power Co. and Southern Communications Services, to Marlene H. Dortch, Secretary, FCC, Attach. B, slide 4 (filed Nov. 17, 2009). This letter describes an actual project in which only 4 of 294 poles, or 1.4%, had to be changed out to accommodate new attachments by a cable company.

nor did they demonstrate that any such increase would have a practical impact on property taxes that should be reflected in pole attachment rates. Moreover, we question whether any taxes incurred on these could exceed the increased value of the new poles, which the utility now will own.

### C. Incumbent LEC Pole Attachments

199. As explained below, historically incumbent LECs owned roughly as many poles as electric utilities, and it appears that incumbent LECs were generally able to ensure just and reasonable rates, terms and conditions for pole attachments by negotiating “joint use” agreements.<sup>602</sup> The record demonstrates that incumbent LECs own fewer poles now than in the past, and this relative change in pole ownership may have left incumbent LECs in an inferior bargaining position to other utilities.<sup>603</sup> As a result, at least in some circumstances, market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates, terms and conditions for incumbent LECs pole attachments.

200. The Commission sought comment on the possibility of regulating the rates incumbent LECs pay for attachments in the 2007 *Pole Attachment Notice*. In particular, the Commission sought comment on the extent of the Commission’s authority to regulate pole attachment rates for incumbent LECs, as well as “possible changes in bargaining power between electric utilities and incumbent LECs, and whether pole attachment rates paid by incumbent LECs could affect the vitality of competition to deliver telecommunications, video services, and broadband Internet access service.”<sup>604</sup> The *Pole Attachment Notice* tentatively concluded that incumbent LECs (as with other broadband providers) should pay a regulated rate for pole attachments and “that the rate should be higher than the current cable rate, yet no greater than the telecommunications rate.”<sup>605</sup>

201. In the 2010 *Further Notice*, the Commission asked parties to refresh the record on the issues raised in the *Pole Attachment Notice* “both in light of the specific telecom rate proposals, as well as the factual findings of the National Broadband Plan.”<sup>606</sup> In addition, the Commission sought comment “on the relationship between the pole rental rates paid by incumbent LECs and any other rights and responsibilities they have by virtue of their pole access agreements with utilities,” such as joint use agreements, and whether any remedies otherwise were available to incumbent LECs absent the ability to file complaints with the Commission.<sup>607</sup> The *Further Notice* also sought comment on proposals under which incumbent LECs’ regulated rate would be an existing rate, whether the cable rate, the pre-existing telecom rate, or any new rate adopted in this proceeding, or an alternative rate, as well as how to balance the rate paid with the other terms and conditions in incumbent LECs’ pole attachment agreements with other utilities.<sup>608</sup>

202. Based on the record in this proceeding, we find it appropriate to revisit our interpretation of section 224 with respect to rates, terms and conditions for pole attachments by incumbent LECs.<sup>609</sup>

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<sup>602</sup> See, e.g., AT&T Reply at 9; Coalition Reply at 36; Florida IOUs Reply at 27–28; Frontier Mar. 8, 2011 *Ex Parte* Letter at 1.

<sup>603</sup> See *infra* para. 206 (describing record evidence).

<sup>604</sup> *Pole Attachment Notice*, 22 FCC Rcd at 20201–06, paras. 15–16, 23–25.

<sup>605</sup> *Id.* at 20209, para. 36.

<sup>606</sup> *Further Notice*, 25 FCC Rcd at 11924–25, para. 143.

<sup>607</sup> *Id.* at 11925–27, paras. 145, 148.

<sup>608</sup> *Id.* at paras. 143–47.

<sup>609</sup> Given the extensive comment sought on these issues, see, e.g., *supra* paras. 200–201, we reject some commenters’ suggestion that the Commission lacks adequate notice. See, e.g., Letter from Sean B. Cunningham, Counsel for the Alliance for Fair Pole Attachment Rules, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, Attach. at 1–2 (filed Mar. 31, 2011) (Alliance Mar. 31, 2011 *Ex Parte* Letter).

Although incumbent LECs have no right of access to utilities' poles pursuant to section 224(f)(1) of the Act, we now conclude that where incumbent LECs have such access, they are entitled to rates, terms and conditions that are "just and reasonable" in accordance with section 224(b)(1).

203. We therefore allow incumbent LECs to file complaints with the Commission challenging the rates, terms and conditions of pole attachment agreements with other utilities. Given that incumbent LECs often can be differently situated from other attachers, both due to the terms of existing joint use agreements and because of their continuing pole ownership, we conclude that it would not be appropriate to treat them identically to telecommunications carrier<sup>610</sup> or cable operator attachers in all circumstances. Instead, we identify a number of factors that the Commission will consider in determining whether a particular rate, term, or condition is just or reasonable pursuant to section 224(b)(1). This guidance will provide greater clarity to the industry, improve the administrability of Commission complaint proceedings involving incumbent LEC attachers, and seek to strike the most appropriate balance in ensuring just and reasonable rates given the particular terms and conditions of an incumbent LEC's agreement for pole access.

### 1. Statutory Analysis

204. Section 224 uses two separate terms to refer to telephone companies that are pole attachers. The statute uses the term "telecommunications carrier," and contains a definition of that term that takes as a starting place the definition of the same term in section 3 of the Act.<sup>611</sup> The definition in section 224, however, deviates from the section 3 definition by excluding incumbent LECs.<sup>612</sup> In most places, section 224 uses the term "telecommunications carrier." In one critical place—the definition of a "pole attachment," the statute refers to "provider of telecommunications service."<sup>613</sup> Here, we explain why we decide to interpret section 224 to authorize the Commission to ensure that the rates, terms and conditions of incumbent LECs' pole attachments are just and reasonable, and why we believe that the definition of "pole attachment" leads to an interpretation of section 224(b) that permits the Commission to do so.

205. In implementing section 224, as amended by the 1996 Act, the Commission interpreted the exclusion of incumbent LECs from the term "telecommunications carrier" to mean that section 224 does not apply to attachment rates paid by incumbent LECs.<sup>614</sup> Although these decisions did not consider alternative interpretations of incumbent LECs' rights under section 224 in detail, the Commission's interpretation appears to have been based in part on incumbent LECs' status as pole owners and thus "utilities" under section 224,<sup>615</sup> and in part on the view that "Congress' intent" was to "promote competition by ensuring the availability of access to new telecommunications entrants."<sup>616</sup>

206. We find it appropriate to change the Commission's prior interpretation of section 224(b) with respect to incumbent LECs given the evidence in the record regarding current market realities. Over

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<sup>610</sup> For purposes of this Part, we use the term "telecommunications carrier" as it is defined in section 224(a)(5).

<sup>611</sup> 47 U.S.C. § 224(a)(5).

<sup>612</sup> *Id.*

<sup>613</sup> *Id.* § 224(a)(4).

<sup>614</sup> See, e.g., *Local Competition Order*, 11 FCC Rcd at 16059–60, 16103–04, paras. 1123 n.2734, 1231; *1998 Implementation Order*, 13 FCC Rcd at 6781, para. 5; *2001 Order on Reconsideration*, 16 FCC Rcd at 12106, para. 2 n.12.

<sup>615</sup> See, e.g., *1998 Implementation Order*, 13 FCC Rcd at 6781, para. 5 (noting that "for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier," and thus "the ILEC has no rights under Section 224 with respect to the poles of other utilities.").

<sup>616</sup> *1998 Implementation Order*, 13 FCC Rcd at 6781, para. 5 (citing S. Rep. No. 104-230).

time, aggregate incumbent LEC pole ownership has diminished relative to that of electric utilities. Today, incumbent LECs as a whole appear to own approximately 25-30 percent of poles and electric utilities appear to own approximately 65-70 percent of poles, compared to historical ownership levels that were closer to parity.<sup>617</sup> Thus, incumbent LECs often may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases.<sup>618</sup> Further, although we agree with the Commission's prior assessment that "Congress' intent" in section 224—and the 1996 Act more broadly—was to "promote competition," we believe this intent was not limited to entities that were "new telecommunications entrants" at the time of the 1996 Act.<sup>619</sup> The Commission has recognized that the incumbent LECs' historical monopoly over local telephone service has not always translated into marketplace power with respect to some new services they began to offer subsequent to the 1996 Act.<sup>620</sup>

207. In reviewing the Commission's prior interpretation of section 224, we note that even incumbent LECs acknowledge that they are excluded from the section 224 definition of "telecommunications carrier,"<sup>621</sup> and generally concede that they thus have no statutory right to

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<sup>617</sup> Qwest, for example, asserts that it co-owns some 970,000 poles, while it is a non-owning attacher on 1.4 million poles. Qwest Comments at 2. Frontier states that, for the 20 largest joint use agreements with investor-owned utilities in newly-acquired Frontier properties, Frontier is attached to 642,594 poles owned by other entities, while other utilities are attached to just 137,552 poles owned by Frontier. Letter from Michael D. Saperstein, Jr., Director of Federal Regulatory Affairs, Frontier Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, Attach. at 8 (filed Mar. 8, 2011) (Frontier Mar. 8, 2011 *Ex Parte* Letter). See also, e.g., AT&T Comments at 18; Mahanger Reply at 9-13; AT&T Reply at 9; Verizon Comments, Decl. of James Slavin and Steven R. Frisbie at para. 13 (Verizon Slavin/Frisbie Decl.); Letter from Jennie B. Chandra, Senior Counsel, Federal Policy, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 (filed Mar. 11, 2011) (Windstream Mar. 11, 2011 *Ex Parte* Letter); 1977 Senate Report at 13, reprinted in 1978 U.S.C.C.A.N. at 121 (noting that, at that time, "53 percent [of poles] are controlled by power utilities, public and private.").

<sup>618</sup> Standard economic theories of bargaining predict that each party will consider its best alternative to a negotiated agreement when negotiating. See, e.g., *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, MB Docket No. 10-56, Memorandum Opinion and Order, FCC 11-4 at para. 36 (rel. Jan. 20, 2011) (citing AVINASH DIXIT AND SUSAN SKEATH, *GAMES OF STRATEGY* 524-47 (1999); Kenneth Binmore, Ariel Rubinstein & Asher Wolinsky, *The Nash Bargaining Solution in Economic Modeling*, 17:2 RAND J. OF ECON., 176-188 (1986)). As a hypothetical illustration, if the electric company owned 90% of poles in an area and the incumbent LEC owned 10%, and if the best outside alternative for each party was deploying the remaining needed poles (and having the legal right to do so), the electric utility would face the cost of deploying 10% of poles, while the incumbent LEC would face the cost of deploying 90% of poles. As a result, the incumbent LEC would have less bargaining power than the electric utility. However, if there were less-costly alternatives for the incumbent LEC to pole deployment, or additional costs that the electric utility would need to consider under the best outside alternative, this would reduce the disparity in the relative bargaining power of the parties.

<sup>619</sup> *1998 Implementation Order*, 13 FCC Rcd at 6781, para. 5. We therefore reject the claims of some commenters that Congress did not intend section 224 to be used to promote competition by incumbent LECs. See, e.g., Alliance Mar. 31, 2011 *Ex Parte* Letter, Attach. at 3-6. Nor does our regulatory authority to ensure just and reasonable rates, terms and conditions when incumbent LECs attach to other utilities' poles preclude us from also regulating incumbent LECs as pole owners. See, e.g., *id.*

<sup>620</sup> See, e.g., *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007) (discussing the impact of exclusivity arrangements for multiple dwelling units on new entry by local exchange carriers, including incumbent LECs, into the provision of video services); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18474, para. 75 (2005) (observing that, at the time of the transaction, Verizon's effort to serve "medium-sized and large enterprise customers with national, multi-location operations" was "nascent").

<sup>621</sup> 47 U.S.C. § 224(a)(5) ("For purposes of this section, the term 'telecommunications carrier' (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.").

nondiscriminatory pole access under section 224(f)(1).<sup>622</sup> That is, they agree that because section 224(f)(1) requires utilities to provide nondiscriminatory access to “telecommunications carriers,” which exclude incumbent LECs, they have no statutory right of nondiscriminatory access to poles, ducts, conduits or rights-of-way under this provision of the Act.<sup>623</sup> We agree. They also contend, however, that sections 224(b)(1) and 224(a)(4) provide an independent right to reasonable rates, terms and conditions for any pole attachment by a *provider of telecommunications service*, and that the statute thus mandates the Commission to apply the “just and reasonable” standard to pole attachments for all such providers, including incumbent LECs.<sup>624</sup>

208. We are persuaded to revisit our prior conclusion,<sup>625</sup> and instead adopt a new interpretation of section 224(b). Specifically, we find that the Commission has authority to ensure that incumbent LECs’ attachments to other utilities’ poles are pursuant to rates, terms and conditions that are just and reasonable.<sup>626</sup> For one, this reflects the marketplace evidence discussed above. This also reflects the fact that actions to reduce input costs, such as pole rental rates, can expand opportunities for investment, especially in combination with other actions, which is particularly important given the up to 24 million Americans that do not have access to broadband today.<sup>627</sup> Under section 706 of the 1996 Act, Congress directed the Commission to “encourage the deployment . . . of advanced telecommunications capability to all Americans by utilizing, in a manner consistent with the public interest . . . measures that promote competition . . . or other regulatory methods that remove barriers to infrastructure investment.”<sup>628</sup> As noted above, in principle, the rates charged for pole access are likely to affect deployment decisions for all telecommunications carriers, including incumbent LECs.<sup>629</sup> In this regard, we note that incumbent

<sup>622</sup> See, e.g., USTelecom Comments at 5; Verizon *NPRM* Comments at 10; ITTA *NPRM* Reply at 4.

<sup>623</sup> 47 U.S.C. § 224(f)(1) (“A utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole . . .”). Although some commenters contend that incumbent LECs broadly lack a statutory right to access, USTelecom asserts that incumbent LECs do, however, have some access rights under section 224(b)(1). Compare, e.g., Alliance Mar. 31, 2011 *Ex Parte* Letter at 3, Attach. at 9–10 (citing Supreme Court precedent as confirming that cable operators possessed no general right of access under section 224(b)(1) and arguing that incumbent LECs may be denied access to poles) with, e.g., Letter from Glenn Reynolds, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 at 1 (filed Mar. 29, 2011) (arguing that incumbent LECs have some access rights pursuant to section 224(b)(1)); *Telephone Company-Cable Television Cross-Ownership Rules*, Further Notice of Inquiry and Notice of Proposed Rulemaking, CC Docket No. 87-266, 3 FCC Rcd 5849, 5854, para. 21 & n.16 (1988) (observing that “[s]ome limitations do exist on the ability of carriers to deny independent cable operators access to poles” and citing prior Commission decisions in that regard). As described below, a finding that incumbent LECs have statutory access rights is not necessary to conclude that incumbent LECs have the right to just and reasonable rates, terms and conditions governing their attachments to other utilities’ poles under section 224(b)(1). See *infra* para. 212. We therefore need not, and do not, resolve this argument here.

<sup>624</sup> See, e.g., *Pole Attachment Notice*, 22 FCC Rcd at 20204–06, paras. 23–25 (discussing incumbent LECs’ theory of statutory interpretation); AT&T Comments at 4–8; USTelecom Comments at 12–18; NTCA *et al.* Comments at 3; Verizon Comments at 5–10.

<sup>625</sup> The Commission has discretion to change its interpretation of the Act, so long as it acknowledges that it is doing so and provides a reasoned explanation for the change. See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810–11 (2009).

<sup>626</sup> As with the Commission’s other pole attachment regulations, our jurisdiction does not extend to states that have certified that they regulate pole attachments, see 47 U.S.C. § 224(c), nor do we have jurisdiction under section 224 over “any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.” 47 U.S.C. § 224(a)(1).

<sup>627</sup> See *id.* (citing *Sixth Broadband Deployment Report*, 25 FCC Rcd at 9574, para. 28).

<sup>628</sup> 47 U.S.C. § 1302(a).

<sup>629</sup> See *supra* Part V.B.

LECs estimate that, in aggregate, they annually pay pole attachment rates that are \$320 to \$350 million greater than they would pay at the cable rate.<sup>630</sup> Incumbent LECs identify five specific categories of consumer benefits arising from ensuring just and reasonable rates for incumbent LECs' attachments to other utilities' poles: (1) reduced demand on the universal service fund arising from reduced incumbent LEC costs; (2) automatic flow-through of cost reductions to the regulated rates of rate-of-return incumbent LECs; (3) use of cost savings to improve service and/or lower prices for broadband services in areas with competition; (4) increased broadband deployment in areas where incumbent LECs currently do not provide broadband due to the improved business case; and (5) a source of capital for expansion.<sup>631</sup> We expect these promised consumer benefits to occur, and we encourage incumbent LECs to provide data to the Commission on an ongoing basis demonstrating the extent to which these benefits are being realized. We would be concerned if these consumer benefits were not realized. We will continue to monitor the outcomes of this Order, and in the absence of evidence that expected benefits are being realized, we may, among other things, revisit our approach to this issue.<sup>632</sup>

209. As an initial matter, we conclude that neither the language or structure of section 224 precludes our finding that incumbent LECs are entitled to pole attachment rates, terms and conditions that are just and reasonable pursuant to section 224(b)(1). The Commission's authority to regulate the rates, terms and conditions of pole attachments by incumbent LECs derives principally from section 224(b) of the Act. In particular, section 224(b)(1) provides that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."<sup>633</sup> The statute defines the term "pole attachment," in turn, as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."<sup>634</sup> While the statute does not define the term "provider of telecommunications service" for the purpose of applying section 224(b)(1), it defines "telecommunications carrier," a term that is used in other subsections of the statute.<sup>635</sup>

210. Although section 224(a)(5) cites section 3 as a starting point for defining "telecommunications carrier," by excluding incumbent LECs, it deviates from that baseline, resulting in a definition that is unique to section 224. In addition, where Congress did not intend for the Commission to

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<sup>630</sup> Letter from Walter B. McCormick, Jr., USTelecom, to Hon. Julius Genachowski, Chairman, FCC, WC Docket No. 07-245, GN Docket No. 09-51 at 5 (filed Mar. 31, 2011) (USTelecom Mar. 31, 2011 *Ex Parte* Letter).

<sup>631</sup> See generally USTelecom Mar. 31, 2011 *Ex Parte* Letter. As discussed above, under economic and legal principles, a given service is not subsidized by other services if the rate for the service produces revenues that cover all of the costs caused by the service. See *supra* para. 184. We thus are not persuaded by the claims of some commenters that a possible reduction in pole attachment rates paid by an incumbent LEC inherently would result in a subsidy of the incumbent LECs' services. See, e.g., Alliance Mar. 31, 2011 *Ex Parte* Letter, Attach. at 11.

<sup>632</sup> This approach addresses concerns that pole rate reductions for incumbent LECs might not yield consumer benefits. See, e.g., Letter from Sean B. Cunningham and Mark S. Menezes, counsel for the Alliance for Fair Pole Attachment Rules, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 at 2, 10 (filed Mar. 17, 2011); Letter from Eric B. Langley, counsel for the Florida IOUs, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, Attach. at 9 (filed Mar. 10, 2011).

<sup>633</sup> 47 U.S.C. § 224(b)(1). In addition, section 224(b)(2) provides that "[t]he Commission shall prescribe by rule regulations to carry out the provisions of this section." 47 U.S.C. § 224(b)(2).

<sup>634</sup> *Id.* § 224(a)(4).

<sup>635</sup> See 47 U.S.C. § 224(a)(5). Section 224(a)(5) provides: "For purposes of [section 224], the term "telecommunications carrier" (as defined in section 3 of this Act) does not include any incumbent local exchange carrier as defined in section 251(h)." *Id.*

regulate rates, terms and conditions in a particular respect, it stated this clearly.<sup>636</sup> Section 224's departure from the definition in section 3, coupled with the fact that Congress could have expressly excluded attachments by incumbent LECs from the Commission's jurisdiction over rates, terms and conditions under section 224(b)(1), persuade us to interpret "provider of telecommunications service" as distinct from "telecommunications carrier" for purposes of section 224.

211. Interpreting these terms as distinct leads us to conclude that the definition of "pole attachment" includes pole attachments of incumbent LECs. As noted above, that definition refers to "any attachment by a . . . provider of telecommunications service."<sup>637</sup> Because incumbent LECs are "providers of telecommunications service," "pole attachment" as defined in section 224(a)(4) includes attachments of incumbent LECs. Moreover, because section 224(b) requires the Commission to "regulate the rates, terms, and conditions for *pole attachments*,"<sup>638</sup> under our revised reading the Commission has a statutory obligation to regulate the attachments of incumbent LECs. Particularly given the marketplace and other evidence discussed above,<sup>639</sup> we find such an interpretation appropriate.

212. Contrary to the assertions of some parties, we are not persuaded that the structure of section 224 counsels against interpreting "provider of telecommunications service" to encompass incumbent LECs. Specifically, some commenters observe that section 224(a)(5) defines "telecommunications carrier" by reference to section 3 of the Act, which in turn defines a "telecommunications carrier" as "any provider of telecommunications services . . . ." <sup>640</sup> These commenters thus argue that "telecommunications carrier" and "provider of telecommunications service" should be interpreted as synonymous in section 224,<sup>641</sup> as the Commission initially did. We disagree. For one, the absence of a statutory right to nondiscriminatory pole access for incumbent LECs under section 224(f) is not incompatible with the Commission's exercise of authority to ensure just and reasonable rates, terms and conditions in situations where incumbent LECs are able to obtain access to poles.<sup>642</sup> Indeed, a regime of regulated rates without a statutory right of access was in place for pole attachments by cable operators between 1978 (when section 224 was first adopted) and 1996 (when Congress first added a right to attach to section 224). Congress' decision not to grant incumbent LECs a general right of nondiscriminatory access to other utilities' poles under section 224(f) also could reflect its recognition of incumbent LECs' continued pole ownership. In particular, if Congress granted incumbent LECs both the statutory right to just and reasonable rates, terms and conditions on other utilities' poles and a general statutory right of nondiscriminatory access, incumbent LECs could rely on those rights to demand access to other utilities' poles on a regulated basis while leaving those utilities with little or no negotiating leverage to ensure just and reasonable rates, terms and conditions for their access to incumbent LECs' poles. By contrast, withholding a general statutory right of nondiscriminatory access under section 224(f) ensures the continued incentives of incumbent LECs to negotiate with other utilities with respect to access

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<sup>636</sup> See 47 U.S.C. § 224(a)(1) (excluding from the definition of "utility" subject to section 224 "any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State"); 47 U.S.C. § 224(c) (providing that the Commission has no jurisdiction under section 224 to regulate pole attachment matters in states that have certified that they regulate pole attachments).

<sup>637</sup> *Id.* § 224(a)(4).

<sup>638</sup> *Id.* § 224(b)(1).

<sup>639</sup> See *supra* paras. 206, 208.

<sup>640</sup> See, e.g., Coalition Comments at 139–40 (quoting 47 U.S.C. § 153(44)). See also, e.g., Alliance Reply at 81–87; Letter from Jeffrey L. Sheldon, Counsel for EEI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 at 1 (filed Mar. 4, 2011) (EEI Mar. 4, 2011 *Ex Parte* Letter).

<sup>641</sup> See *id.*

<sup>642</sup> See, e.g., Coalition Comments at 140.

to its poles, while also providing a mechanism to ensure that rates, terms and conditions ultimately are just and reasonable.<sup>643</sup>

213. Likewise, although sections 224(d) and (e) prescribe specific rate formulas for pole attachments by cable operators and telecommunications carriers, respectively, the existence of those provisions does not evince Congressional intent to prevent the Commission from adopting “just and reasonable” rates for incumbent LEC pole attachments pursuant to section 224(b)(1). As the Supreme Court observed in *NCTA v. Gulf Power*:

Congress did indeed prescribe two formulas for ‘just and reasonable’ rates in two specific categories; but nothing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed. It is true that specific statutory language should control more general language when there is a conflict between the two. Here, however, there is no conflict. The specific controls but only within its self-described scope.<sup>644</sup>

Thus, the fact that pole attachments by incumbent LECs are not within the “self-described scope” of section 224(d) or (e) does not preclude the Commission from ensuring that the rates for those attachments are just and reasonable under section 224(b).

## 2. Guidance Regarding Commission Review of Incumbent LEC Pole Attachment Complaints

214. Having found that section 224(b) enables the Commission to ensure that pole attachments by incumbent LECs are accorded just and reasonable rates, terms and conditions, we recognize the need to exercise that authority in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers. As we observed in the *Further Notice*, the issues related to rates for pole attachments by incumbent LECs raise complex questions, both with respect

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<sup>643</sup> Nor does this interpretation create an inconsistency with section 251(b)(4) of the Act, as some commenters allege. *See, e.g.*, Alliance Mar. 31, 2011 *Ex Parte* Letter, Attach. at 12–13. Section 251(b)(4) requires all LECs to “afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.” 47 U.S.C. § 251(b)(4). However, giving “deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4),” the Commission previously held that “incumbent LECs cannot use section 251(b)(4) as a means of gaining access to the facilities or property of a LEC.” *Local Competition Order*, 11 FCC Rcd at 16103–04, para. 1231. Our actions here do not change that result, and thus do not grant incumbent LECs an access right under section 251(b)(4) that does not exist under section 224. We likewise reject claims that the absence of a state certification process under section 224(c)(2) with respect to pole “access” (as opposed to rates, terms and conditions) means that those sets of rights are inseparable, or else the Commission could be preempted from regulating pole attachments in states that do not regulate access. *See, e.g.*, Alliance Mar. 31, 2011 *Ex Parte* Letter, Attach. at 13. The Commission’s implementation of section 224(c) expressly acknowledged that state regulation of pole access was distinct from state regulation of pole rates, terms and conditions, however. *Implementation of the Local Competition Provisions in the Telecommunications Act Of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, paras. 114–15 (1999). *Cf. Promotion of Competitive Networks et al.*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983, 23025, para. 93 n.239 (2000) (“We note that if it is shown in a complaint proceeding that a state does not regulate access to ducts or conduits within buildings, for example, that state’s regulation of pole attachments on public rights-of-way, and its certification to such regulation, would not defeat the Commission’s jurisdiction over access to ducts or conduits within buildings. In such a case, we would decide the complaint regarding in-building attachments, while continuing to respect the state’s authority over those pole attachments that it does regulate.”).

<sup>644</sup> *Gulf Power*, 534 U.S. at 335–36.

to potential remedies for incumbent LECs and the details of the complaint process itself.<sup>645</sup> These complexities can arise because, for example, incumbent LECs also own many poles and historically have obtained access to other utilities' poles within their incumbent LEC service territory through "joint use" or other agreements.<sup>646</sup> We therefore decline at this time to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis.<sup>647</sup> We do, however, provide certain guidance below regarding the Commission's approach to incumbent LEC pole attachment complaints.

215. *Evidence of Bargaining Power.* We recognize that not all incumbent LECs are similarly situated in terms of their bargaining position relative to other pole owners. For example, although there has been a general trend of reduced pole ownership by incumbent LECs' relative to other utilities, there is evidence that circumstances can vary considerably from location to location.<sup>648</sup> Where parties are in a position to achieve just and reasonable rates, terms and conditions through negotiation, we believe it generally is appropriate to defer to such negotiations.<sup>649</sup> Thus, in evaluating incumbent LEC pole attachment complaints, the Commission will consider the incumbent LEC's evidence that it is in an inferior bargaining position to the utility against which it has filed the complaint.<sup>650</sup>

216. *Existing vs. New Agreements.* The record reveals that incumbent LECs frequently have access to pole attachments pursuant to joint use agreements today.<sup>651</sup> Although some incumbent LECs

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<sup>645</sup> *Further Notice*, 25 FCC Rcd at 11925, paras. 143, 145–48.

<sup>646</sup> Outside of the carrier's incumbent LEC service territory, it would be subject to the pole attachment regulations applicable to a telecommunications carrier. See 47 U.S.C. § 224(a)(5) (excluding from the definition of "telecommunications carrier" for purposes of section 224 "any incumbent local exchange carrier as defined in section 251(h)"); 47 U.S.C. § 251(h)(1) (defining "incumbent local exchange carriers" in terms of their status with respect to a particular area).

<sup>647</sup> We are revising the Commission's pole attachment complaint rules to reflect the ability of incumbent LECs to file such pole attachment complaints. See *infra* App. A (discussing amendments to sections 1.1401 and 1.1403 and addition of new section 1.1424 of the Commission's rules). Under the Commission's pole attachment complaint rules, remedies for incumbent LECs would include: (1) termination of the unjust or unreasonable rate, term, or condition; (2) substitution in the contract of a just and reasonable rate, term, or condition; or (3) a refund or payment. See 47 CFR § 1.1410. We decline to apply our new interpretation of section 224 retroactively, and make clear that incumbent LECs only can get refunds of amounts paid subsequent to the effective date of this Order.

<sup>648</sup> Compare, e.g., Qwest Comments at 2; AT&T Comments at 18; Windstream Mar. 11, 2011 *Ex Parte* Letter with, e.g., Florida IOUs Reply at 30; Alabama Power *et al.* *NPRM* Reply at 14. See also *supra* note 618 (discussing relative bargaining power).

<sup>649</sup> Cf. *Orloff v. Vodafone Airtouch*, Memorandum Opinion and Order, File No. EB-01-MD-009, 17 FCC Rcd 8987 (2002) (generally deferring to the wireless marketplace to ensure just and reasonable and not unjustly or unreasonably discriminatory rates, terms and conditions).

<sup>650</sup> See *supra* note 618 (discussing considerations relevant to evaluating bargaining power).

<sup>651</sup> Although joint use agreements can vary from utility to utility, they tend to differ from cable and telecommunications carrier license agreements with pole owners in several ways. See, e.g., Coalition Comments at 131–38; Oncor *NPRM* Comments at 25–26. Commonly, joint use agreements are structured as cost-sharing arrangements, with each party agreeing to own a certain percentage of the joint use poles. See, e.g., Florida IOUs Reply at 27–28. This percentage typically is 40–50% for the incumbent LEC and 50–60% for the electric utility, and generally reflects the relative ratio of pole ownership that existed at the time these agreements originally were negotiated. See, e.g., Mahanger Reply at 23–24; see also Oncor Comments at 66. No money changes hands under these agreements if each party owns its specified percentage of joint use poles. See, e.g., Florida IOUs Reply at 27–28. A joint use agreement typically also sets forth a pole rental rate for the incumbent LEC and the electric utility that equals a percentage of the annual cost of a joint use pole. See, e.g., Mahanger Reply at 3. The incumbent LEC rate typically is 40–50% of this cost, and the electric utility rate is typically 50–60%. See, e.g., Mahanger Reply at 21–23. When pole ownership deviates from the agreement, the party that owns less than the specified percentage (continued...)

express concerns about existing joint use agreements,<sup>652</sup> these long-standing agreements generally were entered into at a time when incumbent LECs concede they were in a more balanced negotiating position with electric utilities, at least based on relative pole ownership.<sup>653</sup> As explained above, we question the need to second guess the negotiated resolution of arrangements entered into by parties with relatively equivalent bargaining power.<sup>654</sup> Consistent with the foregoing, the Commission is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable. The record also indicates, however, that both incumbent LECs and other utilities have the ability to terminate existing agreements and seek new arrangements, and that, at times, each type of entity has sought to do so.<sup>655</sup> To

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typically pays the other party an amount based on a per pole rate. Mahanger Reply at 21–24. That amount varies depending upon how far the number of poles owned by that party falls below what is specified under the joint use agreement. *See, e.g.*, Florida IOUs Reply at 27–28.

<sup>652</sup> Based on marketplace trends incumbent LECs have reported concerns about continuing to operate under these joint use agreements. In the aggregate, incumbent LECs today appear to own about 25–30% of the poles and use substantially less of the space on jointly used poles than do electric utilities. *See, e.g.*, AT&T Comments at 18; AT&T *NPRM* Comments, Decl. of Veronica Mahanger MacPhee at 4–13. Some incumbent LECs own even fewer poles relative to electric utilities in their operating areas. *See, e.g.*, Frontier Mar. 8, 2011 *Ex Parte* Letter, Attach. at 8. Incumbent LECs argue that the per-pole rate they pay typically reflects use of 40–50% of space on a pole, which they assert is a carryover from when joint agreements were originally negotiated, although they need and use less space than that today. *Id.* As a result of these changes, many incumbent LECs contend that their rental payments are unreasonably increasing. *See, e.g.*, Mahanger Reply at 21–25.

<sup>653</sup> *See, e.g.*, Verizon Slavin/Frisbie Decl. at paras. 13–14; AT&T Reply at 9; Frontier Mar. 8, 2011 *Ex Parte* Letter at 1.

<sup>654</sup> *See supra* para. 215. Nothing in the record suggests that existing agreements between incumbent LECs and electric utilities were entered into with the expectation that their provisions would be subject to Commission review. Moreover, some commenters contend that joint use agreements give incumbent LECs advantages that offset any increased rates they might pay for pole access in certain circumstances. *See, e.g.*, Oncor *NPRM* Comments at 25; Coalition Comments at 146; Comcast Reply at 24–26. As examples of incumbent LEC advantages, these parties cite: “Paying significantly lower make-ready costs; No advance approval to make attachments; No post-attachment inspection costs; Rights-of-way often obtained by electric company; Guaranteed space on the pole; Preferential location on pole; No relocation and rearrangement costs; and Numerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed.” Comcast Reply at 25. Electric utilities also contend that existing joint use arrangements—in contrast to cable or telecommunications carrier pole lease agreements—reflect a decades-old contractual responsibility of incumbent LECs to share in infrastructure costs and also account for the fact that incumbent LECs still own many poles today. *See, e.g.*, Coalition Comments at 130–31; Florida IOUs Reply at 30–31. A failure to weigh, and account for, the different rights and responsibilities in joint use agreement could lead to marketplace distortions. We therefore reject arguments that rates for pole attachments by incumbent LECs should always be identical to those of telecommunications carriers or cable operators. *See, e.g.*, Letter from Glenn Reynolds, Vice President-Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 (filed Mar. 31, 2011). As discussed below, incumbent LECs have the opportunity to demonstrate that they are comparably situated to telecommunications carriers or cable operators in a particular instance.

<sup>655</sup> *See, e.g.*, AT&T Reply at 14; Florida IOU Reply at 33; Verizon Comments at 20; Windstream Mar. 11, 2011 *Ex Parte* Letter. Although incumbent LECs cite the potential threat of having to remove attachments from electric utility poles if an agreement is terminated, *see, e.g.*, AT&T Reply at 14, we believe that electric utilities are unlikely to pursue such actions given the likelihood that incumbent LECs would, in response, deny electric utilities access to their poles. *See, e.g.*, Coalition Reply at 36 (arguing that Coalition members “are completely dependent upon ILECs for access to ILEC-owned poles, no matter how many poles they may own”); Coalition Comments at 130 (“electric utilities are vitally dependent upon ILECs for access to a great number of ILEC poles”); *see also supra* para. 212. In addition, to the extent that an incumbent LEC can show that it was compelled to sign a new pole attachment agreement with rates, terms, or conditions that it contends are unjust or unreasonable simply to maintain pole access as a result of a utility’s unequal bargaining power, *see, e.g.*, CenturyTel *NPRM* Reply at 11, we note that the “sign and sue” rule will apply here in a manner similar to its application in the context of pole attachment agreements (continued...)

the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement, the Commission can consider that as appropriate in a complaint proceeding. The Commission will review complaints regarding agreements between incumbent LECs and other utilities entered into following the adoption of this Order based on the totality of those agreements,<sup>656</sup> consistent with the additional guidance we offer below.

217. *Reference to Other Agreements.* As discussed above, the historical joint use agreements between incumbent LECs and other utilities implicate rights and responsibilities that differ from those in typical pole lease agreements between utilities and telecommunications carriers or cable operators.<sup>657</sup> Under any new agreements, to the extent that the incumbent LEC demonstrates that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators, we believe it will be appropriate to use the rate of the comparable attacher as the “just and reasonable” rate for purposes of section 224(b).<sup>658</sup> As discussed above, just and reasonable pole attachments rates for incumbent LECs are not bound by the formulas in sections 224(d) or (e). Where incumbent LECs are attaching to other utilities’ poles on terms and conditions that are comparable to those that apply to a telecommunications carrier or a cable operator—which generally will be paying a rate equal or similar to the cable rate under our rules—competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider (whether the telecommunications carrier or the cable operator).<sup>659</sup> In this regard, an incumbent LEC might demonstrate that it obtains access to poles on terms and conditions that are the same as a telecommunications carrier or cable operator. Even if the terms and conditions of access are not the same, however, incumbent LECs may seek to demonstrate that the arrangement at issue does not provide a material advantage to incumbent LECs relative to cable operators or telecommunications carriers. To facilitate this analysis, we modify our pole attachment complaint rules to require that incumbent LECs provide, in a complaint proceeding, any agreements between the defendant utility and a third party attacher with whom the incumbent LEC claims it is similarly situated (or that the other utility do so if necessary).<sup>660</sup>

218. By contrast, if a new pole attachment agreement between an incumbent LEC and a pole owner includes provisions that materially advantage the incumbent LEC *vis a vis* a telecommunications carrier or cable operator, we believe that a different rate should apply. Just as considerations of competitive neutrality counsel in favor of similar treatment of similarly situated providers, so too should

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between pole owners and either cable operators or telecommunications carriers. *See generally supra* Part IV.E (describing and declining to modify the “sign and sue” rule).

<sup>656</sup> Cf. 1977 Senate Report at 20, *reprinted in* 1978 U.S.C.C.A.N. at 129 (“[T]he fairness of any term or condition of a CATV pole-leasing agreement will have to be judged in relation to other contract provisions, prevailing practices in the industries involved, and the particular pole rate charges.”).

<sup>657</sup> *See supra* para. 216 and note 654.

<sup>658</sup> This would be somewhat similar to certain proposals that would allow incumbent LECs to “opt in” to pole attachment agreements of telecommunications carriers or cable operators in their entirety. *See Further Notice*, 25 FCC Rcd at 11925, para. 147 (describing proposal). We note that, to the extent that access to poles is a term of these agreements, allowing incumbent LECs to simply “opt in” to such agreements could be at odds with the fact that section 224(f) does not grant incumbent LECs a general right of nondiscriminatory access to poles. Nevertheless, we do not preclude incumbent LECs and other utilities from electing such an approach.

<sup>659</sup> Likewise, an incumbent LEC may seek the same *term* or *condition* that applies to a telecommunications carrier or cable operator upon a showing that it otherwise is comparably situated to that provider.

<sup>660</sup> *See infra* App. A (adopting, as part of new Commission rule 1.1424, the requirement that “In a complaint where an incumbent local exchange carrier or an association of incumbent local exchange carriers claims comparability to the pole attachment agreements of a telecommunications carrier or cable televisions system attacher, and it is not able to file such agreements, the respondent shall have the duty to file such agreements. Confidential information contained in any such filing shall be subject to the terms of an appropriate protective order.”).

differently situated providers be treated differently. In particular, we find it reasonable to look to the pre-existing, high-end telecom rate as a reference point in complaint proceedings involving a pole owner and an incumbent LEC attacher that is not similarly situated, or has failed to show that it is similarly situated to a cable or telecommunications attacher.<sup>661</sup> As a higher rate than the regulated rate available to telecommunications carriers and cable operators, it helps account for particular arrangements that provide net advantages to incumbent LECs relative to cable operators or telecommunications carriers. We find it prudent to identify a specific rate to be used as a reference point in these circumstances because it will enable better informed pole attachment negotiations between incumbent LECs and electric utilities. We also believe it will reduce the number of disputes for which Commission resolution is required by providing parties clearer expectations regarding the potential outcomes of formal complaints, thus narrowing the scope of the conflict. For example, we would be skeptical of a complaint by an incumbent LEC seeking a proportionately lower rate to attach to an electric utility's poles than the rate the incumbent LEC is charging the electric utility to attach to its poles.<sup>662</sup> Further, we find it more administrable to look to this rate, which historically has been used in the marketplace, than to attempt to develop in this Order an entirely new rate for this context.

219. We also recognize that incumbent LECs generally are pole owners themselves and, like electric utilities, have agreements governing access to its poles. As appropriate, in evaluating an incumbent LEC's complaint, the Commission may also consider the rates, terms and conditions that the incumbent LEC offers to the electric utility<sup>663</sup> or other attachers for access to the incumbent LEC's poles, including whether they are more or less favorable than the rates, terms and conditions the incumbent LEC is seeking. Further, evidence that a term or condition was contained in the parties' prior joint use agreement will carry significant weight in the Commission's assessment of whether a refusal to agree to a substantially different term or condition regarding the same subject in a new agreement is unreasonable.

220. *Other Fora for Dispute Resolution.* Some electric utilities and other commenters have observed that certain state commissions might provide a forum for resolving incumbent LEC-electric utility pole attachment disputes.<sup>664</sup> We do not preclude parties from electing to pursue complaints before

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<sup>661</sup> As discussed above, both the 2007 *Pole Attachment Notice* and the 2010 *Further Notice* sought comment on the appropriate regulated rate for incumbent LECs, including potentially the pre-existing (*i.e.*, high-end) telecom rate. *See supra* paras. 200–201. The 2010 *Further Notice* also sought comment on whether the appropriate remedy for an incumbent LEC should reflect the extent to which it is or is not similarly situated to other attachers with respect to the terms and conditions of access. *Further Notice*, 25 FCC Rcd at 11925–27, paras. 145–48. Comments in response to these notices also cited the pre-existing telecom rate as a possible relevant reference point for evaluating the reasonableness of pole attachment rates paid by incumbent LECs. *See, e.g., Further Notice*, 25 FCC Rcd at 11913–14, para. 119 (describing USTelecom's proposal that the Commission establish a rate approximately equal to the pre-existing urban telecom rate as the just and reasonable rate for incumbent LECs (and other attachers)); Verizon Comments at 3 (comparing the rates it currently pays to both the cable rate and the pre-existing telecom rate); AT&T Comments at 2 (same); Verizon Comments (filed Sept. 24, 2009) at 3 (observing that “because there is no default rate formula for attachments by ILECs” their rate “are generally significantly higher than the rates that nonincumbent carriers and cable television systems pay”); ITTA *NPRM* Comments at 5 (arguing for the Commission to revise its rules to provide that the pre-existing telecom rate is the default rate for incumbent LECs); *see also* United States Telecom Association Petition for Rulemaking, RM-11293 at 17–81 (filed Oct. 11, 2005) (advocating the use of the pre-existing telecom rate formula).

<sup>662</sup> We believe that a just and reasonable rate in such circumstances would be the same proportionate rate charged the electric utility, given the incumbent LEC's relative usage of the pole (such as the same rate per foot of occupied space).

<sup>663</sup> *See, e.g.,* EEI/UTC *NPRM* Comments at 48–49 (expressing concern about electric utilities' inability to file complaints with the Commission to ensure just and reasonable rates, terms and conditions for attachments to incumbent LECs' poles); Alliance Mar. 31, 2011 *Ex Parte* Letter, Attach. at 10 (same).

<sup>664</sup> *See, e.g.,* Comcast Comments at 51–52; Alliance Jan. 27, 2011 *Ex Parte* Letter at 2–3.

state commissions, rather than before the Commission.<sup>665</sup> Section 224 ensures incumbent LECs of appropriate Commission oversight of their pole attachments, however, and we therefore do not require incumbent LECs to pursue relief in state fora before filing a complaint with the Commission.

## VI. CLARIFICATION AND RECONSIDERATION OF THE 2010 ORDER

221. In the *2010 Order*, the Commission clarified that cable operators and telecommunications carriers are entitled to use space- and cost-saving techniques, such as boxing and bracketing, consistent with the individual pole owners' use of those techniques.<sup>666</sup> If a utility chooses to allow boxing and bracketing in some circumstances but not others, the Commission explained, the limiting circumstances must be clear, objective, and applied equally to the utility and attaching entity.<sup>667</sup> The Commission rejected the argument that this conclusion is inconsistent with section 224(f)(2) of the Act, which allows electric utilities to deny access where there is "insufficient capacity."<sup>668</sup> It also sought comment on whether a utility should be allowed to prohibit boxing or bracketing going forward if it has used or allowed them in the past, and on how standards should apply when a pole is jointly used or owned.<sup>669</sup>

222. On September 2, 2010, various electric utilities and cable providers filed petitions asking the Commission to clarify or reconsider parts of the *2010 Order* concerning the nondiscriminatory use of attachment techniques.<sup>670</sup> On September 16, 2010, the Commission sought comment on these petitions.<sup>671</sup>

223. The Coalition of Concerned Utilities (the Coalition) asks the Commission to clarify that (1) an electric utility's use of boxing, brackets, or any other attachment technique for facilities in the electric space on a pole does not obligate the utility pole owner to allow the same attachment technique to be used for communications attachments; (2) going forward, a pole owner is free to impose new boxing and extension arm requirements regardless of what it may have allowed in the past; and (3) for poles that are jointly owned by an incumbent LEC and an electric utility, each joint owner is permitted to limit the extent to which boxing, bracketing, and other attachment techniques are permitted on the poles.<sup>672</sup> The Coalition argues that a utility's use of boxing, bracketing, and other attachment technique for facilities in

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<sup>665</sup> Insofar as electric utilities cite state commissions as a viable forum for dispute resolution, *see, e.g.*, Alliance Jan. 27, 2011 *Ex Parte* Letter at 2–3, it appears that they likewise could avail themselves of such a forum if faced with unjust or unreasonable rates, terms and conditions for access to incumbent LECs' poles.

<sup>666</sup> *2010 Order*, 25 FCC Rcd at 11869, para. 9.

<sup>667</sup> *Id.* at 11871, para. 13.

<sup>668</sup> *Id.* at 11871–72, para. 14.

<sup>669</sup> *Id.* at 11896–97, para. 74.

<sup>670</sup> While one filing is styled as a "petition for reconsideration" and the other three are styled as "petitions for clarification or reconsideration," we treat each as a petition for reconsideration filed under section 1.429 of our rules. *See* Coalition of Concerned Utilities, Petition for Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sep. 2, 2010) (Coalition Petition); Florida Investor-Owned Electric Utilities, Petition for Reconsideration and Request for Clarification, GN Docket No. 09-51 (filed Sep. 2, 2009) (Florida IOU Petition); Oncor Electric Delivery Company LLC, Petition for Reconsideration and Request for Clarification, WC Docket No. 07-245; GN Docket No. 09-51 (filed Sep. 2, 2010); Alabama Cable Telecommunications Ass'n, Bresnan Communications, Broadband Cable Ass'n of Pennsylvania, Cable America Corp., Cable Television Ass'n of Georgia, Florida Cable Telecommunications, Inc., MediaCom Communications Corp., New England Cable and Telecommunications Ass'n, Ohio Cable Telecommunications Ass'n, Oregon Cable Telecommunications Ass'n, and South Carolina Cable Television Ass'n, Petition for Reconsideration or Clarification, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sep. 2, 2010) (Cable Providers Petition); *see also 2010 Order*, 25 FCC Rcd at 11869–73, paras. 8–16.

<sup>671</sup> *Comments Sought on Petitions for Reconsideration of Pole Attachments Order*, WC Docket No. 07-245, GN Docket No. 09-51, Public Notice, 25 FCC Rcd 13173 (WCB 2010).

<sup>672</sup> Coalition Petition at 2–3.

the electric space does not obligate it to allow the same attachment technique to be used for communications attachments.<sup>673</sup> It also asserts that utilities should be able to modify their policies with respect to attachment techniques provided the new policy is applied in a nondiscriminatory manner going forward, and that each owner should be permitted to establish requirements or limitations on attachment techniques on jointly owned poles.<sup>674</sup>

224. The Florida Investor-Owned Electric Utilities (Florida IOUs) ask the Commission to clarify that (1) an electric utility's duty to allow boxing, bracketing, and similar techniques is not affected by (a) electric supply construction configurations within the supply space, or (b) the use of boxing, bracketing, and other similar techniques for purposes other than "space and cost-saving"; and (2) the statute only requires accommodation of a new attachment via rearrangement or space-saving techniques within the communications space, and does not require rearrangement or use of space-saving techniques for electric facilities in the supply space.<sup>675</sup> The Florida IOUs maintain that "comparable" circumstances should be limited to where the utility uses a practice for its own facility in the communications space or has permitted other attachers to use the technique as a means of cost- and space-saving.<sup>676</sup> They also argue that requiring a utility to perform make-ready in the electric space would misconstrue the scope of the "insufficient capacity" exception, conflate the separate exceptions to nondiscriminatory access by defining "insufficient capacity" contrary to the legislative intent of section 224, and conflict with the Commission's earlier findings.

225. Oncor Electric Delivery Company LLC (Oncor) joins and adopts the arguments set forth in both the Coalition's petition and the Florida IOUs' petition.<sup>677</sup> Oncor also argues that the Commission lacks authority to adopt any of the rules set forth in the *2010 Order*.<sup>678</sup>

226. The Alabama Cable Telecommunications Association, Bresnan Communications, Broadband Cable Association of Pennsylvania, Cable America Corp., Cable Television Association of Georgia, Florida Cable Telecommunications, Inc., MediaCom Communications Corp., New England Cable and Telecommunications Association, Ohio Cable Telecommunications Association, Oregon Cable Telecommunications Association, and South Carolina Cable Television Association (the Cable Providers) ask the Commission to clarify that pole owners may not refuse to replace or change out an existing pole with a taller replacement pole where a taller pole is needed to accommodate existing or prospective attachers.<sup>679</sup> Because this issue is beyond the scope of the *2010 Order*, we dismiss the Cable Providers' request as an improperly filed petition for reconsideration.<sup>680</sup> While the *2010 Order* may have alluded to pole replacement in discussing our findings on attachment techniques, the Commission made no findings in that Order relative to pole replacement.<sup>681</sup> Thus, the *2010 Order* provides no basis upon which to reconsider (or clarify) a utility's obligation to perform pole change-outs, and there is no record foundation for making the clarification sought by the Cable Providers.

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<sup>673</sup> *Id.* at 3–4.

<sup>674</sup> *Id.* at 4–5.

<sup>675</sup> Florida IOUs Petition at 2–3.

<sup>676</sup> *Id.* at 4–11.

<sup>677</sup> Oncor Petition at 1.

<sup>678</sup> *Id.*

<sup>679</sup> Cable Providers Petition at 2.

<sup>680</sup> See 47 C.F.R. § 1.429; *2010 Order*, 25 FCC Rcd at 11869–73, paras. 8–16.

<sup>681</sup> See *2010 Order*, 25 FCC Rcd at 11869–73, paras. 8–16.

### A. Prospective Policies

227. We clarify that a utility may not simply prohibit an attacher from using boxing, bracketing, or any other attachment technique on a going forward basis where the utility, at the time of an attacher's request, employs such techniques itself.<sup>682</sup> As Fibertech points out, even a policy that is equally applied prospectively is discriminatory in the sense that it disadvantages new attachers.<sup>683</sup> Thus, the relevant standards for purposes of determining a utility's "existing practices" are those that a utility applies at the time of an attacher's request to use a particular attachment technique—not the standards that a utility wishes to apply going forward. 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.

### B. Joint Ownership

228. We also clarify that, where a pole is jointly owned and the owners have adopted different standards regarding the use of boxing, bracketing, or other attachment techniques, the joint owners may apply the more restrictive standards.<sup>684</sup> For instance, if an electric utility and an incumbent LEC jointly own a pole but have divergent standards regarding the use of boxing, they may refuse to allow an attacher to box in a situation where boxing would be allowed by one utility's standards but not the other's. We disagree with Fibertech that permitting application of the more restrictive standard will allow joint pole owners to "double team" attachers by demanding compliance with one set of standards initially and then a different set later.<sup>685</sup> In order to avoid a claim that their terms and conditions for access are unjust, unreasonable or discriminatory, joint pole owners should settle on and apply a single set of standards—not different sets at different times.<sup>686</sup>

### C. Similar Circumstances and the Electric Space

229. At the Coalition's request, we clarify that an electric utility's use of a particular attachment technique for facilities in the electric space does not obligate the utility to allow the same technique to be used by attachers in the communications space.<sup>687</sup> We likewise clarify, in response to the Florida IOUs' request, that the existence of boxing and bracketing configurations in the electric space do not trigger an attacher's right to use boxing and bracketing in the communications space.<sup>688</sup> The *2010 Order* specified that attachers are entitled to use the same techniques that the utility itself uses in similar circumstances,<sup>689</sup> and we agree with the petitioners that the above situations do not involve similar circumstances.<sup>690</sup> For instance, boxing and bracketing in the communications space can limit the use of climbing as a means of maintenance and repair, and also complicate pole change out.<sup>691</sup>

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<sup>682</sup> See *id.* at 11896–97, para. 74; Coalition Petition at 2–3.

<sup>683</sup> Fibertech Coalition Petition Comments at 9–10.

<sup>684</sup> See *2010 Order*, 25 FCC Rcd at 11896–97, para. 74.

<sup>685</sup> Fibertech Comments in re Coalition Petition at 11–12.

<sup>686</sup> See *supra* Part III.D.

<sup>687</sup> Coalition Petition at 3.

<sup>688</sup> Florida IOUs Petition at 2.

<sup>689</sup> See *2010 Order*, 25 FCC Rcd at 11869, para. 9.

<sup>690</sup> See Coalition Petition at 3–4; Florida IOUs Petition at 7–8.

<sup>691</sup> See Coalition Petition at 3–4; Florida IOUs Petition at 7–8.

230. We disagree with the petitioners, however, that the nondiscrimination requirement in section 224(f)(1) applies only to the extent that a pole owner has allowed itself or others to use an attachment technique in the communications space of a pole.<sup>692</sup> As explained in further detail below, the Act does not limit a utility's nondiscrimination obligations to activities that take place in the communications space.<sup>693</sup> Thus, while an electric utility's use of an attachment technique in the electric space might not obligate it to permit use of such technique in the communications space, its use of an attachment technique (like boxing and bracketing) in the electric space may, in fact, obligate it to allow use of that technique in the electric space. The salient issue is whether the attacher's use of a particular technique is consistent with the utility's, not whether its use is consistent with the utility's in the communication space.

#### D. Insufficient Capacity and the Electric Space

231. We deny the Florida IOUs' request to find that a pole has "insufficient capacity" if an electric utility must rearrange its electric facilities to accommodate a new attacher.<sup>694</sup> As explained in the *2010 Order*, a pole does not have insufficient capacity where a request for attachment could be accommodated using traditional methods of attachment.<sup>695</sup> Rearrangement of facilities on a pole is one of these methods,<sup>696</sup> and nothing in the statute suggests that, for purposes of gauging capacity, rearrangement of facilities in the electric space should be treated differently from rearrangement of facilities in the communications space.<sup>697</sup> Thus, where rearrangement of a pole's facilities—whether in the communications space or the electric space—can accommodate an attachment, there is not "insufficient capacity" under section 224(f)(2).

232. Contrary to the Florida IOUs' assertions, this holding does not "repeat[]—almost verbatim—the error found by the Eleventh Circuit in *Southern*."<sup>698</sup> In *Southern Co.*, the Eleventh Circuit found that the Commission had failed to give effect to the term "insufficient capacity" by requiring utilities to expand capacity to accommodate requests for attachment.<sup>699</sup> Specifically, "[w]hen it is agreed that capacity is insufficient," the court explained, "there is no obligation to provide third parties with access to that particular 'pole, duct, conduit, or right-of-way.'"<sup>700</sup> Here, however, we recognize that a utility may deny access where a pole's capacity is insufficient to accommodate a proposed attachment, but find that capacity is not insufficient where a request can be accommodated using traditional methods of attachment.<sup>701</sup> We do not equate capacity expansion with facility rearrangement in existing space.

233. The Florida IOUs' other argument, that this holding improperly conflates the separate exceptions to nondiscriminatory access, is also unpersuasive. According to the Florida IOUs, the Commission is combining the "insufficient capacity" exception with the "safety, reliability, and generally applicable engineering purposes" exceptions, even though the statute sets them out separately.<sup>702</sup> We

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<sup>692</sup> See Coalition Petition at 2; Florida IOUs Petition at 9.

<sup>693</sup> See *infra* para. 231.

<sup>694</sup> See Florida IOUs Petition at 13.

<sup>695</sup> *2010 Order*, 25 FCC Rcd at 11871–73, paras. 14–16.

<sup>696</sup> See *id.*

<sup>697</sup> See 47 U.S.C. § 224; see also Florida IOUs Petition Comments at 5–6.

<sup>698</sup> Florida IOUs Petition at 18.

<sup>699</sup> *Southern*, 293 F.3d at 1346.

<sup>700</sup> *Id.* at 1347.

<sup>701</sup> *2010 Order*, 25 FCC Rcd at 11871–73, paras. 14–16.

<sup>702</sup> Florida IOUs Petition at 18.

disagree. Under the Commission’s reading, there are situations where the insufficient capacity exception—and only the insufficient capacity exception—allows a utility to deny a request for access.<sup>703</sup>

234. Additionally, we disagree with the Florida IOUs that the Commission’s construction of “insufficient capacity” contradicts prior Commission interpretations of the phrase.<sup>704</sup> As the *2010 Order* explains, “the term ‘capacity expansion’ does not appear in the relevant provisions of the Act or our rules, so the Commission has discretion to reasonably construe that term in interpreting section 224(f)(2).”<sup>705</sup> The relevant issue in determining whether a pole has “insufficient capacity,” is whether a utility could accommodate a new attachment on a pole by using techniques that the utility employs in its own operations.<sup>706</sup> To the extent the Commission’s prior statements concerning “capacity expansion” can be read as inconsistent with this finding,<sup>707</sup> we have disavowed those statements and clarify that capacity is not “insufficient” for purposes of section 224(f)(2) where a utility can accommodate new facilities on a pole by using attachment methods that the utility itself employs.<sup>708</sup>

#### E. Space- and Cost-Saving

235. The Florida IOUs argue that section 224(f)(2) allows an electric utility to deny use of a particular attachment technique when the utility itself has not used or authorized that technique as a means of saving both space and cost.<sup>709</sup> We disagree that 224(f)(2) is so limited. We find that the Florida IOUs’ restrictive interpretation has no basis in the text of section 224 and would enable a utility to refuse an attachers use of a particular attachment technique in situations where the utility itself uses the technique or authorizes its use by third parties. If a utility uses bracketing as a means of saving cost (but not space) in a particular type of situation, for instance, it must allow attachers also to use bracketing. But under the Florida IOUs’ formulation, the utility would have no duty to do so.

236. We reiterate, however, that to the extent a utility uses or allows a certain attachment technique in one type of circumstance, it is not obligated to allow the same technique in any type of circumstance. As the Commission explained in the *2010 Order*, a utility may limit the circumstances in which a particular technique can be used so long as its standards are “clear, objective, and applied equally to both the utility and the attaching entity.”<sup>710</sup> Thus, the Florida IOUs’ professed concern, that allowing a technique like bracketing in “rare situations” will “open-up poles to widespread use [of it],” is unfounded.<sup>711</sup>

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<sup>703</sup> See, e.g., *2010 Order*, 25 FCC Rcd at 11871–73, paras. 14-16; *Southern*, 293 F.3d at 1346–47.

<sup>704</sup> Florida IOUs Petition at 20.

<sup>705</sup> *2010 Order*, 25 FCC Rcd at 11872, n.56.

<sup>706</sup> *Id.*

<sup>707</sup> Although some of the Commission’s past statements might suggest that a pole’s capacity “increases” or “expands” when facilities are rearranged, others suggest the opposite. Compare, e.g., *Local Competition Order*, 11 FCC Rcd at 16075, para. 1161 (suggesting that rearranging existing facilities “maximize[es] usable capacity”) with *Local Competition Order*, 11 FCC Rcd at 16076, para. 1163 (suggesting that rearranging existing facilities “increases capacity”).

<sup>708</sup> *Id.* Generally, an agency may depart from a prior decision if it acknowledges that it is doing so and provides a reasonable explanation for the change. See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). While the *2010 Order* referred to statements in the *Local Competition Order* when referring to disavowal, we now clarify that this extends also to statements in the *Local Competition Order on Reconsideration*.

<sup>709</sup> See Florida IOUs Petition at 3, 9–10.

<sup>710</sup> See *2010 Order*, 25 FCC Rcd at 11870, para. 11.

<sup>711</sup> Florida IOUs Petition at 10, n. 25.

## VII. PROCEDURAL MATTERS

### A. Paperwork Reduction Act Analysis

237. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements adopted in this Order.

### B. Regulatory Flexibility Analysis

238. As required by the Regulatory Flexibility Act (RFA),<sup>712</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Pole Attachment Order and Further Notice*.<sup>713</sup> The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *Pole Attachment Order and Further Notice*, including comments on the IRFA. Pursuant to the RFA, a Final Regulatory Flexibility Analysis (FRFA) is set forth in Appendix B.

### C. Congressional Review Act

239. The Commission will send a copy of the Report and Order and Order on Reconsideration, including the FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>714</sup>

### D. Accessible Formats

240. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CARTS, etc.) by e-mail: [FCC504@fcc.gov](mailto:FCC504@fcc.gov); phone: (202) 418-0530 (voice), (202) 418-0432 (TTY).

## VIII. ORDERING CLAUSES

241. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 4(j), 224, 251(b)(4), and 303, of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 224, 251(b)(4), 303(r), 1302, this Report and Order and Order on Reconsideration IS ADOPTED.

242. IT IS FURTHER ORDERED that Part 1 of the Commission's rules IS AMENDED as set forth in Appendix A.

243. IT IS FURTHER ORDERED that, pursuant to sections 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR §§ 1.4(b)(1), 1.103(a), this Report and Order and Order on Reconsideration SHALL BE EFFECTIVE 30 days after publication of a summary in the Federal Register, except for the information collection requirements contained in the Report and Order, which will become effective upon OMB approval.

244. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order and Order on

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<sup>712</sup> See 5 U.S.C. § 603.

<sup>713</sup> See *Further Notice*, 25 FCC Rcd at 11939-57 (App. D).

<sup>714</sup> See 5 U.S.C. § 801(a)(1)(A).

Reconsideration, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

245. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, that the Petition for Reconsideration and Request for Clarification filed by the Florida Investor-Owned Utilities is GRANTED to the extent indicated herein, and otherwise is DENIED.

246. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, that the Petition for Reconsideration filed by the Coalition of Concerned Utilities is GRANTED to the extent indicated herein, and otherwise is DENIED.

247. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, that the Petition for Reconsideration and Request for Clarification filed by the Oncor Electric Delivery Company is GRANTED to the extent indicated herein, and otherwise is DENIED.

248. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, that the Petition for Reconsideration or Clarification filed by the Cable Providers is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Final Rules

Part 1, Subpart J of Title 47 of the Code of Federal Regulations is amended as follows:

1. The table of contents of Part 1 is revised to read as follows:

\* \* \*

**Subpart J—Pole Attachment Complaint Procedures**

**1.1401 Purpose.**

**1.1402 Definitions.**

**1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.**

**1.1404 Complaint.**

**1.1405 File numbers.**

**1.1406 Dismissal of complaints.**

**1.1407 Response and reply.**

**1.1408 Numbers of copies and form of pleadings.**

**1.1409 Commission consideration of the complaint.**

**1.1410 Remedies.**

**1.1411 Meetings and hearings.**

**1.1412 Enforcement.**

**1.1413 Forfeiture.**

**1.1414 State certification.**

**1.1415 Other orders.**

**1.1416 Imputation of rates; modification costs.**

**1.1417 Allocation of Unusable Space Costs.**

**1.1418 Use of presumptions in calculating the space factor.**

**1.1420 Timeline for access to utility poles.**

**1.1422 Contractors for survey and make-ready.**

**1.1424 Complaints by incumbent local exchange carriers.**

\* \* \*

2. Section 1.1401 is revised to read as follows:

**§ 1.1401 Purpose.**

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory

access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable. They also provide complaint and enforcement procedures for incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)) to ensure that the rates, terms, and conditions of their access to pole attachments are just and reasonable.

3. Section 1.1402 is revised to read as follows:

**§ 1.1402 Definitions.**

\* \* \*

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable. It also means a filing by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.

(e) The term *complainant* means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, an association of telecommunications carriers, an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers who files a complaint.

4. Section 1.1404 is revised to read as follows:

**§ 1.1404 Complaint.**

(k) The complaint shall include a certification that the complainant has, in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute. A refusal by a respondent to engage in the discussions contemplated by this rule shall constitute an unreasonable practice under section 224 of the Act.

\* \* \*

(m) In a case where a cable television system operator or telecommunications carrier as defined in 47 C.F.R. 224(a)(5) claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. 224(f), the complaint shall include the data and information necessary to support the claim, including:

- (1) The reasons given for the denial of access to the utility's poles, ducts, conduits, or rights-of-way;
- (2) The basis for the complainant's claim that the denial of access is unlawful;
- (3) The remedy sought by the complainant;
- (4) A copy of the written request to the utility for access to its poles, ducts, conduits, or rights-of-way; and

(5) A copy of the utility’s response to the written request including all information given by the utility to support its denial of access. A complaint alleging unlawful denial of access will not be dismissed if the complainant is unable to obtain a utility’s written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

\* \* \*

(ix) The annual carrying charges attributable to the cost of owning a pole. The utility shall submit these charges separately for each of the following categories: depreciation, rate of return, taxes, maintenance, and administrative. These charges may be expressed as a percentage of the net pole investment. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court that determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section that specifically determines the treatment and amount of accumulated deferred taxes.

\* \* \*

5. Section 1.1409(e) is revised to read as follows:

**§ 1.1409 Commission consideration of the complaint.**

\* \* \* \*

(e) \* \* \*

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by section 1.1409(e)(2)(i) or 1.1409(e)(2)(ii) of this Part.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in section 1.1409(e)(2)(ii):

$$\text{Rate} = \text{Space Factor} \times \text{Cost}$$

Where Cost

in Urbanized Service Areas = 0.66 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Non-Urbanized Service Areas = 0.44 x (Net Cost of a Bare Pole x Carrying Charge Rate)

$$\text{Where Space Factor} = \left[ \frac{\left( \frac{\text{Space}}{\text{Occupied}} \right) + \left( \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in section 1.1409(e)(2)(i):

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[ \begin{array}{c} \text{Maintenance and Administrative} \\ \text{Carrying Charge Rate} \end{array} \right]$$

$$\text{Where Space Factor} = \left[ \frac{\left( \frac{\text{Space}}{\text{Occupied}} \right) + \left( \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

6. Section 1.1410 is revised to read as follows:

**§ 1.1410 Remedies.**

(a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

- (1) Terminate the unjust and/or unreasonable rate, term, or condition;
- (2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission;
- (3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations; and

(b) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

7. Section 1.1420 is added as follows:

**§ 1.1420 Timeline for access to utility poles.**

(a) The term “attachment” means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(b) All time limits in this subsection are to be calculated according to section 1.4 of this title.

(c) *Survey.* A utility shall respond as described in section 1.1043(b) to a cable operator or telecommunications carrier within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days, in the case of larger orders as described in subsection (g)). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.

(d) *Estimate.* Where a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by section 1.1420(c), or in the case where a prospective attacher’s contractor has performed a survey, within 14 days of receipt by the utility of such survey.

- (1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.
- (2) A cable operator or telecommunications carrier may accept a valid estimate and make payment anytime after receipt of an estimate but before the estimate is withdrawn.

(e) *Make-ready*. Upon receipt of payment specified in subsection (d)(2), a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

- (1) For attachments in the communications space, the notice shall:
  - (i) Specify where and what make-ready will be performed.
  - (ii) Set a date for completion of make-ready that is no later than 60 days after notification is sent (or 105 days in the case of larger orders, as described in subsection (g)).
  - (iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.
  - (iv) State that the utility may assert its right to 15 additional days to complete make-ready.
  - (v) State that if make-ready is not completed by the completion date set by the utility (or, if the utility has asserted its 15-day right of control, 15 days later), the cable operator or telecommunications carrier requesting access may complete the specified make-ready.
  - (vi) State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.
- (2) For wireless attachments above the communications space, the notice shall:
  - (i) Specify where and what make-ready will be performed.
  - (ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in subsection (g)).
  - (iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.
  - (iv) State that the utility may assert its right to 15 additional days to complete make-ready.
  - (v) State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

(f) For wireless attachments above the communications space, a utility shall ensure that make-ready is completed by the date set by the utility in subsection (e)(2)(ii) (or, if the utility has asserted its 15-day right of control, 15 days later).

- (g) For the purposes of compliance with the time periods in this section:
- (1) A utility shall apply the timeline described in subsections (c) through (e) to all requests for pole attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.
  - (2) A utility may add 15 days to the survey period described in subsection (c) to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.
  - (3) A utility may add 45 days to the make-ready periods described in subsection (e) to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.
  - (4) A utility shall negotiate in good faith the timing of all requests for pole attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.
  - (5) A utility may treat multiple requests from a single cable operator or telecommunications carrier as one request when the requests are filed within 30 days of one another.

- (h) A utility may deviate from the time limits specified in this section:
- (1) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.
  - (2) During performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete the make-ready work within the prescribed time frame. A utility that so deviates shall immediately notify, in writing, the cable operator or telecommunications carrier requesting attachment and other affected entities with existing attachments, and shall include the reason for and date and duration of the deviation. The utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.
- (i) If a utility fails to respond as specified in subsection (c), a cable operator or telecommunications carrier requesting attachment in the communications space may, as specified in section 1.1422, hire a contractor to complete a survey. If make-ready is not complete by the date specified in subsection (e)(1)(ii), a cable operator or telecommunications carrier requesting attachment in the communications space may hire a contractor to complete the make-ready:
- (1) Immediately, if the utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attacher that it will do so; or
  - (2) After 15 days if the utility has asserted its right to perform make-ready by the date specified in subsection (e)(1)(ii) and has failed to complete make-ready.

8. Section 1.1422 is added as follows:

**§ 1.1422 Contractors for survey and make-ready.**

- (a) A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles in cases where the utility has failed to meet deadlines specified in section 1.1420.
- (b) If a cable operator or telecommunications carrier hires a contractor for purposes specified in section 1.1420, it shall choose from among a utility's list of authorized contractors.
- (c) A cable operator or telecommunications carrier that hires a contractor for survey or make-ready work shall provide a utility with a reasonable opportunity for a utility representative to accompany and consult with the authorized contractor and the cable operator or telecommunications carrier.
- (d) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

9. Section 1.1424 is added as follows:

**§ 1.1424 Complaints by incumbent local exchange carriers.**

Complaints by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this Part, as relevant. In complaint proceedings where an incumbent local exchange carrier (or an association of incumbent local exchange carriers) claims that it is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system for purposes of obtaining comparable rates, terms or conditions, the incumbent local exchange carrier shall bear the burden of demonstrating that it is similarly situated by reference to any relevant evidence, including pole attachment agreements. If a respondent declines or refuses to provide a complainant with access to

agreements or other information upon reasonable request, the complainant may seek to obtain such access through discovery. Confidential information contained in any documents produced may be subject to the terms of an appropriate protective order.

## APPENDIX B

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was included in the *2010 Order and Further Notice* in WC Docket No. 07-245 and GN Docket No. 09-51.<sup>2</sup> The Commission sought written public comment on the proposals in these dockets, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. In this *Report and Order and Order on Reconsideration*, the Commission revises its pole attachment rules to promote competition and to reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks. The Commission has historically relied primarily on private negotiations and case-specific adjudications to ensure just and reasonable rates, terms, and conditions, but its experience during the past 15 years has demonstrated the need to provide more guidance. Accordingly, the Commission establishes a four-stage timeline for wireline and wireless access to poles; provides attachers with a self-effectuating contractor remedy in the communications space; improves its enforcement rules; reinterprets the telecommunications rate formula within the existing statutory framework; and addresses rates, terms, and conditions for pole attachments by incumbent LECs. The Commission also resolves multiple petitions for reconsideration and addresses various points regarding the nondiscriminatory use of attachment techniques.

**B. Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA and Summary of the Assessment of the Agency of Such Issues**

3. One commenter discussed the IRFA from the Further Notice. A group of associations representing rural telephone companies argued specifically that the Commission should adopt the lowest telecom rate for broadband connections,<sup>4</sup> adopt an incumbent LEC dispute resolution process,<sup>5</sup> and cap pole attachment orders at 100 poles.<sup>6</sup> We squarely address these concerns by revising the section 224(e) rental rate for pole attachments used by telecommunications carriers to provide telecommunications services;<sup>7</sup> permitting incumbent LECs to file complaints with the Commission to ensure reasonable rates,

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§601–12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864 at App. D (2010) (*2010 Order and Further Notice*).

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> Joint Initial Comments of the National Telecommunications Cooperative Association; Organization for the Promotion and Advancement of Small Telecommunications Companies; Western Telecommunications Alliance; and Eastern Rural Telecom Association, WC Docket No. 07-245, GN Docket No. 09-51, at 5–8 (filed Aug. 16, 2010) (collectively, NTCA *et al.*).

<sup>5</sup> NTCA *et al.* Comments 8–10.

<sup>6</sup> NTCA *et al.* Comments 10–11.

<sup>7</sup> See *supra* Part V.B.

terms, and conditions of pole attachments;<sup>8</sup> and adopting the lesser of a numerical or a percentage-based cap on pole orders.<sup>9</sup>

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply**

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.<sup>10</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>11</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>12</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>13</sup>

5. *Small Businesses.* Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.<sup>14</sup>

6. *Small Organizations.* Nationwide, as of 2002, there are approximately 1.6 million small organizations.<sup>15</sup> A “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>16</sup>

7. *Small Governmental Jurisdictions.* The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>17</sup> Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.<sup>18</sup> We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.”<sup>19</sup> Thus, we estimate that most governmental jurisdictions are small.

8. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a “small business” under the RFA is one that, inter alia, meets the pertinent small

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<sup>8</sup> See *supra* Part V.C.

<sup>9</sup> See *supra* para. 63.

<sup>10</sup> 5 U.S.C. § 603(b)(3).

<sup>11</sup> 5 U.S.C. § 601(6).

<sup>12</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>13</sup> 15 U.S.C. § 632.

<sup>14</sup> See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://web.sba.gov/faqs> (accessed Jan. 2009).

<sup>15</sup> Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

<sup>16</sup> 5 U.S.C. § 601(4).

<sup>17</sup> 5 U.S.C. § 601(5).

<sup>18</sup> U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, Section 8, p. 272, Table 415.

<sup>19</sup> We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, section 8, p. 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>20</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>21</sup> We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

9. *Incumbent Local Exchange Carriers (“ILECs”).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>22</sup> According to Commission data,<sup>23</sup> 1,311 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

10. *Competitive Local Exchange Carriers (“CLECs”), Competitive Access Providers (“CAPs”), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>24</sup> According to Commission data,<sup>25</sup> 1005 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 1005 carriers, an estimated 918 have 1,500 or fewer employees and 87 have more than 1,500 employees. In addition, 16 carriers have reported that they are “Shared-Tenant Service Providers,” and all 16 are estimated to have 1,500 or fewer employees. In addition, 89 carriers have reported that they are “Other Local Service Providers.” Of the 89, all have 1,500 or fewer employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities that may be affected by our proposed action.

11. *Interexchange Carriers (“IXCs”).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>26</sup> According to Commission data,<sup>27</sup>

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<sup>20</sup> 15 U.S.C. § 632.

<sup>21</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (“Small Business Act”); 5 U.S.C. § 601(3) (“RFA”). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

<sup>22</sup> 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110.

<sup>23</sup> FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “*Trends in Telephone Service*” at Table 5.3, Page 5-5 (Aug. 2008) (“*Trends in Telephone Service*”). This source uses data that are current as of November 1, 2006.

<sup>24</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>25</sup> “Trends in Telephone Service” at Table 5.3.

<sup>26</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>27</sup> “Trends in Telephone Service” at Table 5.3.

300 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 268 have 1,500 or fewer employees and 32 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXC's are small entities that may be affected by our proposed action.

12. *Satellite Telecommunications and All Other Telecommunications.* These two economic census categories address the satellite industry. The first category has a small business size standard of \$15 million or less in average annual receipts, under SBA rules.<sup>28</sup> The second has a size standard of \$25 million or less in annual receipts.<sup>29</sup> The most current Census Bureau data in this context, however, are from the (last) economic census of 2002, and we will use those figures to gauge the prevalence of small businesses in these categories.<sup>30</sup>

13. The category of Satellite Telecommunications “comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”<sup>31</sup> For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year.<sup>32</sup> Of this total, 307 firms had annual receipts of under \$10 million, and 26 firms had receipts of \$10 million to \$24,999,999.<sup>33</sup> Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

14. The second category of All Other Telecommunications comprises, *inter alia*, “establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.”<sup>34</sup> For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year.<sup>35</sup> Of this total, 303 firms had annual receipts of under \$10 million and 15 firms had annual receipts of \$10 million to \$24,999,999.<sup>36</sup> Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

15. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.<sup>37</sup> Prior to that time, such

<sup>28</sup> 13 C.F.R. § 121.201, NAICS code 517410.

<sup>29</sup> 13 C.F.R. § 121.201, NAICS code 517919.

<sup>30</sup> 13 C.F.R. § 121.201, NAICS codes 517410 and 517910 (2002).

<sup>31</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications”; <http://www.census.gov/naics/2007/def/ND517410.HTM>.

<sup>32</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 517410 (issued Nov. 2005).

<sup>33</sup> *Id.* An additional 38 firms had annual receipts of \$25 million or more.

<sup>34</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517919 All Other Telecommunications”; <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

<sup>35</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 517910 (issued Nov. 2005).

<sup>36</sup> *Id.* An additional 14 firms had annual receipts of \$25 million or more.

<sup>37</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”<sup>38</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>39</sup> Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.<sup>40</sup> Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.<sup>41</sup> For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.<sup>42</sup> Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.<sup>43</sup> Thus, we estimate that the majority of wireless firms are small.

16. *Common Carrier Paging.* As noted, since 2007 the Census Bureau has placed paging providers within the broad economic census category of Wireless Telecommunications Carriers (except Satellite).<sup>44</sup> Prior to that time, such firms were within the now-superseded category of “Paging.”<sup>45</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>46</sup> Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior category and associated data. The data for 2002 show that there were 807 firms that operated for the entire year.<sup>47</sup> Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.<sup>48</sup> Thus, we estimate that the majority of paging firms are small.

17. In addition, in the *Paging Second Report and Order*, the Commission adopted a size standard for “small businesses” for purposes of determining their eligibility for special provisions such as

<sup>38</sup> U.S. Census Bureau, 2002 NAICS Definitions, “517211 Paging”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, “517212 Cellular and Other Wireless Telecommunications”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

<sup>39</sup> 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

<sup>40</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517211 (issued Nov. 2005).

<sup>41</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

<sup>42</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517212 (issued Nov. 2005).

<sup>43</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

<sup>44</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

<sup>45</sup> U.S. Census Bureau, 2002 NAICS Definitions, “517211 Paging”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

<sup>46</sup> 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

<sup>47</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517211 (issued Nov. 2005).

<sup>48</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

bidding credits and installment payments.<sup>49</sup> A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>50</sup> The SBA has approved this definition.<sup>51</sup> An initial auction of Metropolitan Economic Area (“MEA”) licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold.<sup>52</sup> Fifty-seven companies claiming small business status won 440 licenses.<sup>53</sup> A subsequent auction of MEA and Economic Area (“EA”) licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold.<sup>54</sup> One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.<sup>55</sup>

18. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 281 carriers reported that they were engaged in the provision of “paging and messaging” services.<sup>56</sup> Of these, an estimated 279 have 1,500 or fewer employees and two have more than 1,500 employees.<sup>57</sup> We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

19. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).<sup>58</sup> Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>59</sup> According to *Trends in Telephone Service* data, 434 carriers reported that they were engaged in wireless telephony.<sup>60</sup> Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.<sup>61</sup> We have estimated that 222 of these are small under the SBA small business size standard.

20. *Broadband Personal Communications Service.* The broadband personal communications

<sup>49</sup> *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, Second Report and Order, 12 FCC Rcd 2732, 2811–12, paras. 178–181 (“*Paging Second Report and Order*”); see also *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085–88, paras. 98–107 (1999).

<sup>50</sup> *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

<sup>51</sup> See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (“WTB”), FCC (Dec. 2, 1998) (“*Alvarez Letter 1998*”).

<sup>52</sup> See “*929 and 931 MHz Paging Auction Closes*,” Public Notice, 15 FCC Rcd 4858 (WTB 2000).

<sup>53</sup> See *id.*

<sup>54</sup> See “*Lower and Upper Paging Band Auction Closes*,” Public Notice, 16 FCC Rcd 21821 (WTB 2002).

<sup>55</sup> See “*Lower and Upper Paging Bands Auction Closes*,” Public Notice, 18 FCC Rcd 11154 (WTB 2003). The current number of small or very small business entities that hold wireless licenses may differ significantly from the number of such entities that won in spectrum auctions due to assignments and transfers of licenses in the secondary market over time. In addition, some of the same small business entities may have won licenses in more than one auction.

<sup>56</sup> “*Trends in Telephone Service*” at Table 5.3.

<sup>57</sup> “*Trends in Telephone Service*” at Table 5.3.

<sup>58</sup> 13 C.F.R. § 121.201, NAICS code 517210.

<sup>59</sup> *Id.*

<sup>60</sup> “*Trends in Telephone Service*” at Table 5.3.

<sup>61</sup> “*Trends in Telephone Service*” at Table 5.3.

services (“PCS”) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>62</sup> For Block F, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>63</sup> These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.<sup>64</sup> No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 “small” and “very small” business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.<sup>65</sup> In 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.<sup>66</sup>

21. In 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses.<sup>67</sup> Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses.<sup>68</sup> Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71.<sup>69</sup> Of the 14 winning bidders, six were designated entities.<sup>70</sup> In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.<sup>71</sup>

22. *Advanced Wireless Services.* In 2008, the Commission conducted the auction of Advanced Wireless Services (“AWS”) licenses.<sup>72</sup> This auction, which as designated as Auction 78, offered 35 licenses in the AWS 1710-1755 MHz and 2110-2155 MHz bands (“AWS-1”). The AWS-1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded \$15 million and did not exceed \$40 million for the preceding three years (“small business”)

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<sup>62</sup> See *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, 11 FCC Rcd 7824, 7850–52, paras. 57–60 (1996) (“*PCS Report and Order*”); see also 47 C.F.R. § 24.720(b).

<sup>63</sup> See *PCS Report and Order*, 11 FCC Rcd at 7852, para. 60.

<sup>64</sup> See *Alvarez Letter 1998*.

<sup>65</sup> FCC News, “Broadband PCS, D, E and F Block Auction Closes,” No. 71744 (rel. Jan. 14, 1997).

<sup>66</sup> See “C, D, E, and F Block Broadband PCS Auction Closes,” *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

<sup>67</sup> See “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 2339 (2001).

<sup>68</sup> See “Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58,” *Public Notice*, 20 FCC Rcd 3703 (2005).

<sup>69</sup> See “Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71,” *Public Notice*, 22 FCC Rcd 9247 (2007).

<sup>70</sup> *Id.*

<sup>71</sup> See *Auction of AWS-1 and Broadband PCS Licenses Rescheduled For August 13, 3008, Notice of Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures For Auction 78*, *Public Notice*, 23 FCC Rcd 7496 (2008) (“*AWS-1 and Broadband PCS Procedures Public Notice*”).

<sup>72</sup> See *AWS-1 and Broadband PCS Procedures Public Notice*, 23 FCC Rcd 7496. Auction 78 also included an auction of Broadband PCS licenses.

received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed \$15 million for the preceding three years (“very small business”) received a 25 percent discount on its winning bid. A bidder that had combined total assets of less than \$500 million and combined gross revenues of less than \$125 million in each of the last two years qualified for entrepreneur status.<sup>73</sup> Four winning bidders that identified themselves as very small businesses won 17 licenses.<sup>74</sup> Three of the winning bidders that identified themselves as a small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

23. *Narrowband Personal Communications Services.* In 1994, the Commission conducted an auction for Narrowband PCS licenses. A second auction was also conducted later in 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.<sup>75</sup> Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.<sup>76</sup> To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order.<sup>77</sup> A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.<sup>78</sup> A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.<sup>79</sup> The SBA has approved these small business size standards.<sup>80</sup> A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.<sup>81</sup> Three of these claimed status as a small or very small entity and won 311 licenses.

24. *Cellular Radiotelephone Service.* Auction 77 was held to resolve one group of mutually exclusive applications for Cellular Radiotelephone Service licenses for unserved areas in New Mexico.<sup>82</sup> Bidding credits for designated entities were not available in Auction 77.<sup>83</sup> In 2008, the Commission

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<sup>73</sup> *Id.* at 23 FCC Rcd at 7521–22.

<sup>74</sup> See “Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period”, *Public Notice*, 23 FCC Rcd 12749–65 (2008).

<sup>75</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

<sup>76</sup> See “Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674,” *Public Notice*, PNWL 94-004 (rel. Aug. 2, 1994); “Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787,” *Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

<sup>77</sup> *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000) (“*Narrowband PCS Second Report and Order*”).

<sup>78</sup> *Narrowband PCS Second Report and Order*, 15 FCC Rcd at 10476, para. 40.

<sup>79</sup> *Id.*

<sup>80</sup> See *Alvarez Letter 1998*.

<sup>81</sup> See “Narrowband PCS Auction Closes,” *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

<sup>82</sup> See Closed Auction of Licenses for Cellular Unserved Service Area Scheduled for June 17, 2008, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 77, *Public Notice*, 23 FCC Rcd 6670 (2008).

<sup>83</sup> *Id.* at 6685.

completed the closed auction of one unserved service area in the Cellular Radiotelephone Service, designated as Auction 77. Auction 77 concluded with one provisionally winning bid for the unserved area totaling \$25,002.<sup>84</sup>

25. *Private Land Mobile Radio (“PLMR”).* PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee’s primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.<sup>85</sup> The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.<sup>86</sup>

26. As of March 2010, there were 424,162 PLMR licensees operating 921,909 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that any revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

27. *Fixed Microwave Services.* Fixed microwave services include common carrier,<sup>87</sup> private operational-fixed,<sup>88</sup> and broadcast auxiliary radio services.<sup>89</sup> At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.<sup>90</sup> The Commission does not have data specifying the number of these licensees that have no more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA’s small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer common carrier fixed licensees and 61,670 or fewer private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that

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<sup>84</sup> See Auction of Cellular Unserved Service Area License Closes, Winning Bidder Announced for Auction 77, Down Payment due July 2, 2008, Final Payment due July 17, 2008, *Public Notice*, 23 FCC Rcd 9501 (2008).

<sup>85</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>86</sup> See generally 13 C.F.R. § 121.201.

<sup>87</sup> See 47 C.F.R. §§ 101 *et seq.* for common carrier fixed microwave services (except Multipoint Distribution Service).

<sup>88</sup> Persons eligible under parts 80 and 90 of the Commission’s Rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.

<sup>89</sup> Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission’s Rules. See 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

<sup>90</sup> 13 C.F.R. § 121.201, NAICS code 517210.

may be small and may be affected by the rules and policies proposed herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

28. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (“LMDS”) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>91</sup> The auction of the 986 LMDS licenses began and closed in 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>92</sup> An additional small business size standard for “very small business” was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>93</sup> The SBA has approved these small business size standards in the context of LMDS auctions.<sup>94</sup> There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

29. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.<sup>95</sup> A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (“BETRS”).<sup>96</sup> In the present context, we will use the SBA’s small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.<sup>97</sup> There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

30. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (“MDS”) and Multichannel Multipoint Distribution Service (“MMDS”) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) (previously referred to as the Instructional Television Fixed Service (“ITFS”).<sup>98</sup> In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>99</sup> The BRS auctions resulted

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<sup>91</sup> See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission’s Rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689–90, para. 348 (1997) (“*LMDS Second Report and Order*”).

<sup>92</sup> See *LMDS Second Report and Order*, 12 FCC Rcd at 12689–90, para. 348.

<sup>93</sup> See *id.*

<sup>94</sup> See *Alvarez to Phythyon Letter 1998*.

<sup>95</sup> The service is defined in § 22.99 of the Commission’s Rules, 47 C.F.R. § 22.99.

<sup>96</sup> BETRS is defined in §§ 22.757 and 22.759 of the Commission’s Rules, 47 C.F.R. §§ 22.757 and 22.759.

<sup>97</sup> 13 C.F.R. § 121.201, NAICS code 517210.

<sup>98</sup> *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995) (“*MDS Auction R&O*”).

<sup>99</sup> 47 C.F.R. § 21.961(b)(1).

in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (“BTAs”). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.<sup>100</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.<sup>101</sup> The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.<sup>102</sup> Auction 86 concluded in 2009 with the sale of 61 licenses.<sup>103</sup> Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

31. In addition, the SBA’s Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.<sup>104</sup> Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>105</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.<sup>106</sup> According to Census Bureau data for 2002, there were a total of

<sup>100</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard.

<sup>101</sup> Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86, *Public Notice*, 24 FCC Rcd 8277 (2009).

<sup>102</sup> *Id.* at 8296.

<sup>103</sup> Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period, *Public Notice*, 24 FCC Rcd 13572 (2009).

<sup>104</sup> The term “small entity” within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)–(6). We do not collect annual revenue data on EBS licensees.

<sup>105</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>106</sup> 13 C.F.R. § 121.201, NAICS code 517110.

1,191 firms in this previous category that operated for the entire year.<sup>107</sup> Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.<sup>108</sup> Thus, the majority of these firms can be considered small.

32. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>109</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.<sup>110</sup> According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.<sup>111</sup> Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.<sup>112</sup> Thus, the majority of these firms can be considered small.

33. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.<sup>113</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.<sup>114</sup> In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.<sup>115</sup> Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have fewer than 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.<sup>116</sup> Thus, under this second size standard, most cable systems are small.

34. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a

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<sup>107</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

<sup>108</sup> *Id.* An additional 61 firms had annual receipts of \$25 million or more.

<sup>109</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>110</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>111</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

<sup>112</sup> *Id.* An additional 61 firms had annual receipts of \$25 million or more.

<sup>113</sup> 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

<sup>114</sup> These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

<sup>115</sup> 47 C.F.R. § 76.901(c).

<sup>116</sup> Warren Communications News, *Television & Cable Factbook 2008*, “U.S. Cable Systems by Subscriber Size,” page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”<sup>117</sup> The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>118</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.<sup>119</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>120</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

35. *Open Video Systems.* The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.<sup>121</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>122</sup> OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”<sup>123</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for such services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.<sup>124</sup> According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.<sup>125</sup> Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.<sup>126</sup> Thus, the majority of cable firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.<sup>127</sup> Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or

<sup>117</sup> 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn.1–3.

<sup>118</sup> 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

<sup>119</sup> These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

<sup>120</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 C.F.R. § 76.909(b).

<sup>121</sup> 47 U.S.C. § 571(a)(3)–(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report*, 24 FCC Rcd 542, 606 para. 135 (2009) (“*Thirteenth Annual Cable Competition Report*”).

<sup>122</sup> See 47 U.S.C. § 573.

<sup>123</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>124</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>125</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

<sup>126</sup> *Id.* An additional 61 firms had annual receipts of \$25 million or more.

<sup>127</sup> A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsccer.html>.

local OVS franchises.<sup>128</sup> The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

36. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. This cable service is defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>129</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.<sup>130</sup> According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.<sup>131</sup> Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.<sup>132</sup> Thus, the majority of these firms can be considered small.

37. *Multichannel Video Distribution and Data Service.* MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years.<sup>133</sup> These definitions were approved by the SBA.<sup>134</sup> On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.<sup>135</sup> Eight of the ten winning bidders claimed small business status and won 144 of the licenses.

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<sup>128</sup> See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606–07 para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

<sup>129</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>130</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>131</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

<sup>132</sup> *Id.* An additional 61 firms had annual receipts of \$25 million or more.

<sup>133</sup> *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission’s Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licenses and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to provide A Fixed Service in the 12.2–12.7 GHz Band*, ET Docket No. 98-206, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

<sup>134</sup> See Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb.13, 2002).

<sup>135</sup> See “*Multichannel Video Distribution and Data Service Auction Closes*,” Public Notice, 19 FCC Rcd 1834 (2004).

The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.<sup>136</sup>

38. *Internet Service Providers.* The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications connections (*e.g.* cable and DSL, ISPs), or over client-supplied telecommunications connections (*e.g.* dial-up ISPs). The former are within the category of Wired Telecommunications Carriers,<sup>137</sup> which has an SBA small business size standard of 1,500 or fewer employees.<sup>138</sup> The latter are within the category of All Other Telecommunications,<sup>139</sup> which has a size standard of annual receipts of \$25 million or less.<sup>140</sup> The most current Census Bureau data for all such firms, however, are the 2002 data for the previous census category called Internet Service Providers.<sup>141</sup> That category had a small business size standard of \$21 million or less in annual receipts, which was revised in late 2005 to \$23 million. The 2002 data show that there were 2,529 such firms that operated for the entire year.<sup>142</sup> Of those, 2,437 firms had annual receipts of under \$10 million, and an additional 47 firms had receipts of between \$10 million and \$24,999,999.<sup>143</sup> Consequently, we estimate that the majority of ISP firms are small entities.

39. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer."<sup>144</sup> This category includes Electric Power Distribution, Hydroelectric Power Generation, Fossil Fuel Power Generation, Nuclear Electric Power Generation, and Other Electric Power Generation. The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours."<sup>145</sup> According to Census Bureau data for 2002, there

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<sup>136</sup> See "Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63," Public Notice, 20 FCC Rcd 19807 (2005).

<sup>137</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers", <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>138</sup> 13 C.F.R. § 121.201, NAICS code 517110 (updated for inflation in 2008).

<sup>139</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications"; <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

<sup>140</sup> 13 C.F.R. § 121.201, NAICS code 517919 (updated for inflation in 2008).

<sup>141</sup> U.S. Census Bureau, "2002 NAICS Definitions, "518111 Internet Service Providers"; <http://www.census.gov/eped/naics02/def/NDEF518.HTM>.

<sup>142</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 518111 (issued Nov. 2005).

<sup>143</sup> An additional 45 firms had receipts of \$25 million or more.

<sup>144</sup> U.S. Census Bureau, 2002 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution"; <http://www.census.gov/epcd/naics02/def/NDEF221.HTM>.

<sup>145</sup> 13 C.F.R. § 121.201, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1.

were 1,644 firms in this category that operated for the entire year.<sup>146</sup> Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

40. *Natural Gas Distribution.* This economic census category comprises: “(1) establishments primarily engaged in operating gas distribution systems (e.g., mains, meters); (2) establishments known as gas marketers that buy gas from the well and sell it to a distribution system; (3) establishments known as gas brokers or agents that arrange the sale of gas over gas distribution systems operated by others; and (4) establishments primarily engaged in transmitting and distributing gas to final consumers.”<sup>147</sup> The SBA has developed a small business size standard for this industry, which is: all such firms having 500 or fewer employees.<sup>148</sup> According to Census Bureau data for 2002, there were 468 firms in this category that operated for the entire year.<sup>149</sup> Of this total, 424 firms had employment of fewer than 500 employees, and 18 firms had employment of 500 to 999 employees.<sup>150</sup> Thus, the majority of firms in this category can be considered small.

41. *Water Supply and Irrigation Systems.* This economic census category “comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems.”<sup>151</sup> The SBA has developed a small business size standard for this industry, which is: all such firms having \$6.5 million or less in annual receipts.<sup>152</sup> According to Census Bureau data for 2002, there were 3,830 firms in this category that operated for the entire year.<sup>153</sup> Of this total, 3,757 firms had annual sales of less than \$5 million, and 37 firms had sales of \$5 million or more but less than \$10 million.<sup>154</sup> Thus, the majority of firms in this category can be considered small.

#### **D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements**

42. The timeline for access to poles that we adopt today will marginally affect recordkeeping and compliance requirements for utilities and attachers. We anticipate that utilities and attachers will modify their recordkeeping regarding the performance of make-ready work, including timeliness, safety, and capacity, in order to show compliance with the timeline in the case of a dispute.<sup>155</sup> The notification

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<sup>146</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122 (issued Nov. 2005).

<sup>147</sup> U.S. Census Bureau, 2007 NAICS Definitions, “221210 Natural Gas Distribution”; <http://www.census.gov/epcd/naics02/def/ND221210.HTM>.

<sup>148</sup> 13 C.F.R. § 121.201, NAICS code 221210.

<sup>149</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: 2002 (Including Legal Form of Organization),” Table 5, NAICS code 221210 (issued November 2005).

<sup>150</sup> *Id.* An additional 26 firms had employment of over 1,000 employees.

<sup>151</sup> U.S. Census Bureau, 2007 NAICS Definitions, “221310 Water Supply and Irrigation Systems” (partial definition); <http://www.census.gov/naics/2007/def/ND221310.HTM>.

<sup>152</sup> 13 C.F.R. § 121.201, NAICS code 221310.

<sup>153</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: 2002 (Including Legal Form of Organization),” Table 4, NAICS code 221310 (issued November 2005).

<sup>154</sup> *Id.* An additional 36 firms had annual sales of \$10 million or more.

<sup>155</sup> *See supra* App. A (47 C.F.R. § 1.1420).

rule requires the inclusion of certain information in make-ready notifications sent to other attachers.<sup>156</sup> We also anticipate that the rule regarding the publication of qualified third-party contract workers will involve more recordkeeping for utilities that must maintain and make available the list to prospective attachers.<sup>157</sup> However, we expect the costs of complying with these rules to be minimal, since they do not measurably differ from the requirements in place before the adoption of this order.

43. The changes we adopt today in the enforcement process, specifically for pole attachment complaints, similarly do not produce significant differences in recordkeeping and compliance requirements from the requirements in place before the adoption of this order. For example, although our decision to permit recovery of a monetary award to extend as far back as the appropriate statute of limitations allows, rather than beginning the award period with the filing of the complaint (*see* Section IV.C. *supra*), may increase the period of time over which a complainant must produce data to support its monetary claim, we have not adopted any requirements of data collection or filing *per se*.

44. We expect the costs of complying with the new rules affecting attachment rates to be minimal, since any of these compliance costs do not significantly differ from requirements in place before the adoption of this Order.

#### **E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

45. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>158</sup>

46. The specific timeline and additional rules adopted in this Order provide a predictable, timely process for parties to seek and obtain pole attachments, while maintaining a utility's interest in preserving safety, reliability, and sound engineering. We do not adopt different requirements for small entities because we expect the economic impact on small entities to be minimal. Since we cap the number of poles subject to the timeline based on the lesser of a numerical cap or a percentage of poles owned by a utility in a state, small entities do not undergo any disproportionate hardship.<sup>159</sup> The 100 pole order cap proposed by NTCA *et al.* does not achieve the same benefit for small entities because it is not specifically tailored to the size of the entity. Also, it is unlikely that the timeline will result in any significant recordkeeping burdens for small entities since prudent utilities and attachers already keep records regarding make-ready work and pole capacity and we do not impose any additional information collection requirements. Similarly, identifying the contractors that utilities themselves already use to prospective attachers should not require an additional resource burden. Finally, the Commission does not have authority to regulate (and the proposed rules, thus, do not apply to) small utilities that are municipally or cooperatively owned.

47. Further, in this Order, the Commission revises the section 224(e) rental rate for pole attachments used by telecommunications carriers to provide telecommunications services. This new telecom rate generally will recover the same portion of pole costs as the current cable rate. The new formula will minimize the difference in rental rates paid for attachments that are used to provide voice,

<sup>156</sup> *See supra* App. A (47 C.F.R. § 1.1420).

<sup>157</sup> *See supra* App. A (47 C.F.R. § 1.1422).

<sup>158</sup> 5 U.S.C. § 603(c).

<sup>159</sup> *See supra* para. 63.

data, and video services, and thus will help remove market distortions that pose barriers to deployment of new services by small cable and telecommunications providers. The Commission also revisits its prior interpretation of the statute and allows incumbent LECs to file pole attachment complaints before the Commission if they are unable to negotiate just and reasonable rates, terms, and conditions with other pole owners. Thus, we believe that the rules adopted in this Order to ensure that pole attachment rates are just and reasonable will have a positive economic benefit on small entities in areas that fall under the Commission's regulatory jurisdiction, rather than an adverse impact.

48. Specifically, NTCA *et al.* asserts that small rural incumbent LECs are concerned about unreasonably high rates and “face difficulties in negotiating and, in some cases, litigating contractual terms for pole attachments.”<sup>160</sup> NCTA *et al.* also asserts that “[t]he Commission’s current pole attachment rules effectively deny rural ILECs a remedy against unreasonable pole attachment provisions which has a significant economic impact on a substantial number of small ILECs.”<sup>161</sup> NTCA requested that the Commission adopt a “remedy mechanism by which [rural ILECs] can present claims of unjust or unreasonable pole attachment rates, terms and conditions imposed by utilities” – and stated that such a provision “would reduce the economic impact on small rural communications providers.”<sup>162</sup> The Commission, in fact, adopts such a rule in this Order – allowing incumbent LECs to file pole attachment complaints. Further, the Commission provides guidance regarding its approach to evaluating those complaints and what the appropriate rate may be.

49. Also in this Order, the Commission responds to small cable operator concerns about “possible increases in rates for commingled Internet and video services,” as noted by the U.S. Small Business Administration.<sup>163</sup> Addressing the role of the new telecom rate in the context of commingled services, the Commission recognized concerns by some cable operators<sup>164</sup> that pole owners may seek to impose rates higher than both the cable rate and the new telecom rate where cable operators or telecommunications carriers also provide services, such as VoIP, that have not been classified.<sup>165</sup> The Commission stated that this outcome would be contrary to its policy goals here in which it adopts a lower and more uniform attachment rate to reduce the disparity in pole rental rates among providers of competing services to minimize disputes resulting from the disparity between cable and pre-existing higher telecom rates.<sup>166</sup> This disparity has acted to deter investment and network expansion for new services by cable providers because of the risk that some of those services could potentially be classified as “telecommunications services” – triggering disputes and litigation as to whether the higher telecom rate should be applied over their entire pole attachment network. The Commission also makes clear that the use of pole attachments by telecommunications carriers or cable operators to provide commingled services does not remove them from the pole rate regulation framework, and that rates generally will not be considered just and reasonable if they exceed the new telecom rate.<sup>167</sup>

50. In addition, the new rate for attachments used by telecommunications carriers will have a positive economic impact on small competitive LECs. It will minimize competitive disadvantages that

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<sup>160</sup> NTCA *et al.* at 6.

<sup>161</sup> NTCA *et al.* at 9.

<sup>162</sup> NTCA *et al.* at 9–10.

<sup>163</sup> U.S. Small Business Administration, Office of Advocacy, Comments, GN Docket No. 10-188, at 8 (filed Oct. 15, 2010).

<sup>164</sup> See, e.g., Bright House Comments at 2, 12–14; Bright House Reply at 3–5.

<sup>165</sup> See *supra* Part V.B.1.

<sup>166</sup> See *id.*

<sup>167</sup> See *id.*

these carriers faced by having to pay higher rates for these key inputs to communications services. The Order also confirms that wireless carriers are entitled to the same rate under the statute as other telecommunications carriers. Specifically, the Commission explains that wireless carriers are entitled to the benefits and protection of section 224, including the right to the telecom rate under section 224(e), in response to reports by the wireless industry of cases where wireless providers were not afforded the regulated rate and instead had been charged higher rates that were unreasonable.<sup>168</sup>

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules**

51. None.

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<sup>168</sup> *See id.*

## APPENDIX C

**States That Have Certified That They Regulate Pole Attachments**

1. The following states have certified that they regulate rates, terms, and conditions for pole attachments, and, in so regulating, have the authority to consider and do consider the interests of subscribers of cable television services, as well as the interests of the consumers of the utility services. Moreover, these states have certified that they have issued and made effective rules and regulations implementing their regulatory authority over pole attachments, including a specific methodology for such regulation which has been made publicly available in the state.

2. <sup>1</sup> Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules, including the rules adopted in this Order.<sup>2</sup> All other states remain subject to the Commission's jurisdiction to regulate pole attachments under section 224 of the Act.

Alaska  
Arkansas  
California  
Connecticut  
Delaware  
District of Columbia  
Idaho  
Illinois  
Kentucky  
Louisiana  
Maine  
Massachusetts  
Michigan  
New Hampshire  
New Jersey  
New York  
Ohio  
Oregon  
Utah  
Vermont  
Washington

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<sup>1</sup> *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541 (WCB 2010).

<sup>2</sup> 47 U.S.C. § 224(c); 47 C.F.R. §§ 1.1401–1.1418.

## APPENDIX D

## Lists of Commenters

***Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864 (2010).***

<u>Commenter</u>	<u>Abbreviation</u>
Alliance for Fair Pole Attachment Rules	Alliance
Alliant Energy Corporate Services, Inc.	Alliant
Ameren Services Company; CenterPoint Energy Houston Electric, LLC; and Virginia Electric and Power Company	Ameren <i>et al.</i>
American Cable Association	ACA
American Public Power Association	APPA
Association of Louisiana Electric Cooperatives, Inc.	Louisiana Association
AT&T Inc.	AT&T
Bob Matter Consulting	Bob Matter Consulting
Bright House Networks	Bright House
CenturyLink	CenturyLink
Charter Communications, Inc.	Charter
Coalition of Concerned Utilities	Coalition
Comcast Corporation	Comcast
CPS Energy	CPS Energy
CTIA – The Wireless Association	CTIA
DAS Forum	DAS Forum
Edison Electric Institute and Utilities Telecom Council	EET/UTC
Exelon Electric Distribution Companies	Exelon
Fiber Technologies Networks, LLC	Fibertech
Florida Investor-Owned Electric Utilities	Florida IOUs
Idaho Power Company	Idaho Power
Imperial Irrigation District	Imperial Irrigation
Independent Telephone & Telecommunications Alliance	ITTA
Level 3 Communications, Inc.	Level 3
Massachusetts Department of Telecommunications and Cable	MDTC
MetroPCS Communications, Inc.	MetroPCS
National Cable & Television Association	NCTA
National Rural Electric Cooperative Association	NRECA
National Telecommunications Cooperative Association; Organization for the Promotion and Advancement of Small Telecommunications Companies; Western Telecommunications Alliance; and Eastern Rural Telecom Association	Associations
NextG Networks, Inc.	NextG
NTELOS, Inc.	NTELOS
Oncor Electric Delivery Company LLC	Oncor
Petra Solar, Inc.	Petra Solar
Public Utilities Commission of Ohio	Ohio Commission
Puget Sound Energy	Puget Sound Energy
Qwest Communications International, Inc.	Qwest

Sunesys, LLC  
 T-Mobile USA, Inc.  
 Time Warner Cable, Inc.  
 tw telecom inc. and Comptel  
 United States Telecom Association  
 Verizon  
 Virginia Electric Power Company  
 We Energies

Sunesys  
 T-Mobile  
 TWC  
 TWTC/COMPTEL  
 USTelecom  
 Verizon  
 Virginia Electric  
 We Energies

### **Reply Commenter**

Alliance for Fair Pole Attachment Rules  
 Alabama Rural Electric Association  
 American Public Power Association  
 AT&T Inc.  
 Bright House Networks  
 Clay Electric Cooperative  
 Coalition of Concerned Utilities  
 Comcast Corporation  
 Dairyland Power Cooperative  
 DAS Forum  
 Edison Electric Institute and Utilities Telecom Council  
 Florida Investor-Owned Electric Utilities  
 Flint Electric Membership Corporation  
 Georgia Electric Membership Corporation  
 Hawaii Telecom, Inc.  
 Kansas Electric Cooperatives, Inc.  
 Little Ocmulgee Electric Membership Corporation  
 Mahanger Consulting Associates  
 MetroPCS Communications, Inc.  
 Montana Electric Cooperatives Association  
 Montgomery County, Maryland and Anne Arundel County,  
 Maryland  
 National Cable & Television Association  
 National Rural Electric Cooperative Association  
 New Mexico Exchange Carrier Group  
 NextG Networks, Inc.  
 North Carolina Association of Electric Cooperatives  
 Northern Virginia Electric Cooperative  
 Oklahoma Association of Electric Cooperatives  
 Oncor Electric Delivery Company LLC  
 Sunesys, LLC  
 T-Mobile USA, Inc.  
 Texas Electric Cooperatives, Inc.  
 Time Warner Cable, Inc.  
 tw telecom inc. and Comptel  
 Verizon  
 Virginia, Maryland, and Delaware Association of Electric  
 Cooperatives

### **Abbreviation**

Alliance  
 Alabama Assoc.  
 APPA  
 AT&T  
 Bright House  
 Clay Electric  
 Coalition  
 Comcast  
 Dairyland  
 DAS Forum  
 EEI/UTC  
 Florida IOUs  
 FEMC.  
 GEMC  
 HTI  
 Kansas Cooperatives  
 LOEMC  
 Mahanger Consulting  
 MetroPCS  
 MECA  
 Montgomery and Anne  
 Arundel Counties  
 NCTA  
 NRECA  
 NMECG  
 NextG  
 NCAEC  
 NVEC  
 Oklahoma Cooperatives  
 Oncor  
 Sunesys  
 T-Mobile  
 Texas Cooperatives  
 TWC  
 TWTC/COMPTEL  
 Verizon  
 VMDAEC

***Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245; RM-11293; RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007).***

**Commenter****Abbreviation**

American Electric Power Service Corporation; Duke Energy Corporation; Entergy Services Company; PPL Electric Utilities Corporation; Progress Energy; Southern Company; and Xcel Energy Services, Inc.	AEP <i>et al.</i>
Alabama Power Company; Georgia Power Company; Gulf Power Company; and Mississippi Power Company	Alabama Power <i>et al.</i>
Alpheus Communications, L.P. and 360networks USA, Inc.	Alpheus and 360networks
Ameren Services Company and Virginia Electric and Power Company	Ameren and Virginia Electric
AT&T Inc.	AT&T
Cavalier Telephone, LLC	Cavalier
CenturyTel, Inc.	CenturyTel
Charter Communications, Inc.	Charter
Coalition of Concerned Utilities	Coalition of Concerned Utilities
Comcast Corporation	Comcast
CTIA – The Wireless Association	CTIA
DAS Forum	DAS Forum
Edison Electric Institute and Utilities Telecom Council	EEI/UTC
Empire District Electric Company	Empire
ExteNet Systems, Inc.	ExteNet
Fibertech Networks, LLC and Kentucky Data Link, Inc.	Fibertech/KDL
Fibertower Corporation	Fibertower
Florida Power & Light and Tampa Electric Company	FPL and Tampa Electric
Florida Power & Light Company; Tampa Electric Company; and Progress Energy Florida, Inc.	FPL <i>et al.</i>
Frontier Communications	Frontier
Hance Haney	Hance Haney
Idaho Power Company	Idaho Power
Independent Telephone and Telecommunications Alliance	ITTA
Knology, Inc.	Knology
Mississippi Cable Telecommunications Association	MCTA
MetroPCS Communications, Inc.	MetroPCS
MI Connection Communications System	MI Connection
National Cable & Television Association	NCTA
NextG Networks, Inc.	NextG
National Telecommunications Cooperative Association	NTCA
Oncor Electric Delivery Company	Oncor
Oregon Public Utility Commission	Oregon Commission
PacifiCorp; Wisconsin Electric Power Company; and Wisconsin Public Service Corporation	PacifiCorp <i>et al.</i>
Portland General Electric Company	PGE
Qwest Communications International, Inc.	Qwest
State Cable Associations	SCA
segTEL, Inc.	segTEL
Sunesys, LLC	Sunesys
T-Mobile USA	T-Mobile

Time Warner Cable, Inc.	TWC
Time Warner Telecom, Inc.; One Communications Corporation; and CompTel	TWTC
United States Telecom Association	USTelecom
Utilities Telecom Council	UTC
Utah Public Service Commissioners	Utah Commissioners
Verizon	Verizon
Windstream Corporation	Windstream
Wireless Communications Association International, Inc.	WCA
WOW! Internet Cable and Phone	WOW!
Zayo Bandwidth Entities	Zayo

**Reply Commenter**

American Electric Power Service Corporation; Duke Energy Corporation; Entergy Services Company; PPL Electric Utilities Corporation; Progress Energy; Southern Company; and Xcel Energy Services, Inc.  
Alabama Power Company; Georgia Power Company; Gulf Power Company; and Mississippi Power Company  
Ameren Services Company and Virginia Electric and Power Company  
American Cable Association  
American Corn Growers Association  
American Legislative Exchange Council  
Americans for Tax Reform and Media Free Project  
AT&T Inc.  
Coalition of Concerned Utilities  
Comcast Corporation  
CTIA – The Wireless Association  
DAS Forum  
Edison Electric Institute and Utilities Telecom Council  
Embarq Local Operating Companies  
ExteNet Systems, Inc.  
Fibertech Networks, LLC; and Kentucky Data Link, Inc.  
Fibertower Corporation  
Florida Cable Telecommunications Association, Inc.  
Florida Power & Light Company; Tampa Electric Company; and Progress Energy Florida, Inc.  
Georgia Power Company  
Grande Communications Networks, Inc.  
Independent Telephone and Telecommunications Alliance  
National Association of State Utility Consumer Advocates  
National Cable & Television Association  
National Rural Electric Cooperative Association  
National Telecommunications Cooperative Association  
NextG Networks, Inc.  
Oncor Electric Delivery Company  
Organization for the Promotion and Advancement of Small Telecommunications Companies  
Pacific LightNet, Inc.

**Abbreviation**

AEP *et al.*  
  
Alabama Power *et al.*  
  
Ameren and Virginia Electric  
  
ACA  
ACGA  
ALEC  
ATR/MFP  
AT&T  
Coalition of Concerned Utilities  
Comcast  
CTIA  
DAS Forum  
EEI/UTC  
Embarq  
ExteNet  
Fibertech/KDL  
Fibertower  
FCTA  
FPL *et al.*  
  
Georgia Power  
Grande  
ITTA  
NASUCA  
NCTA  
NRECA  
NTCA  
NextG  
Oncor  
OPASTCO  
  
Pacific LightNet

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PacifiCorp; Wisconsin Electric Power Company; and Wisconsin Public Service Corporation	PacifiCorp <i>et al.</i>
State Cable Associations	SCA
segTEL, Inc; Zayo Bandwidth Entities; and 360networks USA, Inc.	SegTEL <i>et al.</i>
Sunesys, LLC	Sunesys
T-Mobile USA	T-Mobile
Time Warner Cable, Inc.	TWC
Time Warner Telecom, Inc.; One Communications Corporation; and CompTel	TWTC
United States Telecom Association	USTelecom
Verizon	Verizon

**STATEMENT OF  
CHAIRMAN JULIUS GENACHOWSKI**

RE: *Implementation of Section 224 of the Act, WC Docket No. 07-245, A National Broadband Plan for Our Future, GN Docket No. 09-51*

RE: *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Government Rights of Way and Wireless Facilities Siting, WC Docket No. 11-59*

Today, we take a major step in reducing barriers to broadband deployment, even as we set the stage for further progress on this vital goal. Our actions will enable and accelerate billions of dollars of private investment in the 21st century infrastructure America needs to create jobs, grow our economy, and compete globally.

Today's actions implement key recommendations of the National Broadband Plan and are central pillars of our Broadband Acceleration Initiative, announced on February 9. This Initiative is one of the Commission's top priorities: an agency-wide effort to speed the build-out of wired and wireless broadband by removing obstacles to deployment, particularly obstacles created by unneeded or inefficient regulation.

Having determined that broadband is not being reasonably and timely deployed to all Americans, the Commission is required by Section 706 of the Telecommunications Act to "take immediate action to accelerate deployment . . . by removing barriers to infrastructure investment." The Broadband Acceleration Initiative, and our actions today, are central to carrying out that duty.

The Initiative incorporates work being done by the Commission's Technological Advisory Council. I was pleased to revive the TAC, announce its new members on October 21, and give them a concrete charge: identify ways to use communications technologies and spectrum to drive job creation and economic growth. Under the excellent leadership of Tom Wheeler, and with participation from a host of private sector experts and Internet pioneers, the TAC has already identified several promising policy proposals that I look forward to the Commission considering in the coming year.

Another key milestone was the Broadband Acceleration Conference we held earlier this year, which yielded a number of strong ideas for policy reforms, many of which are included in the Notice of Inquiry the Commission adopts today.

Why is this Initiative so important? In the race for global competitiveness, the speed with which we can build America's broadband networks is as important as the speed that is delivered over these networks. Broadband is indispensable infrastructure for improving America's productivity in the 21<sup>st</sup> century – which is in turn the key to robust economic growth and job creation. The faster we can build out broadband, the faster we can help American workers and small businesses create the leading web-based enterprises of tomorrow. That's what the Broadband Acceleration Initiative is all about.

The Pole Attachments Order we adopt today comprehensively reforms the Commission's pole attachment rules for the first time since the 1990s, taking account of major changes in the marketplace and incorporating smart policies pioneered by various states.

Some might wonder what the connection is between utility poles and broadband service. Utility poles are essential to providing broadband service, wired and wireless, because that's where communications companies string cables and, increasingly, place wireless antennas. If every company that wanted to provide broadband service had to build its own separate set of poles to carry its equipment,

we wouldn't have much broadband in this country—it would simply be too expensive, and often impossible, to build an entirely new network of poles. This is why the Commission has historically taken steps to ensure that communications providers have reasonable access to the poles that already exist throughout the country.

The record in this proceeding demonstrates that today, the process by which broadband providers get access to utility poles frequently is so unpredictable, takes so long, and costs so much that it discourages providers from entering the marketplace and significantly delays broadband build-out. So our Order provides for a fixed timeline for getting access to poles that providers can count on, for both wired and wireless broadband build-out.

It also provides a timeline for accessing the tops of poles, which are key for the deployment of wireless broadband technologies like distributed antenna systems – DAS for short. DAS deployments use multiple antennas to extend wireless coverage and provide service more efficiently than conventional wireless antennas. As a result of this Order, DAS providers estimate that their cumulative capital investment could total more than \$15 billion over the next six years.

Importantly, the Order balances the need for efficient access to poles with protections for the safety and reliability of our electric grid, and empowers utilities to effectively prevent unauthorized attachments on their poles. Lineworkers perform jobs that are both valuable and dangerous, and we have been careful in developing this Order to make sure that we do nothing that would jeopardize their safety or the safety of others.

The Order also reforms policies for pole attachment rates. The record shows that pole rental rates vary widely and are often inefficiently high, which slants the competitive playing field, distorts infrastructure investment decisions, and deters broadband build-out. This is why incumbent phone companies argued that the Commission should regulate the prices they pay to access a utility's network of poles.

Reforming pole attachment rates is particularly important for rural America, where this Order will reduce pole rental costs for some broadband providers by more than 50%. This should spur broadband deployment where it is needed most, reduce the need for universal service funding to serve some hard-to-reach areas, and lower the cost of serving some rural households by as much as several dollars per month – which could mean real savings on consumers' bills. We expect these benefits to occur, and would be concerned – and would seriously consider modifying our approach to this issue – if we did not see evidence that these benefits were indeed occurring.

Today's Order is a testament to the strengths of our federal system and the importance of states as laboratories for policy development. Thanks to the thoughtful work of a number of states in crafting pole attachment rules over the last two decades, we have several effective models for pole attachment governance with proven track records. Our rules incorporate best practices from Oregon, Utah, New York, and other states.

While the Pole Attachments Order brings one proceeding to a close, we are simultaneously opening a new proceeding on Accelerating Broadband Deployment. This proceeding will examine key challenges and best practices for rights-of-way and wireless facilities siting policies. Rights-of-way policies are the rules that govern access to the public spaces where broadband infrastructure – including wireless towers and antennas – are deployed, including roadways, sidewalks, public lands, and public buildings, but excluding utility poles.

This proceeding is focused on improving these policies in order to enable broadband providers to expand the reach and accelerate deployment of robust, affordable broadband to all Americans. The

National Broadband Plan and our Technological Advisory Council have identified a number of potential barriers in this area, including:

- Poor coordination across jurisdictions on infrastructure issues, which delays broadband build-out and raises consumer costs;
- The expense and complexity of obtaining access to public rights of way;
- The fact that it's much harder than it should be to put another antenna on an existing cell tower;
- Failure to embrace "dig-once" policies that save money when workers dig a trench in the ground to lay fiber or cable; and
- Non-standard, confusing permitting processes for broadband infrastructure siting on federal property.

We will examine these issues with input from all interested parties, including states and localities, Tribes, other federal agencies, broadband providers, equipment providers, and consumer advocates. I look forward to learning what's working and can be replicated more broadly; what's not working and should be fixed; and, in general, what can be done to improve inefficient or burdensome policies.

I thank the staff, particularly the Wireline and Wireless Bureaus, for their hard work on these complex and important items. And I thank the TAC, and the FCC staff working with the TAC, for their continued efforts to develop proposals for further reform.

**STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

RE: *Implementation of Section 224 of the Act, WC Docket No. 07-245, A National Broadband Plan for Our Future, GN Docket No. 09-51*

RE: *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Government Rights of Way and Wireless Facilities Siting, WC Docket No. 11-59*

The National Broadband Plan clearly and rightly identified pole attachment policy as a key part of ensuring that all Americans have access to robust and affordable broadband service. It's not sexy or very exciting and you can quickly get lost in the weeds, but clarifying the rules surrounding rates and access to poles has been on the Commission's to-do list for longer than I've been here—and that's a long time. Pole attachments are without a doubt one of the critical inputs when communications providers assess the economics of deploying advanced telecommunications networks. Now, finally, and thanks to the leadership of the Chairman and the hard work of the staff, we can check it off the list. Today's action should do a lot to promote our ambitious broadband deployment goals. And, by the way, accelerating the roll out of advanced telecommunications services *is* exciting.

Our experience over the past fifteen years has demonstrated a need for a more detailed framework to govern pole attachments. I believe these revisions of the pole attachment rules will promote a more competitive broadband market and spur broadband's availability throughout the country. To that end, we establish a more balanced process to ensure timely and non-discriminatory access to poles for both wireline and wireless attachers, which will go a long way toward removing uncertainty and minimizing delays that have frustrated deployment. The disparities in pole attachment rates for different providers have also been a source of confusion and litigation, and hopefully the clarity we add today will discourage such outcomes. The provision in this item of a mechanism to ensure that incumbent local exchange carriers will have a forum to seek Commission remedies for rates that they believe to be unjust and unreasonable is a good step in the right direction.

We should always be mindful of, and build upon, the successful experiences at local and state levels. This much we know: in order to spread the wonders of broadband to every corner of this country we are going to need a set of best practices in place that will both expand the reach and reduce the costs of deployment. While we spirit ahead to make broadband a reality, we need to be cognizant of the authority that local, state and Tribal entities have over rights-of-way and the siting of wireless facilities. In beginning this conversation today with the Notice of Inquiry just presented by the Bureau, we need to be mindful of not impinging on local rights as we keep our important broadband objectives front-and-center. We need the right questions asked, the right data gathered and the input from all the relevant stakeholders. Getting high-speed, value-laden broadband out to every citizen in the land is, if it is to become reality, a partnership exercise—just as all the major infrastructure build-outs in this country have been, going back to the very beginning. That means the private sector and the public sector—the public sector including the federal, state and local levels. Working together, we can get this job done and keep the United States a world leader in technology, innovation and consumer opportunity.

My thanks to the Bureau for its hard work here and to the Chairman for bringing us another critical component of the National Broadband Plan.

**STATEMENT OF  
COMMISSIONER ROBERT M. McDOWELL**

RE: *Implementation of Section 224 of the Act, WC Docket No. 07-245, A National Broadband Plan for Our Future, GN Docket No. 09-51*

RE: *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Government Rights of Way and Wireless Facilities Siting, WC Docket No. 11-59*

While not the most exciting of issues, the Commission's pole attachment rules are nonetheless critical to our nation's broadband deployment effort. I, therefore, commend the Chairman for re-opening the pole attachment debate last spring and following through with some concrete decisions.

Our action today will help promote continued broadband deployment throughout our country.<sup>1</sup> Our guidance regarding so-called "make ready work" will provide more certainty, help streamline the process and ultimately speed new entrants' efforts to deploy broadband. Also, the Commission's use of its authority under Section 224 of the Act to adopt a new telecommunications pole rental rate formula - generally lowering the attachment rate to the current "cable rate" - will more effectively encourage competition in broadband deployment.

In concept, I would have liked to have seen a similar move to parity in regard to pole attachment rental rates for ILECS. But I understand that not all of the ILECS may be similarly situated vis-à-vis their competitors, because the ILECs are also pole owners and may enjoy certain benefits due to their joint use agreements with the utilities. On the other hand, this order still does provide some relief to ILECs and their customers, where appropriate. Pursuant to our action today, the ILECs will now have an opportunity to file complaints with the FCC and argue why the rates, terms or conditions in their agreements with the utilities are not just and reasonable, as allowed by Section 224.

Regarding a related matter before us today, I hope the Notice of Inquiry on public rights of way solicits useful information that can assist the FCC's continued efforts to encourage broadband deployment. I caution, however, that the FCC should be mindful of its limitations and only use this information in areas where it has jurisdiction.

In sum, I commend all of the staff who worked so diligently on all of these infrastructure issues and look forward to working with my colleagues as we learn from the various stakeholders who file in response to the notice.

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<sup>1</sup> The nationwide effect of this order is limited. For example, the Commission can only exert jurisdiction over pole attachment issues in areas where these access issues are not regulated by a state. *See* 47 U.S.C. § 224(c). Also, pole attachment arrangements that involve cooperatives are not under our jurisdiction. *See* 47 U.S.C. 224(a)(1). Nevertheless, each incremental move will make a difference in America's broadband deployment numbers.

**STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

RE: *Implementation of Section 224 of the Act, WC Docket No. 07-245, A National Broadband Plan for Our Future, GN Docket No. 09-51*

RE: *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Government Rights of Way and Wireless Facilities Siting, WC Docket No. 11-59*

Today we take an important step to promote broadband deployment and competition, and both wireline and wireless consumers stand to gain. Through our adoption of specific timeframes for access to poles, broadband providers will be better positioned to plan their network deployments and upgrades. As a result, they will be better able to serve their customers and meet their broadband demands. Moreover, by addressing the disparate pole rental rates paid by service providers, we are establishing a more evenhanded opportunity for providers to compete with one another based on their offerings and prices.

I spent a great deal of time considering the arguments on both sides concerning the joint use agreements that utilities and incumbent local exchange carriers (“ILECs”) rely upon for access to one another’s poles. At face value, parity for ILECs is an attractive proposition, especially considering the policy rationale of a level playing field for all broadband competitors.

However, I was persuaded that joint use agreements are not just simple pole attachment contracts. They are joint *ownership* agreements. Some of these agreements have significant histories, as they are decades old. Accordingly, I agree with the guidelines we establish in this Order that set forth a series of factors for the Commission to consider in determining whether the existing rates are just and reasonable in a complaint proceeding. To the extent that ILECs benefit from our oversight of these agreements through decreased pole expenses, consumers should be the beneficiaries through additional deployment, decreases in service prices, or network upgrades to faster broadband speeds. As such, it is only appropriate that industry provide us with regular updates on how they are passing these benefits on to consumers.

I also support the Notice of Inquiry we adopt today that seeks detailed information on the management of public rights of ways and the siting of wireless facilities. I believe it is important for the Commission to gather this data as part of our Broadband Acceleration Initiative.

While it is essential to learn how long it takes and how much it costs for broadband providers to obtain the necessary approvals from a local jurisdiction to build a new tower or access conduit under a street, I believe it is equally imperative for the Commission to fully understand the policy rationales for these processes and costs. Gathering and analyzing the data should not be done in a vacuum. We must also commit ourselves, to work in partnership, with our counterparts in state and local governments, other federal agencies, and Tribal governments on these issues. We can achieve our common goal of promoting broadband service to residents and anchor institutions by working together.

**STATEMENT OF  
COMMISSIONER MEREDITH ATTWELL BAKER**

RE: *Implementation of Section 224 of the Act, WC Docket No. 07-245, A National Broadband Plan for Our Future, GN Docket No. 09-51*

RE: *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Government Rights of Way and Wireless Facilities Siting, WC Docket No. 11-59*

There are very few concrete steps this Commission can take to promote broadband deployment. The pole attachment proceeding is one of them, and I support our efforts to provide greater certainty and competitive parity in the pole attachment process. We must always act in a manner that reflects the critical safety and reliability interests of the utilities, and I believe we struck the proper balance in this Order.

We take important steps to provide clarity to all stakeholders on wireless attachment rates, timelines, and pole top access issues. The ability to leverage utility poles may be critical for next-generation wireless build-out to fill coverage holes, to more efficiently re-use spectrum, and to take advantage of distributed antenna systems. This is the type of action needed to help us achieve our collective goal of nationwide 4G coverage, and promote greater mobile broadband competition and efficient spectrum policy. We importantly make clear that utilities retain their statutory right to ensure the safety and reliability of their core networks. I expect wireless operators and utilities to work collaboratively to protect electric networks while facilitating access to these new technologies and services.

I also support the effort to raise the profile of important rights of way issues in the accompanying Notice of Inquiry. While our authority to act in this area is limited, the Commission does have a role to highlight impediments to broadband deployment, and I am hopeful we can partner with industry, states and localities to address these challenges together.