No. ______

In the Supreme Court of the United States

AMERICAN ELECTRIC POWER SERVICE CORP., et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"Because no incumbent local exchange carrier (ILEC) is a 'telecommunications carrier,' no ILEC can be a 'provider of telecommunications service' for purposes of the definition of 'pole attachment' in Section 224(a)(4)."[1]

For fifteen years following the last amendments to the Pole Attachments Act (47 U.S.C. § 224), the FCC consistently acknowledged the same conclusion that the Solicitor General urged before this Court: that an "ILEC has no rights under section 224 with respect to the poles of other utilities."[2] Indeed, the Act's principal purpose was to protect entities with attachments to utility poles owned by ILECs—the incumbent telephone utilities who, along with electric utilities, own the nation's network of utility poles. Nevertheless, the FCC in 2011 re-interpreted the Act to grant what everyone agreed Congress intended *not* to provide: protection for attachments by ILECs to the poles of other utilities.

The questions presented by this petition are:

1. Whether Congress, by expressly excluding ILECs from the Pole Attachments Act's definition of "telecommunications carrier," intended to exclude attachments by ILECs to the

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[1] Brief for the Federal Petitioners, *Nat'l Cable Television Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (Nos. 00-832,00-843), 2001 WL 345195, at *18.

[2] *Id.*

poles of other utilities from the protections of the Act.

2. Whether the FCC provided a reasoned justification for re-interpreting the Pole Attachments Act to extend its protections to attachments by ILECs to the poles of other utilities.

PARTIES TO THE PROCEEDINGS

Parties in the D.C. Circuit

Petitioners below were American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Florida Public Utilities Company, Oncor Electric Delivery Company, Progress Energy, Inc. (which has since merged with Petitioner Duke Energy Corporation), Southern Company, and Tampa Electric Company.

Respondents, which were also respondents below, are the Federal Communications Commission and the United States of America.

Edison Electric Institute was *amicus curiae* below in support of petitioners.

Consumers Energy Company, The Detroit Edison Company, FirstEnergy Corp., Hawaiian Electric Company, Inc., Northern States Power Company (a Minnesota corporation), Northern States Power Company (a Wisconsin corporation), NSTAR Electric Company, Pepco Holdings, Inc., Public Service Company of Colorado, and Southwestern Public Service Company were intervenors below in support of the petitioners.

United States Telecom Association, AT&T Inc., The CenturyLink Local Operating Companies, and Verizon were intervenors below in support of the respondents on the issue raised in this Petition.

Bright House Networks, LLC, Charter Communications, Inc., Comcast Corporation, CTIA – The Wireless Association, Mediacom Communications Corporation, the National Cable & Telecommunications Association, NextG Networks, Inc., PCIA – The Wireless Infrastructure Association, Sunesys, LLC, Time Warner Cable Inc. and tw telecom inc. were intervenors below in support of respondents on issues not relevant to this Petition.

Corporate Disclosure Statements of Petitioners

American Electric Power Service Corporation ("AEP Service Corp.") is a wholly owned subsidiary of American Electric Power Company, Inc. ("AEP"). AEP Service Corp. supplies administrative and technical support services to AEP and its subsidiaries. AEP, through its operating company subsidiaries, owns electric distribution infrastructure, including a substantial number of utility poles, in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia, many of which are affected either directly or indirectly by the FCC's pole attachment rules.

Duke Energy Corporation ("Duke Energy") has no parent company and there are no publicly held companies that have a 10% or greater ownership interest in Duke Energy. Duke Energy is an electric power holding company. Through its operating company subsidiaries, Duke Energy owns electric distribution infrastructure, including a substantial number of utility poles, in Florida, Indiana, Kentucky, North Carolina, Ohio, and South Carolina, many of

which are affected either directly or indirectly by the FCC's pole attachment rules.

Florida Power & Light Company ("FPL") is a wholly owned subsidiary of NextEra Energy, Inc. FPL is an integrated electric utility primarily engaged in the production, transmission and distribution of electric power in Florida. FPL owns a substantial number of electric distribution utility poles, all of which are affected either directly or indirectly by the FCC's pole attachment rules.

Oncor Electric Delivery Company ("Oncor") is majority-owned by Oncor Electric Delivery Holdings Company LLC, which is wholly owned by Energy Future Intermediate Holding Company LLC. Energy Future Intermediate Holding Company LLC is owned by Energy Future Holdings Corp. There are no publicly held companies that have a 10% or greater ownership interest in Oncor. Oncor is an electric distribution company that owns a substantial number of utility poles in Texas, all of which are affected either directly or indirectly by the FCC's pole attachment rules.

Southern Company ("Southern") has no parent company, and there are no publicly held companies that have a 10% or greater ownership interest in Southern. Southern is an electric utility holding company. Southern's operating-company subsidiaries, Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company, own electric distribution infrastructure, including a substantial number of utility poles, in Alabama, Florida, Georgia, and Mississippi, all of which are

affected either directly or indirectly by the FCC's pole attachment rules.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners American Electric Power Service Corporation, Duke Energy Corporation, Florida Power & Light Company, Oncor Electric Delivery Company, and Southern Company (on behalf of its operating-company subsidiaries Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company) respectfully petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit, which is captioned as *American Electric Power Service Corp. v. FCC*, is published at 708 F.3d 183 (D.C. Cir. 2013), and reproduced at App. 1–23. The final order of the Federal Communications Commission, as released and adopted on April 7, 2011, may be found at 26 FCC Rcd. 5240, and excerpts that are relevant to this Petition are reproduced at App. 24–165. The order was subsequently published in abbreviated form in the Federal Register at 76 Fed. Reg. 45590, and is reproduced at App. 166–261. Because the April 7, 2011 order is more detailed, that is the version cited in this Petition.

STATEMENT OF JURISDICTION

The D.C. Circuit entered judgment on February 26, 2013. This petition for a writ of certiorari is timely filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are set out in App. 262–68 pursuant to Rule 14(f):

- Section 3 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 153.
- The Pole Attachments Act of 1978, as amended by the Telecommunications Act of 1996 and codified at 47 U.S.C. § 224.

INTRODUCTION

"The fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." *City of Arlington, Tex. v. FCC*, 569 U.S. ___ at 16 (2013).

Despite the fact that the FCC "has repeatedly been rebuked in its attempts to expand the [Communications Act] beyond its text, and has repeatedly sought new means to the same ends,"[3] in this case, the D.C. Circuit left the fox (the FCC) in charge of the henhouse (the scope of its regulatory authority). It deferred to the FCC's assertion of authority over attachments by ILECs to the poles of

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[3] *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

other utilities, even though "Congress has established a clear line . . . [which] the agency cannot go beyond": that under the Pole Attachments Act, ILECs are to be classified as "utilities" subject to the *duties* of historical pole owners, not eligible for the *benefits* of new pole attachers.

In the fifteen years since Congress last amended the Pole Attachments Act, the FCC, the Solicitor General, and the courts have uniformly acknowledged that ILECs are excluded from the protections of the Act. This unanimity is unremarkable given that Congress expressly excluded ILECs from the definition of "telecommunications carrier" and, consequently, from the class of pole-attaching entities entitled to protections under the Act.

When it passed the Telecommunications Act of 1996, Congress recognized that ILECs were not (and had never been) in need of the Act's protections, because ILECs—unlike cable operators and, later, competitive telecommunications providers—were pole *owners*. Because of this pole ownership, ILECs had negotiated "joint use" agreements with the electric utilities (their fellow pole owners) long before the Act was originally passed in 1978. Under these joint use agreements, telephone and electric utilities shared their networks of poles. These arrangements saved costs to both utilities, and spared the public the aesthetic nuisance of redundant pole networks.

Thus, "there was no need to provide rate protection to entities that usually owned or controlled poles

themselves."[4] And it was simply inconceivable that Congress would allow ILECs to *benefit* from the Act when a principal purpose of the Act was to place *burdens* on pole owners.

Nevertheless, the FCC did an about-face in its April 2011 order, and for the first time contended that Congress concealed within a definitional subsection of the Pole Attachments Act an implicit reference to ILECs as protected attachers. But as this Court has often acknowledged, "Congress does not . . . hide elephants in mouseholes."[5]

"[U]nder the guise of statutory construction,"[6] the FCC has effectively amended the Act in an effort to "harmonize"[7] its words to the tune of the FCC's National Broadband Plan, rather than to "fit, if possible, all parts [of the Act] into an harmonious

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[4] Brief for the Federal Petitioners, *Nat'l Cable Television Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (Nos. 00-832, 00-843), 2001 WL 345195, at *18.

[5] *Am. Library Ass'n v. FCC*, 406 F.3d 689, 704 (D.C. Cir. 2005) (quoting *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001)).

[6] *Nat'l Cable Television Ass'n v. Brand X*, 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting).

[7] *See Connecting America: The National Broadband Plan*, *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf (hereinafter "National Broadband Plan"), at *109 ("Congress should consider amending Section 224 of the Act to establish a harmonized access policy for all poles, ducts conduits and rights-of-way.").

whole."[8] And to do so, the FCC contrived a distinction between two statutory terms—"telecommunications carrier" and "provider of telecommunications services"—even though the terms are expressly defined by the Act to mean the same thing.

Thus, the FCC "re-interpreted" a statutory provision it had always treated as an unambiguous expression of Congress's intent to exclude ILECs. In doing so, the FCC almost certainly relied on the fact that "*Chevron* is a powerful weapon in an agency's regulatory arsenal,"[9] and that a reviewing court these days will rarely second-guess an agency's interpretation of a statute which Congress has entrusted it to administer.

"But what we have here goes well beyond that. It is effectively the introduction of a whole new regime of regulation . . . , which may well be a better regime, but is not the one that Congress established."[10] Indeed, in the National Broadband Plan, the FCC itself had previously admitted that "without statutory change," the Commission would remain constrained by the words of the Act and the intent of Congress to treat

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[8] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *FTC* v. *Mandel Brothers, Inc.,* 359 U. S. 385, 389 (1959)).

[9] *City of Arlington*, 569 U.S. ___ at 4 (Roberts, C.J., dissenting).

[10] *MCI Telecommc'ns Corp. v. AT&T*, 512 U.S. 218, 234 (1994).

pole attachments differently based on the identity of an attaching entity.[11]

When the D.C. Circuit reviewed this about-face by the FCC, it viewed its duty as singular: to "review the Commission's interpretation of § 224 for reasonableness." App. 6. And as a result, the D.C. Circuit failed to employ the "traditional tools of statutory construction"[12] to determine whether Congress intended for ILECs to remain excluded from the protections of the Act. Instead, the D.C. Circuit reduced the Act's statutory terms to a mathematical formula. App. 8–9.

But "the meaning of statutory language, plain or not, depends on context"[13]—context which is lost when words are converted to variables in a mathematical formula. If after employing the traditional tools of statutory construction, "the intent of Congress is clear,

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[11] *See* National Broadband Plan at 112 ("[W]ithout statutory change, the convoluted rate structure for cable and telecommunications providers will persist . . ."); *see also id.* at *110 ("Different rates for virtually the same resource (space on a pole), based solely on the regulatory classification of the attaching provider, largely results from rate formulas established by Congress and the FCC under Section 224 of the Communications Act of 1934, as amended."); *id*. ("Congress should consider amending or replacing Section 224 with a harmonized and simple policy that establishes minimum standards throughout the nation . . .").

[12] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

[13] *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *City of Arlington*, 569 U.S. ___ at 4 (quoting *Chevron*, 467 U.S. at 842–43).

Here, Congress's intent was clear: to exclude ILECs from all protections under the Pole Attachments Act. But the D.C. Circuit inadequately examined "the statute's text, its context, the structure of the statutory scheme, and canons of textual construction,"[14] even turning on its head the very definitional cross-reference specified by Congress.

STATEMENT OF THE CASE

Congress passed the Pole Attachments Act of 1978, codified at 47 U.S.C. § 224, in response to complaints by the then-nascent cable television industry over the rates charged for access to pole networks owned by telephone and electric utilities. The Act gave the FCC limited authority to regulate the "rates, terms, and conditions" imposed by pole owners (telephone and electric utilities) to pole attachers (cable providers) to ensure that they were "just and reasonable."[15]

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[14] *City of Arlington*, 569 U.S. ___ at 3 (Breyer, J., concurring).

[15] The Pole Attachments Act, Pub. L. No. 95-234, *codified at* 47 U.S.C. § 224. "This expansion of FCC regulatory authority is strictly circumscribed and only extends so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to [cable] systems." S. Rep. No. 95-580, at 15 (1977).

The Act originally made no distinction between electric and telephone utilities because Congress recognized that "poles, ducts, and conduits are usually owned by *telephone* and electric power utility companies, which often have entered into joint use or joint ownership agreements."[16] Thus, the electric and telephone utilities needed no protecting from each other.

With the Telecommunications Act of 1996, which, among other things, amended the Pole Attachments Act, Congress "imposed a number of duties on incumbent providers of local telephone service in order to facilitate market entry by competitors. . . . Before the 1996 Act, a new, competitive LEC could not compete with an incumbent carrier without basically replicating the incumbent's entire existing network"[17]—including the ILEC's entire existing network of utility poles.

Recognizing that the newly competitive entrants into the telecommunications market lacked the advantages of the *incumbent* telephone utilities, Congress expressly distinguished the two, introducing

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[16] Brief for the Federal Petitioners, *Nat'l Cable Television Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (Nos. 00-832, 00-843), 2001 WL 345195, at *18 (quoting S. Rep. No. 98-580) (emphasis in original).

[17] *Talk America*, *Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, at 2257–58 (2011).

for the first time the term "*incumbent* local exchange carrier,"[18] or "ILEC," to describe the latter.

And in order to prevent ILECs (i.e., the Bell operating company successors to the AT&T monopoly) from erecting unlawful barriers to entry, "[t]he 1996 Act . . . requir[es] incumbent LECs to share their networks with competitive LECs in several ways. . . ."[19] For example, Congress amended § 224 to include a "provider of telecommunications services" among the Pole Attachments Act's beneficiaries.[20] Recognizing that an ILEC would be classified under the Act as both a "utility" and a "provider of telecommunications services," Congress intended to make clear that the entities entitled to the Act's protections would continue to exclude the incumbent telephone utilities.[21] From that point on, it was universally recognized that ILECs were to be treated as pole owners (i.e., "utilities") and not pole attachers (i.e., "provider[s] of telecommunications services") under the Act.

In its April 2011 order, the FCC reversed course on its fifteen years of regulatory precedent which had acknowledged what was universally understood—that ILECs remained excluded from the Act's protections, even after the 1996 amendments added "provider of

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[18] *See* 47 U.S.C. § 251(h).

[19] *Talk America*, 131 S. Ct. at 2258.

[20] 47 U.S.C. § 224(a)(4).

[21] 47 U.S.C. § 224(a)(5).

telecommunications services" as a protected category of pole attacher.

And in reviewing the FCC's order, the D.C. Circuit reached the wrong answer because it asked the wrong question. As this Court recently held, "[n]o matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington*, 569 U.S. ___ at 5 (emphasis in original). Rather than employ the traditional tools of statutory construction to answer the question of where Congress had drawn the lines of the FCC's authority under § 224, the D.C. Circuit simply reviewed the FCC's re-interpretation of its statutory bounds for "reasonableness."[22]

This is not the first time the FCC has decided that it cannot wait for Congress to legislatively extend the reach of its regulatory authority. The FCC's "history of rulemaking at the horizon of its statutory authority"[23] began four decades ago when it asserted "ancillary jurisdiction" over the nascent cable industry.[24] Though

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[22] App. 8–9.

[23] Daniel A. Lyons, *Tethering the Administrative State: The Case Against* Chevron *Deference for FCC Jurisdictional Claims*, 36 Iowa J. Corp. L. 823, 825 (2011).

[24] *In the Matter of Amendment of Subpart L, Part 91 to adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Rely Television*

this Court initially affirmed the FCC's assertion of limited jurisdiction over cable providers to prevent them from frustrating its regulation of broadcasters, Chief Justice Burger cautioned that "the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts."[25]

But the FCC ignored the Chief Justice's warning and soon thereafter attempted to expand its authority once again by treating cable providers as common carriers. That time, this Court reached the opposite conclusion,[26] prompting Congress to enact the Cable Communications Act, which provided the FCC with some of the same authority it previously had claimed for itself,[27] while striking the legislative balance that only Congress can provide.

Just fifteen years later, the FCC once again found itself defending its efforts to re-interpret provisions of the Communications Act of 1934. This time, the FCC had determined that, under its statutory authority to "modify" the Communication Act's mandate that "[e]very common carrier . . . shall . . . file" rate tariffs,

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Signals to Community Antenna Systems, 2 F.C.C.2d 725, 788–34 (1966).

[25] *United States v. Midwest Video Corp.*, 406 U.S. 649, 676 (1972) (*Midwest Video I*) (Burger, C.J. concurring).

[26] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979) (*Midwest Video II*).

[27] *See* The Cable Communications Act, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

the Commission was free to exempt entirely a subset of long-distance telephone providers from the Act's tariff-filing requirement.[28]

But this Court held that the FCC's supposed "modification" was, "in reality, . . . a fundamental revision of the statute, changing it from a scheme of rate regulation . . . to a scheme of rate regulation only where effective competition does not exist."[29] Congress again responded by enacting the Telecommunications Act of 1996, which also provided the most recent amendments to the Pole Attachments Act of 1978.

Congress has not amended the Pole Attachments Act since 1996, thereby ensuring the status quo that an "ILEC has no rights under section 224 with respect to the poles of other utilities."[30] Nonetheless, the FCC has again determined that changed market conditions compel it "to concoct 'a whole new regime of regulation . . .' under the guise of statutory construction."[31]

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[28] *See In re Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd. 8072 (1992); 47 U.S.C. § 203(a).

[29] *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 231–32 (1994).

[30] Brief for the Federal Petitioners, *Nat'l Cable Television Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (Nos. 00-832, 00-843), 2001 WL 345195, at *18.

[31] *Nat'l Cable Television Ass'n v. Brand X*, 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting) (quoting *MCI,* 512 U.S. at 234).

REASONS FOR GRANTING THE PETITION

I. The FCC's abrupt reversal of course will fundamentally restructure the relationship between the electric and telephone industries and could shift hundreds of millions of dollars in costs to electric ratepayers.

The FCC's assertion of authority over attachments by ILECs to the poles of other utilities will directly affect the relationship between the electric and telephone industries, two of this nation's oldest and most important industries. Together, these industries have constructed the nation's aerial corridors in reliance on the terms of long-standing joint use agreements. Most of these joint use agreements, which outline how the parties share the costs of building and maintaining their networks of utility poles, have been in place for many, many decades.

As a result of the FCC's radical expansion of its regulatory authority in the 2011 order, ILECs across the country have already terminated long-standing joint use agreements or flatly refused to meet their contractual obligations, or both. In fact, according to the ILECs' own estimates, the FCC's newfound jurisdiction carries with it the potential to shift as much as $350 million in annual costs from ILECs to electric utility ratepayers.[32]

The FCC's re-interpretation of the Pole Attachments Act as granting it the discretion to re-

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[32] App. 68 (¶ 208).

draw the "bounds of its statutory authority" in response to what it perceives as changed circumstances, and the D.C. Circuit's deference to the FCC, completely disregard these well-settled and investment-backed expectations. This Court should grant the Petition to remind the FCC that Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) (citing *MCI*, 512 U.S. at 231, and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

II. The Court of Appeals misapplied *Chevron* by deferring to the FCC without determining whether Congress intended for the Pole Attachments Act to exclude ILECs from the entities entitled to its protections.

"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *City of Arlington*, 569 U.S. ___ at 4 (quoting *Chevron* 467 U.S. at 842–43).

On the question of whether the FCC's congressionally delegated authority extends to attachments by ILECs to the poles of other utilities, the inquiry should never proceed past step one. For fifteen years, the FCC contended that § 224 of the Pole Attachments Act meant what it said—that ILECs are excluded from the Act's protections—and required no

further interpretation. But when the FCC "re-interpreted" the bounds of its statutory authority in 2011, resulting in a monumental upheaval of the long-understood status quo, the D.C. Circuit did not ask the threshold question of whether Congress had unambiguously intended to exclude ILECs from the protections of the Act. Instead, the D.C. Circuit presumed that the FCC was entitled to deference and asked only whether the FCC's reading of the statute was "permissible."[33]

In reality, courts should operate under the opposite presumption: that "Congress . . . [did] not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—[because] it does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468 (citing *MCI*, 512 U.S. at 231, and *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60). To the contrary, Congress intended for both the 1978 Act and its 1996 amendments to protect only new pole *attachers* from the pole *owners*—electric and telephone utilities. It is implausible that Congress hid an elephant (protections for ILECs, one of the classes of utility pole owners which Congress intended to remain excluded from the Act) in a mousehole (the term "provider of telecommunications services").

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[33] App. 10.

A. Congress unambiguously intended for *incumbent* LECs to remain excluded from the protections of the Pole Attachments Act.

"*Chevron* is rooted in a background presumption of congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *City of Arlington*, 569 U.S. ___ at 5. But "[e]ven for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."[34]

Even if the extent of the FCC's authority under the Act were ambiguous, "the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill,"[35] because "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority."[36] "For if delegation really is antecedent to deference, as *Mead* insists, it cannot be that courts should defer to

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[34] *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004).

[35] *City of Arlington*, 569 U.S. ___ at 2 (Breyer, J., concurring).

[36] *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *see also United States v. Mead Corp.* 533 U.S. 218, 226–27 (2001).

an agency's views on whether a delegation has taken place. Deference comes into play only *after* a court convinces itself that Congress meant for a given agency to wield interpretive power."[37]

In its decision below, however, the D.C. Circuit failed to conduct this preliminary inquiry mandated by *Mead*, its progeny, and even its progenitor, *Chevron*. Instead of fully examining the context of the statute as a "harmonious whole,"[38] the D.C. Circuit permitted the FCC to "harmonize" the Pole Attachments Act to the tune of its National Broadband Plan by reducing the statutory provisions to a symbolic formulation, thereby stripping them of all context.

But in determining whether Congress has left ambiguous gaps within a statute which it has entrusted an agency to fill, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 121. Rather, "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.* at 133.

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[37] *City of Arlington*, 569 U.S. ___ at 11 (Roberts, C.J., dissenting) (quoting Sales & Adler, *The Rest is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1564 (2009)).

[38] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *FTC v. Mandel Brothers, Inc.,* 359 U.S. 385, 389 (1959)).

1. By excluding ILECs from the definition of "telecommunications carrier" for purposes of the Pole Attachments Act, Congress unambiguously intended to exclude ILECs entirely from the Act's protections.

A "statute's text, its context, the structure of the statutory scheme, and canons of textual construction are relevant in determining whether the statute is ambiguous and can be equally helpful in determining whether such ambiguity comes accompanied with agency authority to fill a gap with an interpretation that carries the force of law."[39] Under this rubric, it becomes clear that Congress unambiguously intended for ILECs to be classified as "utilities" subject to the *duties* of historical pole owners, not eligible for the *benefits* of new pole attachers under the Pole Attachments Act.

In 1996, Congress amended the Act to provide that, in addition to a "cable television system," a "provider of telecommunications services" would also be afforded the Act's protections vis-a-vis pole owners.[40] But it was cognizant that this modification might inadvertently transform an ILEC from a "utility" under § 224(a)(1) into a protected attacher under § 224(a)(4). Thus, Congress incorporated within the amendments to the Pole Attachments Act the Telecommunications Act's newly minted distinction between ILECs and other

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[39] *City of Arlington*, 569 U.S. ___ at 2 (2013) (Breyer, J., concurring).

[40] 47 U.S.C. § 224(a)(4).

telecommunications carriers (such as competitive local exchange carriers, or CLECs) in order to ensure that the Act continued to expressly exclude ILECs from the statutory protections afforded to pole attachers:

> For purposes of this section, 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) of this title.[41]

The definition of "telecommunications carrier," incorporated from section 3 of the Communications Act, provides in relevant part that "telecommunications carrier *means* any provider of telecommunications services."[42]

"Where 'means' is employed, the term and its definition are to be interchangeable equivalents."[43] Because § 153(51) was incorporated into § 224, the synonymy between "telecommunications carrier" and "provider of telecommunications services" provides an important backdrop for the entire section. When, for purposes of that section, ILECs are explicitly excluded from one term, they are necessarily excluded from the other because the Act has already established that the two terms are synonymous. And courts generally have

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[41] *Id.* at § 224(a)(5).

[42] *Id.* at § 153(51) (emphasis added).

[43] *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 n.1 (1934).

heeded this command by using the two terms interchangeably.[44]

"It can hardly have been Congress's intention to include this cross-reference and thereby incorporate the otherwise inapplicable definition, only to have the [FCC] disregard the definition. . . ."[45] In fact, a cross-reference like the definition at issue here, "contained as it is in the immediate context of the term requiring interpretation, is determinative."[46]

The dichotomy set up by the Pole Attachments Act, both as originally enacted in 1978 and as amended in 1996, was pole owners (i.e., "utilities") vs. pole attachers. *See Congressional Record* Vol. 23, 35006 (1977) ("H.R. 7442 will resolve a longstanding problem in the relationship of cable television companies on the one hand, and power *and telephone* utilities on the other.") (emphasis added); S. Rep. No. 103-367 (1995) (explaining that the amendments would "allow *competitors* to the *telephone companies* to obtain access to poles owned by utilities *and telephone companies* at

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[44] *See, e.g.*, *Nat'l Cable Television Ass'n v. Brand X*, 545 U.S. 967, 977 (2005) ("'Telecommunications carrier[s]'—those subjected to mandatory Title II common-carrier regulation—are defined as 'provider[s] of telecommunications services.'"); *Southern Co. v. FCC*, 293 F.3d 1338, 1342 n.1 (11th Cir. 2002) (noting that the 1996 Act "added telecommunications carriers to the class of entities entitled to regulated rates for pole attachments and granted them the same access rights given cable companies.").

[45] *Port Authority v. DOT*, 479 F.3d 21, 32–33 (D.C. Cir. 2007) (citing *Chevron*, 467 U.S. at 842–43).

[46] *Id.*

rates that give the owners of poles a fair return on their investment") (emphases added).

In fact, when Congress last amended the Pole Attachments Act as part of the Telecommunications Act of 1996, it introduced the term "ILEC" to distinguish traditional *incumbent* telephone companies from the new entrants it sought to protect. To discourage anticompetitive behavior by ILECs directed at their newfound competition, Congress also "imposed a number of duties on incumbent providers of local telephone service [and] requir[ed] [I]LECs to share their networks with competitive LECs in several ways."[47] For example, "47 U.S.C. § 251(c)(3) requires incumbent LECs to lease 'on an unbundled basis'—*i.e.,* a la carte—network elements specified by the Commission."[48] And 47 U.S.C. § 251(c)(2) "mandates that incumbent LECs 'provide . . . interconnection' between their networks and competitive LECs' facilities."[49]

Likewise, Congress amended the Pole Attachments Act to require ILECs (and electric companies), as "utilities," to share their existing networks of utility poles with new market entrants, such as CLECs and other competitive telecommunications providers.

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[47] *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2258 (2011).

[48] *Id.*

[49] *Id.*

Thus, utilities—both power companies and ILECs—were to remain excluded from the protections of the Act because "there was no need to provide rate protection to entities that usually owned or controlled the poles themselves." Brief for the Federal Petitioners, *Nat'l Cable Television Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (Nos. 00-832, 00-843), 2001 WL 345195, at *18. But Congress explicitly carved out ILECs because, as a "provider of telecommunications services" in the general sense, an ILEC would otherwise constitute a "telecommunications carrier" for purposes of the Act, whereas an electric utility normally would not.[50] Thus, in the provision *immediately following* the addition of a "provider of telecommunications services" as an attaching entity entitled to protection under the Act, *see* 47 U.S.C. § 224(a)(4), Congress made clear that the term telecommunications carrier "*does not include any incumbent local exchange carrier,*" *id.* at § 224(a)(5) (emphasis added).

In a rulemaking shortly after the 1996 amendments, the FCC itself had no hesitation in concluding that Congress unambiguously intended to exclude ILECs entirely from the protections of the Act:

> ILECs have no rights with respect to the poles of ***other*** utilities, [which is] consistent with ***Congress' intent*** to promote competition by ensuring the availability of access to ***new*** telecommunications entrants.

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[50] *See* 47 U.S.C. § 153(51).

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd. 6777, ¶ 5 (Feb. 6, 1998) (emphases added).

The FCC has repeatedly re-affirmed this understanding in subsequent years, even as recently as 2005. *See, e.g.*, *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order, 15 FCC Rcd. 22983, ¶ 72 (2000) ("While previously the protections of Section 224 had applied only to cable operators, the 1996 Act extended those protections to telecommunications carriers as well," but "***specifically excludes incumbent LECs*** from the definition of telecommunications carriers with rights as pole attachers.") (emphasis added); *In the Matter of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd. 19415, ¶ 99 n.243 (2005) (Mem. Op. and Order) ("Because an incumbent LEC is a utility and not a telecommunications carrier for purposes of section 224, an incumbent LEC must grant ***other*** telecommunications carriers and cable operators access to its poles . . . even though an incumbent LEC has no rights under section 224 with respect to those of ***other*** utilities.") (emphases added).

Indeed, for a decade, the ILECs themselves recognized that the plain text excluded them from the Act's protections.[51] Never did anyone suggest

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[51] *See In the Matter of 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, Comments of Bell Atlantic at 5–6 (filed September 26, 1997) (stating that "the Act defines a 'pole attachment' as 'any

otherwise until the ILECs petitioned the FCC to reverse its longstanding acknowledgment of the Act's words.

But while "[o]ld words may gain new meaning as circumstances change, . . . old words in statutes retain their meaning; change depends upon amendment."[52] When it last amended the Pole Attachments Act in 1996, "Congress was quite precise in defining the scope of the Act and fully capable of limiting that scope where it saw fit."[53] Yet, the FCC decided that the words have changed meaning such that ILECs are no longer utilities against whom protection is needed, but instead are themselves now in need of protection.

Even if it were correct that ILECs are indeed now in need of protection, the FCC has no more liberty than this Court to "re-interpret" a statute to be more in line with the times. After all, "a statute is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 827 (1978) (citation and quotation omitted).

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attachment by a . . . provider of telecommunications service,' but specifically exempts incumbent local exchange carriers from the definition of a telecommunications carrier.").

[52] *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722, 725 (7th Cir. 1994).

[53] Brief for the Federal Petitioners, *Nat'l Cable Television Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (Nos. 00-832, 00-843), 2001 WL 345195 at *17.

Thus, "[w]hat we have here, in reality, is a fundamental revision of the statute." *See MCI Telecommc'ns Corp. v. AT&T*, 512 U.S. 218, 231 (1994). Once again, "under the guise of statutory construction," the FCC has re-drawn the bounds of its statutory authority, this time to extend the reach of § 224 beyond the agency's grasp in order to protect the very entities whom the Pole Attachments Act was designed to protect against. *Id.* "That may be a good idea, but it was not the idea Congress enacted into law in [1996]." *Id.* at 231–32.

2. The Court of Appeals did not adequately employ the "traditional tools of statutory construction" to discern the meaning of § 224 in context.

In reviewing the FCC's "re-interpretation" of the Act, the D.C. Circuit did not adequately address the central question: "simply, whether the agency ha[d] stayed within the bounds of its statutory authority,"[54] as circumscribed by congressional intent. Instead, the D.C. Circuit took for granted that the FCC was entitled to deference, and presumed that it had simply decided to pivot "from one supposedly permissible interpretation . . . to another permissible interpretation." App. 10.

In doing so, the D.C. Circuit deferred to the FCC's departure from what it had previously acknowledged was a clear expression of congressional intent. And while the Act's terms have not changed their meaning

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[54] *City of Arlington*, 569 U.S. ___ at 5.

since Congress last spoke in 1996, the FCC now says that "telecommunications carrier" and "provider of telecommunications services" do not mean the same thing in § 224, even though the incorporated definition still says that they do.[55] Because Congress used two different (yet otherwise synonymous) terms, the D.C. Circuit reasoned that it was obliged to defer to the FCC's "re-interpretation" bringing ILECs within the protections of the Pole Attachments Act.

Read literally, as the FCC purports to do, the definition of "pole attachments" over which it has statutory authority encompasses attachments by a "provider of telecommunications service," whereas ILECs are explicitly excluded only from § 224(a)(5)'s definition of "telecommunications carrier." Thus, the FCC posited:

> [1] 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.
>
> [2] Although section 224(a)(5) cites section 3 as a starting point for defining "telecommunications carrier," by excluding incumbent LECs it deviates from that

[55] *Compare* 47 U.S.C. § 153(51) ("The term telecommunications carrier means any provider of telecommunications services . . . ."), *with* 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. . . .").

> baseline, resulting in a definition that is unique to section 224. . . .
>
> [3] Section 224's departure from the definition from section 3 . . . persuade[s] us to interpret "provider of telecommunications service" as distinct from "telecommunications carrier" for purposes of section 224.

App. 70–71 (¶¶ 209–10).

Notwithstanding this reasoning proffered by the FCC as justification for its "re-interpretation," at the first step of its review the D.C. Circuit actually agreed with Petitioners that "for purpose of [its] analysis . . . the word 'means' is equivalent to 'equals'" and consequently "it is true that under § 153(51), telecommunications carrier equals provider of telecommunications services, and thus vice versa." App. 8.

But rather than use "traditional tools of statutory construction," the D.C. Circuit translated the FCC's "logic" into a symbolic equation which ignored the precept enunciated by this Court that the "meaning of statutory language, plain or not, depends on context."[56] Instead, the D.C. Circuit elected to represent the statutory terms as variables—"TC" for "telecommunications carrier"; "PTS" for provider of telecommunications services"; and "TC_{224}" for "telecommunications carrier for purposes of § 224" —thereby ignoring for the remainder of its purportedly

[56] *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

algebraic syllogism the context of § 224, as well as the baseline equivalency the court had just accepted:

[1] TC = PTS[;]

[2] TC_{224} = PTS – ILEC[;]

[3] [Therefore,] PTS = TC_{224} + ILEC.

Id. But the D.C. Circuit's conclusion does not logically follow from the major premise that it had just accepted—that "telecommunications carrier equals provider of telecommunications services, and thus vice versa." *Id.*

Having accepted the statutory equivalency that the general term "telecommunications carrier" *equals* "provider of telecommunications services," rather than represent § 224's exclusion of ILECs from the term "telecommunications carrier" with a "*minus*" sign, the court should have used the symbol for *non-identity*. Then, the D.C. Circuit would have logically proceeded from its initial premise—"that under § 153(51), telecommunications carrier *equals* provider of telecommunications services, and thus vice versa"—to the minor premise that, under § 224, telecommunications carrier "*does not equal*" an incumbent local exchange carrier. Thus, the conclusion follows necessarily from those premises that, for purposes of § 224, ILECs are also excluded from the term "provider of telecommunications services":

For all purposes, TC = PTS;

For purposes of § 224, TC ≠ ILEC;

Therefore, for purposes of § 224, PTS ≠ ILEC.

This formulation, unlike the one used by the D.C. Circuit, accounts for the fact "that statutory interpretation turns on the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Nken v. Holder*, 556 U.S. 418, 426 (2009). As the D.C. Circuit itself recognized, § 153(51) is the *general* definition of "telecommunications carrier." Section 224(a)(5) tailored that definition for the limited purpose of "pole attachments." The D.C. Circuit suggests that because ILECs, as providers of telecommunications services generally speaking, would fall within the *non-tailored*, general definition of "telecommunications carrier," then they must also be a "provider of telecommunications services" under the *tailored* definition provided by § 224(a)(4). *See* App. 9 ("[W]e pause to identify petitioners' error. They take the first definition, § 153(51), and insert into it § 224(a)(5)'s exclusion of ILECs, but fail to note that § 153(51) is the *general* definition of telecommunications carrier, not the one tailored to § 224.").

But it is precisely because ILECs were excluded from the *tailored* definition of "telecommunications carrier" that they are likewise excluded from its synonym *for purposes of § 224*. And "[the FCC] has given us no sound reason in the statutory text or

context to disregard"[57] the Act's exclusion of ILECs from the term "telecommunications carrier," and "thus vice versa," from the term "provider of telecommunications services."

B. The FCC failed to provide a reasoned justification for re-interpreting the Act to extend its protections to ILECs.

In *FCC v. Fox Television Stations, Inc.*, this Court accepted that an agency could reverse its positions, but stated that "a *reasoned* explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." 556 U.S. 502, 515 (2009) (emphasis added). Likewise, Justice Stevens and Justice Breyer recognized that it is the duty of an administrative agency (especially an independent agency, such as the FCC) to supply a justification for its reversal of course, which "requires more than setting forth reasons why the new policy is a good one. It requires the agency to answer the question, 'Why did you change?'"[58]

The FCC invoked two factual premises in defense of bringing ILECs within the protections that it had previously acknowledged were intended to apply only to new cable or telecommunications entrants: that (1) diminished ILEC pole ownership relative to electric utilities "may" reduce ILECs' bargaining power; and (2) reduced pole attachment rates for ILECs will result

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[57] *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1184 (2011).

[58] *See Fox*, 556 U.S. at 540–42 (Stevens, J., dissenting); *id.* at 546–52 (Breyer, J., dissenting).

in consumer benefits. The D.C. Circuit accepted the FCC's purported justifications for its reversal as "reasoned," again without first placing those justifications in their proper context.

For example, the FCC claimed that "[t]oday, [ILECs] 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." App. 63 (¶ 206). But the FCC's baseline against which it compares today's purported ownership is 1977—nearly twenty years *before* the 1996 amendments that extended pole attachment rights to include "providers of telecommunications services." *See id.* (¶ 206 n.617) (citing a 1977 Senate Report finding that "53 percent [of poles] are controlled by power utilities, both public and private").

If circumstances were different in 1996 than they were in 1977, then why did the FCC contemporaneously understand that the 1996 amendments continued to exclude ILECs from the Act's protections? Or, if it is the FCC's position that circumstances have changed only since 1996, then why did the FCC use 1977 as its baseline rather than 1996? In other words, did the FCC's supposed shift in pole ownership occur between 1977 and 1996, or between 1996 and now? These questions were left wholly unanswered by the FCC, and were *never even asked* by the D.C. Circuit.

Likewise, while the FCC offered hypothetical "games of strategy,"[59] as justification for its concern that diminished pole ownership by ILECs would inhibit their bargaining power, in virtually the same breath the FCC also acknowledged that the long-standing sharing of pole networks among electric and ILEC utilities was likely to continue.[60] Petitioners need not refute the FCC when it does so itself. *See Nat'l Cable Television Ass'n v. Brand X*, 545 U.S. 967, 981 (2005) (stating that "[u]nexplained inconsistency is . . . a reason for holding the interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedures Act" (internal citations omitted)). But the D.C. Circuit faulted Petitioners for not offering "conflicting data." App. 10.

The FCC's failure to offer a satisfactory explanation for its abrupt reversal (separate and apart from its newfound interpretation of the Act, viewed in a vacuum) reveals that its change in policy was arbitrary and capricious. *See Fox*, 556 U.S. at 513 (noting that an agency's statutory interpretation should be set aside as arbitrary and capricious if it fails to "examine the relevant data and articulate a satisfactory explanation for its action") (quoting *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

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[59] App. 64 (¶ 206 n.618).

[60] App. 81 (¶ 216 n.655) ("[W]e believe that electric utilities are unlikely to [deny ILECs access to their poles] given the likelihood that incumbent LECs would, in response, deny electric utilities access to their poles.").

This Court should grant the Petition to remind reviewing courts that an independent agency such as the FCC is required to offer a reasoned explanation for any abrupt reversal of statutory interpretation in light of the "facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 515. This is particularly true where, as here, (a) the agency claims authority to expansively re-interpret the bounds of its statutory authority, and (b) in a manner that fundamentally restructures the long-standing relationships between private citizens and industries such as the electric and telephone utilities, upon which the nation's aerial corridors were built and maintained.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

United States Court of Appeals
For the District of Columbia Circuit

No. 11-1146

[Filed February 26, 2013]

AMERICAN ELECTRIC POWER SERVICE CORPORATION, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

CONSUMERS ENERGY COMPANY, ET AL.,
INTERVENORS

Argued January 23, 2013

Decided February 26, 2013

On Petition for Review of an Order
of the Federal Communications Commission

Eric B. Langley argued the cause for petitioners. With him on the briefs were *J. Russ Campbell*, *Jason B. Tompkins*, and *Sean B. Cunningham*.

John B. Richards and *Thomas B. Magee* were on the brief for intervenors Consumers Energy Company, et al. in support of petitioners.

Edward H. Comer, *Aryeh B. Fishman*, *Shirley S. Fujimoto*, *Jeffrey L. Sheldon*, and *Kevin M. Cookler* were on the brief for *amicus curiae* Edison Electric Institute in support of petitioners.

C. Grey Pash Jr., Counsel, Federal Communications Commission, argued the cause for respondents. On the brief were *Robert B. Nicholson* and *Kristen C. Limarzi*, Attorneys, U.S. Department of Justice, and *Austin C. Schlick*, General Counsel, Federal Communications Commission, *Peter Karanjia*, Deputy General Counsel, and *Richard K. Welch*, Deputy Associate General Counsel. *Laurel R. Bergold*, Attorney, Federal Communications Commission, entered an appearance.

Helgi C. Walker argued the cause for intervenors United States Telecom Association, et al. With her on the brief were *Bennett L. Ross*, *Brendan T. Carr*, *John E. Benedict*, *William A. Brown*, *Gary L. Phillips*, *Michael E. Glover*, *Edward Shakin*, and *Katharine R. Saunders.*

Jonathan E. Nuechterlein argued the cause for intervenors Comcast Corporation, et al. With him on the brief were *Kelly P. Dunbar*, *Rick Chessen*, *Neal M. Goldberg*, *Lynn R. Charytan*, *T. Scott Thompson*, *Michael T.N. Fitch*, *Craig Gilmore*, *Alan G. Fishel*,

Jeffrey E. Rummel, *Adam D. Bowser*, *David P. Murray*, *Thomas Jones*, *Gardner Gillespie*, *Wesley R. Heppler*, *Paul Glist*, *Daniel L. Brenner*, *Michael F. Altschul*, *Brian M. Josef*, *Jonathan D. Hacker*, *Loren L. AliKhan*, and *John D. Seiver*. *Christopher A. Fedeli*, *Paul A. Werner III*, *Christopher M. Heimann*, and *Heather M. Zachary* entered appearances.

Before: TATEL, *Circuit Judge*, and WILLIAMS and SENTELLE, *Senior Circuit Judges*.

WILLIAMS, *Senior Circuit Judge*: Section 224 of the Communications Act of 1934, 47 U.S.C. § 224, provides a variety of advantages to certain types of firms seeking to attach their wires, cable, or other network equipment to utility poles. The Federal Communications Commission, which is charged with applying § 224, in 2011 made three revisions to its interpretation of the statute. *In the Matter of Implementation of Section 224 of the Act,* Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 (April 7, 2011) ("Order"). The Order (1) for the first time allows incumbent local exchange carriers ("ILECs") (which are principally the descendants of the "Baby Bells" that emerged from AT&T's 1984 break-up, see 47 U.S.C. § 251(h)) to share the benefits of some of § 224's provisions; (2) reformulates the ceiling on the rate that pole-owning utilities can charge "telecommunications carriers" seeking to make pole attachments; and (3) moves back the date as of which compensatory damages start to accrue in favor of parties filing successful complaints against utilities. The reader should note that because § 224(a)(5) excludes ILECs from the definition of

"telecommunications carriers," the newly reformulated rates do not directly affect the rates chargeable to ILECs.

Petitioners, the American Electricity Power Services Corporation and other power companies, challenge all three changes. We reject petitioners' arguments and deny the petition.

* * *

Before the advent of cable television, utilities—including power companies and ILECs—owned and operated extensive networks of poles that carried their wires, cables, and other network equipment. These utilities often shared poles, operating them under joint ownership agreements that split the costs. Cable companies sought access to the poles for their own network equipment; the utilities, in turn, sought "to charge monopoly rents" for that access. *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) ("*NCTA*").

In 1978 Congress responded by passing the Pole Attachment Act ("the 1978 Act"), adding it as § 224 of the Communications Act. (Because we address many provisions of § 224, we attach its current version below in its entirety.) The 1978 Act provided 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." 47 U.S.C. § 224(b)(1). It also adopted upper and lower bounds for "just and reasonable" rates: the upper bound is "the fully allocated cost of the construction and operation of the pole to which [the] cable is attached,"

FCC v. Florida Power Corp., 480 U.S. 245, 253 (1987), the lower bound the "marginal cost of [the] attachments," *id*. See 47 U.S.C. § 224(d)(1). Under this authority, the Commission adopted a rate formula that has become known as the "cable rate." See 47 C.F.R. § 1.1409(e)(1).

The Telecommunications Act of 1996 ("the 1996 Act") adjusted and expanded the provisions of the 1978 Act. Three sets of changes in the 1996 Act are especially relevant to this petition. First, the 1996 Act amended § 224 to define a "pole attachment" 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." 47 U.S.C. § 224(a)(4)(emphasis added). The 1978 Act had identified only cable television systems as § 224's potential beneficiaries.

Second, besides clarifying the definition of "utility" to include local exchange carriers (i.e., ILECs and competitive LECs), the 1996 Act provided a special definition of "telecommunications carrier," excluding ILECs from that category for purposes of § 224. 47 U.S.C. § 224(a)(5). Its language is the gravamen of petitioners' claim that ILECs are not in any respect among § 224's beneficiaries.

Third, Congress added § 224(e) to authorize the FCC to develop regulations governing the charges for "pole attachments used by telecommunications carriers to provide telecommunications services." In 1998 the Commission issued such regulations, thereby establishing what has been known as the "telecom rate." See *Implementation of Section 703(e) of the*

Telecommunications Act of 1996, 13 FCC Rcd 6777, 6822-23, ¶¶ 99-102 (1998) ("1998 Order"). The 1996 Act left intact the Commission's broad rate-setting authority under § 224(b)(1).

In 2011 the Commission issued the Order, adopting the three new interpretations identified at the outset. We review the Commission's interpretation of § 224 for reasonableness under the familiar standard of *Chevron, USA, Inc. v. NRDC, Inc.,* 467 U.S. 837 (1984), "which . . . means (within its domain) that a 'reasonable agency interpretation prevails.'" *Northern Natural Gas Co. v. FERC*, 700 F.3d 11, 14 (D.C. Cir. 2012) (quoting *Entergy Corp. v. Riverkeeper, Inc.,* 556 U.S. 208, 218 (2009)). Because the Order is a change in the Commission's position, the requirement of reasoned decisionmaking demands that it "display awareness that it *is* changing position." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Id*.

* * *

ILECs' Pole Attachment Rights. Section 224(a)(4), as amended by the 1996 Act, defines a pole attachment as any attachment either by the operators of cable television systems covered by the 1978 Act or by any "provider of telecommunications services." The Commission relies on § 224(a)(4) to support its decision to allow ILECs access to benefits from § 224.

Petitioners challenge that conclusion, claiming that via § 224(a)(5) Congress intended to rigorously exclude ILECs from any of those benefits.

We reiterate, to make clear just what the Commission has and has not done, that it has not purported to bring ILECs under the new telecom rate adopted under § 224(e)(1). The Order simply classifies ILECs as among the potential beneficiaries of § 224(b)(1), which authorizes the Commission to regulate the rates, terms and conditions of "pole attachments" and assure that they are "just and reasonable." For now, noting the existence of possible distinctions between ILECs and other pole attachers, the Commission says that it will handle any complaints by ILECs "on a case-by-case basis." Order ¶ 214 & n.647.

To support their challenge, petitioners point to the two statutory provisions that define "telecommunications carrier." First, § 153(51), part of the Act's general list of definitions for Chapter 5, provides (with an irrelevant exception) that "[t]he term 'telecommunications carrier' means any provider of telecommunications services." Second, § 224(a)(5) specifies that "[f]or 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," i.e., does not include any ILEC. Thus, because § 224(a)(5) excludes ILECs from the category "telecommunications carrier," and § 153 partially defines "telecommunications carrier" as "any *provider of telecommunications services*," petitioners argue that for purposes of § 224 there is a simple equation:

telecommunications carriers equals providers of telecommunications services (and thus, by definition, the reverse). Accordingly, in their view, § 224(a)(5)'s exclusion of ILECs necessarily applies to § 224(a)(4)'s reference to "a provider of telecommunications services."

We will accept, for purposes of this analysis, petitioners' assumption that the word "means" is equivalent to "equals," see *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934), though we think that such equivalence is in fact not universal. With that assumption, it is true that under § 153(51), telecommunications carrier equals provider of telecommunications services, and thus vice versa, or, to express that equation in the sort of mathematical language that petitioners have invoked,

TC = PTS.

We agree with this reading of § 153(51).

Section 224(a)(5) provides another, related equation. Paraphrasing § 224(a)(5) by substituting § 153(51)'s definition of telecommunication carrier for the cross reference, we have the proposition: telecommunications carrier (for purposes of § 224) equals provider of telecommunications services *minus* ILECs. (This formulation assumes the undisputed proposition that without the qualifying language of § 224(a)(5) ILECs are "providers of telecommunication services.") So, if we use TC_{224} to signify "telecommunications carriers for purposes of § 224," § 224(a)(5) means

TC_{224} = PTS – ILEC,

and, equivalently,

$$PTS = TC_{224} + ILEC.$$

Thus, on petitioners' own rather mathematized reading of the statute, § 224(a)(4)'s reference to any "provider of telecommunications services" embraces ILECs rather than excludes them.

Before turning to explain why this reading makes contextual sense, we pause to identify petitioners' error. They take the first definition, § 153(51), and insert into it § 224(a)(5)'s exclusion of ILECs, but fail to note that § 153(51) is the *general* definition of telecommunications carrier, not the one tailored to § 224. Thus, they take § 153(51)'s equation TC = PTS and claim to find TC_{224} = PTS. But Congress never said the latter.

Congress's uses of the two terms (telecommunications carrier, provider of telecommunications services) conform readily to the understanding we have just sketched out. Section 224(a)(4), defining pole attachment to include an attachment by a "provider of telecommunications services," is cheek by jowl with § 224(a)(5), with its restricted definition of telecommunication carrier. This proximity suggests an entirely intentional character in § 224(a)(4)'s use of the broader term. Petitioners detect an anomaly in the Commission's reading of § 224(a)(5), as § 224(f) mandates that utilities provide nondiscriminatory access *only* for "a cable television system or any telecommunications carrier," 47 U.S.C. § 224(f)(1), despite the Commission's view that ILECs benefit from the statute as providers of

telecommunications services. But as the Commission pointed out, the result simply puts ILECs in the position that cable television stations occupied between 1978 and 1996: open to the benefits of § 224(b) but with no explicit right to nondiscriminatory access. Order ¶ 212.

Because the Commission in 2011 was changing from one supposedly permissible interpretation of § 224(a)(5) to another permissible interpretation, it set out to justify the change. Given our analysis of the relevant language, we very much doubt if the prior interpretation was reasonable. Assuming that it was, we assess the Commission's explanation for its change of view under the latitudinarian standards of *Fox*. That explanation was in essence that whereas in 1978 the power companies and the historic phone companies had, by virtue of the roughly equal scale of their pole systems, roughly equal incentives for sharing, that equality had since eroded, leaving the power companies with a far higher proportion of poles and a lesser incentive to share. See Order ¶ 206. While petitioners say that the Commission's data for the past are wrong, their only attack on its numbers for the present is that the data are incomplete and might not be representative. See Pet'rs Br. at 28. They have offered neither conflicting data on the current situation, nor any actual reason to suppose that the Commission's numbers are materially unrepresentative. There is therefore every reason to believe the new view satisfies *Fox*'s requirements that "there are good reasons for" the Commission's choice (assuming it was free to choose), and "that the [Commission] *believes* [the new interpretation] to be better." *Fox*, 556 U.S. at 515.

Accordingly we uphold the Commission's view that ILECs are "providers of telecommunications services" for purposes of § 224(a)(4).

Telecom Rate Revision. Petitioners separately challenge the Commission's decision to adopt telecom rates under §§ 224(d) & (e) that it has designed to be substantially equivalent to its already adopted cable rates. (The new telecom rates, unless the Commission should apply them independently to ILECs via its rate-setting authority under §§ 224(a)(4) and (b), apply only to telecommunications carriers as defined above. See *NCTA*, 534 U.S. at 335-36 (rejecting the contention that §§ 224(d) & (e) limit the Commission's authority under § 224(b)(1) to define just and reasonable rates outside the "self-described scope" of the former); Order ¶¶ 214-20.)

While § 224(b)(1) gives the Commission broad authority to ensure that pole attachment rates are "just and reasonable," other provisions of § 224 limit that authority. Section 224(d), applying to "the rate for any pole attachment used by a cable television system solely to provide cable service," 47 U.S.C. § 224(d)(3), sets a lower bound (roughly, incremental cost) and an upper bound (roughly, fully allocated cost) to govern the Commission's formulation of the cable rate, *id*. § 224(d)(1).

Section 224(e), the statutory basis for the telecom rate, is in important respects less specific than § 224(d). Paragraph (1) authorizes the Commission to "prescribe regulations . . . to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties

fail to resolve a dispute over such charges," *id.* § 224(e)(1), and then gives the utilities instructions for apportioning, among the entities using a pole, both "the cost of providing space on a pole . . . other than usable space among entities," and the cost of providing "usable space," *id.* §§ 224(e)(2) & (3). The parties agree that, while § 224(e) prescribes the apportionment criteria rather specifically, it nowhere defines the term "cost."

As the Commission explained in the Order, the previous cable and telecom rate formulae yielded markedly different results. The Commission estimates that the formulae promulgated under the 1998 Order yielded rates for cable of about 7.4% of the annual pole cost, and rates for telecom ranging between 11.2% and 16.9% of the annual pole cost. Order ¶ 131 n.399. The Order reinterpreted §§ 224(e)(2) and (3) with the goal of reducing this disparity, so that the telecom rate would generally "recover the same portion of pole costs as the current cable rate." *Id.* ¶ 8. The Commission justified its decision by stating that the revised telecom rate would "significantly reduce the marketplace distortions and barriers to the availability of new broadband facilities and services that arose from disparate rates." *Id.* ¶ 151. To reach this convergence, it gave utilities the option of charging the higher of either the original telecom rate with a cost factor multiplied by fractional coefficients—66% for urban poles, and 44% for rural poles (priced differently due to the difference in quantity of attachments likely to occur in urban versus rural areas, see *id.* ¶ 150)—or a rate aimed at covering all costs *caused* by an attachment, *id.* ¶¶ 143-44. Petitioners, though objecting to the rates, do not contest the Commission's view that this latter option satisfies the lower bound set out in

§ 224(d)(1). (The Eleventh Circuit has held that the constitutional bar on takings without just compensation generally allows application of the lower bound, subject to narrow exceptions. *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1367-71 (11th Cir. 2002).)

The Commission expressly justifies its current policy in terms of eliminating the differences between the cable and telecom rates (subject, of course, to complying with § 224(d)(1)'s lower bound). But petitioners claim that the word "cost" as used in § 224(e) blocks the Commission's move by clearly requiring use of fully allocated costs. They invoke in support the statute's references to the cost of the space on the pole (either usable or not usable), and say that "cost" must necessarily refer to the pole's fully allocated cost. But as the Commission found, the term "cost" in §§ 224(e)(2) and (3) is necessarily ambiguous, and could thus "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." Order ¶ 8. Indeed, the Supreme Court, in the course of endorsing one of the most innovative calculations of cost in the history of regulation, said:

> The fact is that without any better indication of meaning than the unadorned term, the word "cost" in [47 U.S.C.] § 252(d)(1), as in accounting generally, is "a chameleon," *Strickland v. Commissioner, Maine Dept. of Human Services,* 96 F.3d 542, 546 (C.A.1 1996), a "virtually meaningless" term, R. Estes, Dictionary of Accounting 32 (2d ed.1985).

Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 500 (2002). And we have previously held that the term "cost," without more, is open to a wide range of reasonable interpretations. Thus we have found the statutory term "legitimate, verifiable and economic costs" ambiguous as to the inclusion of "stranded" costs, *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 703-04 (D.C. Cir. 2000) (per curiam), *aff'd*, 535 U.S. 1 (2002), and held that, within the framework of rates based on "cost," statutory mandates against rate discrimination did not generally bar an agency from allowing allocation of rates among classes of customers on the basis of their elasticity of demand, *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1009-12 (D.C. Cir. 1987).

The Commission's chosen methodology—which petitioners characterize as "nothing more than an algebraic sleight of hand designed to conflate" the two rates, see Pet'rs Br. at 16—draws on determinations that the revised rate will (1) "eliminate distortions in end-user choices between technologies, and lead to [telecom] provider behavior being driven more by underlying economic costs than arbitrary price differentials," Order ¶ 147, and (2) reflect a national "interest in continued pole investment," *id*. ¶ 8. Although petitioners challenge this policy justification, they offer neither theory nor fact to contradict the Commission's fundamental proposition that artificial, non-cost-based differences in the prices of inputs among competitors are bound to distort competition, handicapping the disfavored competitors and at the margin causing market share and capital to flow to less efficient firms. In the absence of some feature of the law or facts that contradicts the Commission's effort to

eliminate that distortion, its reasoning amply satisfies the standard imposed by *Fox*.

Because the Commission's methodology is consistent with the unspecified cost terms contained in § 224(e), and the Commission's justifications are reasonable, the revision warrants judicial deference.

Refund Period. The Order revised the Commission's earlier determination that overcharged attachers are entitled to refunds starting at the date of the initial complaint. In its place, the Commission will now determine the refund period "consistent with the applicable statute of limitations." 47 C.F.R. § 1.1410(a)(3). The Commission argues that petitioners have waived their challenge by failing to raise the issue before the agency, but under *United Church of Christ v. FCC*, 779 F.2d 702, 706 (D.C. Cir. 1985), 47 U.S.C. § 405(a)(2)'s requirements are satisfied so long as the issues were presented to the Commission by some party, even if not by the party raising the issue on appeal. See Order ¶ 106 & n.329.

Petitioners' arguments have no serious statutory basis. Section 224(b)(1) provides, in relevant part, that "the Commission shall regulate the rates, terms, and conditions for pole attachments"; it "shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions"; and "[f]or purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary." 47 U.S.C. § 224(b)(1).

Under this broad authorization, it is hard to see any legal objection to the Commission's selection of any reasonable period for accrual of compensation for overcharges or other violations of the statute or rules. The current Order has amended 47 C.F.R. § 1.1410 to provide that refunds or payments are to be made "consistent with the applicable statute of limitations," but it does not appear to specify what makes a limitations period applicable. Petitioners note but do not complain about that uncertainty. Pet'rs Br. at 53.

As with the other issues on appeal, the Order reverses decades-old Commission policy. The original theory for adopting the date-of-complaint rule was that such a limitation would tend to "avoid abuse and encourage early filing when rates are considered objectionable." *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC 2d 1585, ¶ 45 (Aug. 11, 1978). In explaining its change of viewpoint, the Commission has noted that such a system gave parties a "disincentive to engage in pre-complaint negotiation," as doing so would cut the complainant's recovery period short. Order ¶ 111 n.345. Petitioners identify neither a material flaw in that reasoning nor any powerful countervailing consideration. As the Commission has met *Fox*'s modest demands for changing its policy, upholding its decision follows ineluctably.

* * *

We have considered petitioners' many subsidiary arguments and find them to be without merit. The petition is

Denied.

Statutory Appendix: 47 U.S.C. § 224 (2010)

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means 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.

(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.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, 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. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that- -

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does 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.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments--

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter--

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of

providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) 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.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

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.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity

(including the owner of such pole, duct, conduit, or right-of-way).

APPENDIX B

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

WC Docket No. 07-245

GN Docket No. 09-51

[Filed April 7, 2011]

In the Matter of	)
	)
Implementation of Section 224 of the Act	)
	)
A National Broadband Plan for Our Future	)
	)

REPORT AND ORDER AND ORDER ON RECONSIDERATION

Adopted: April 7, 2011 Released: April 7, 2011

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.[1] 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.[2] Congress has expressed its desire to ensure that

[1] *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*).

[2] 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*.

consumers in all regions of the country have access to advanced telecommunications and information services at rates that are just, reasonable and affordable.[3] In 2009, Congress directed the Commission to develop a National Broadband Plan that would ensure that every American has access to broadband services.[4]

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 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

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[3] 47 U.S.C. § 254 (b)(1)–(3).

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

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."[5] 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."[6] 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

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[5] 47 U.S.C. § 224(b)(1).

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

rates.'"[7] 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.[8]

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.[9] 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

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[7] *Id*.

[8] *Id*.; *see* 47 U.S.C. § 224(b)(1), (2).

[9] 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.

of timelines has expedited the make-ready process considerably in states where timelines have been implemented.[10] 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 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.[11]

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.[12] 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

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[10] PLAN at 110–11.

[11] *See infra* para. 18.

[12] *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").

critical to deployment of telecommunications and broadband services.[13] 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.

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[13] *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).

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.[14] 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 for the telecommunications access rate, and a process to

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[14] 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).

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[15]—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.[16]

- ○ **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

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[15] *See* 47 U.S.C. § 224(f)(2).

[16] 47 U.S.C. § 224.

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).

- **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.[17] Section 224 provides that the Commission will regulate pole attachments except where such matters are regulated by a state.[18] 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.[19]

10. The Telecommunications Act of 1996 (1996 Act)[20] expanded the definition of pole attachments to include attachments by providers of telecommunications service,[21] and granted both cable systems and telecommunications carriers[22] an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility.[23] However, the 1996 Act permits utilities

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[17] Pole Attachment Act of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978).

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

[19] 47 U.S.C. § 224(a)(1).

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

[21] 47 U.S.C. § 224(a)(4).

[22] For purposes of section 224, Congress excluded incumbent LECs from the definition of "telecommunications carriers." 47 U.S.C. § 224(a)(5).

[23] 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

to deny access where there is insufficient capacity and for reasons of safety, reliability or generally applicable engineering purposes.[24] 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."[25]

11. The Commission implemented the new section 224 access requirements in the *Local Competition Order*.[26] At that time, the Commission concluded that it would determine the reasonableness of a particular condition of access on a case-by-case basis.[27] Finding that no single set of rules could take into account all attachment issues, the Commission specifically declined to adopt the National Electric

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attachments," including ducts, conduits and rights-of-way, unless otherwise indicated. 47 U.S.C. § 224(a)(4).

[24] 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).

[25] *See* 47 U.S.C. § 224(d) (describing the "cable rate formula"), (e) (describing the "telecom rate formula").

[26] *Local Competition Order*, 11 FCC Rcd at 15499.

[27] *Id.* at 16067–68, para. 1143.

Safety Code (NESC) in lieu of access rules.[28] 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.[29] 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.[30] The Commission did adopt five rules of general applicability and several broad policy guidelines in the *Local Competition Order*.[31] The Commission also stated that it would

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[28] *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).

[29] *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).

[30] *Id.* at 16058–107, paras. 1119–240 (Part XI.B. "Access to Rights of Way").

[31] *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

monitor the effect of the case-specific approach, and would propose specific rules at a later date if conditions warranted.[32]

12. In the *1998 Implementation Order*, the Commission adopted rules implementing the 1996 Act's new pole attachment rate formula for telecommunications carriers.[33] The Commission also concluded that cable television systems offering both

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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).

[32] *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.").

[33] *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*).

cable and Internet access service should continue to pay the cable rate.[34] The Commission further held that wireless carriers had a statutory right of nondiscriminatory access to poles.[35] Although the latter two determinations were challenged, both were ultimately upheld by the Supreme Court.[36] In particular, the Court held that section 224 gives the Commission broad authority to adopt just and reasonable rates.[37] The Court also deferred to the Commission's conclusion that wireless carriers are entitled by section 224 to attach facilities to poles.[38]

13. On November 20, 2007, the Commission issued the *Pole Attachment Notice*[39] 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

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[34] *See 1998 Implementation Order*, 13 FCC Rcd at 6796, para. 34.

[35] *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).

[36] *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).

[37] *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).

[38] *See Gulf Power*, 534 U.S. at 341.

[39] *Pole Attachment Notice*, 22 FCC Rcd 20195.

Fibertech Networks.[40] USTelecom argued 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.[41] Fibertech petitioned the Commission to initiate a rulemaking to set access standards for pole attachments, including standards for timely performance of make-ready work,[42] use of boxing and extension arms, and use of qualified third-party contract workers, among other concerns.[43] The *Pole Attachment Notice* sought comment on the concerns raised by USTelecom and

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[40] *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

[41] *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).

[42] "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*).

[43] *Pole Attachment Notice*, 22 FCC Rcd at 20210, para. 37.

Fibertech, as well as the application of the telecommunications rate to wireless pole attachments[44] and other pole access concerns.[45]

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.[46] 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.[47] Accordingly, the Plan included several recommendations regarding pole attachment access, enforcement, and pricing policies to further advance broadband deployment.[48]

15. On May 20, 2010, the Commission issued the *Pole Attachment Order and Further Notice*.[49] 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

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[44] *Id.* at 20209, para. 34.

[45] *Id.* at 20211, para. 38.

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

[47] NATIONAL BROADBAND PLAN at 109.

[48] *Id.* at 109–13.

[49] *2010 Order and Further Notice*, 25 FCC Rcd 11864.

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.[50] 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[51] and sought comment on possible adjustments to that timeline. The Commission sought comment on whether to adopt a separate timeline for wireless attachments.[52] 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.[53] The Commission further proposed that utilities may deny access by contractors to work among the electric lines.[54] 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.[55]

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[50] *2010 Order*, 25 FCC Rcd at 11879–84, paras. 8–18.

[51] *Further Notice*, 25 FCC Rcd at 11876–85, paras. 25–45.

[52] *Id.* at 11885–89, paras. 46–54.

[53] *Id.* at 11891–94, paras. 61–68.

[54] *Id*. at 11894–95, para. 69.

[55] *Id.* at 11895–97, paras. 70–77.

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.[56] 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).[57]

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

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[56] *Id.* at 11898–09, paras. 78–109.

[57] *Id.* at 11909–27, paras. 110–48.

attachment techniques.[58] 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.[59]

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

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[58] 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.

[59] *See* Coalition Petition at 2–3; Florida IOUs Petition at 2–3.

proposed pole attachment regulations."[60] 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.[61] At this conference, the Commission announced its Broadband Acceleration Initiative: an agenda for work inside the Commission, with our partners in Tribal, state, and local government, and with the private sector to reduce barriers to broadband deployment.[62]

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[60] *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).

[61] *FCC to Hold Broadband Acceleration Conference*, Public Notice, DA 11-241 (rel. Feb. 8, 2011).

[62] *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; *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.

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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.[384] 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 1978 when it added section 224 to the Communications

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[384] *Further Notice,* 25 FCC Rcd at 11917–24, paras. 128–41.

Act.[385] 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.[386]

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.[387] These costs include pre-construction survey, engineering, make-ready, and change-out costs incurred in preparing the pole for attachments.[388] Congress expected a pole attachment

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[385] 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.

[386] 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.

[387] 1977 Senate Report at 19, *reprinted in* 1978 U.S.C.C.A.N. at 127.

[388] "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*

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.[389] 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.[390]

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.[391] In 1987, the U.S. Supreme Court found that the cable rate

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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).

[389] *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.

[390] 1977 Senate Report at 19–20, *reprinted in* 1978 U.S.C.C.A.N. at 127–28.

[391] *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).

formula adopted by the Commission provides pole owners with adequate compensation, and thus did not result in an unconstitutional "taking."[392]

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,[393] and added section 224(e), which provides a methodology "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services."[394] Section 224(e) provides for the determination of pole attachment rates based on "the cost of providing space on a pole."[395] The

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[392] *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).

[393] 47 U.S.C. §§ 224(a)(4), (b)(1).

[394] 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.

[395] 47 U.S.C. § 224(e)(2).

statute explains how the costs should be divided, or allocated, between the pole owner and attacher.[396]

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).[397] 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.[398] As the Commission implemented these statutory formulas,

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[396] 47 U.S.C. § 224(e)(2)–(3).

[397] 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.

[398] 47 U.S.C. § 224(e)(4).

the telecom rate formula generally resulted in higher pole rental rates than the cable rate formula.[399]

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.[400] 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).[401]

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[399] 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.

[400] *See 1998 Implementation Order*, 13 FCC Rcd at 6796, para. 34.

[401] *Gulf Power*, 534 U.S. at 335–36, 338–39.

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.[402] The Commission likewise recognized "the importance of promoting broadband deployment and the 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."[403] 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."[404]

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."[405] Instead, the Commission sought to limit the distortions present in the current pole rental

[402] *Pole Attachment Notice*, 22 FCC Rcd at 20200, 20206, paras. 13, 26.

[403] *Id.* 20209, para. 36.

[404] *Id.*

[405] *Further Notice*, 25 FCC Rcd at 11913, para. 118.

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.[406] 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)."[407] 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.[408] The *Further Notice*

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[406] *Id*.

[407] 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).

[408] *Id.*

explained that the record likewise bears out these concerns.[409]

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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.[602] 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.[603] 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

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[409] *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).

[602] *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.

[603] *See infra* para. 206 (describing record evidence).

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."[604] 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."[605]

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."[606] 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

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[604] *Pole Attachment Notice*, 22 FCC Rcd at 20201–06, paras. 15–16, 23–25.

[605] *Id*. at 20209, para. 36.

[606] *Further Notice*, 25 FCC Rcd at 11924–25, para. 143.

complaints with the Commission.[607] 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.[608]

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.[609] 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,

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[607] *Id*. at 11925–27, paras. 145, 148.

[608] *Id.* at paras. 143–47.

[609] 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).

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[610] 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.[611] The definition in section 224, however, deviates from the section 3 definition by excluding

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[610] For purposes of this Part, we use the term "telecommunications carrier" as it is defined in section 224(a)(5).

[611] 47 U.S.C. § 224(a)(5).

incumbent LECs.[612] 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."[613] 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.[614] 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,[615] and in part on the view that "Congress' intent"

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[612] *Id.*

[613] *Id.* § 224(a)(4).

[614] *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.

[615] *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

was to "promote competition by ensuring the availability of access to new telecommunications entrants."[616]

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 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 that were closer to parity.[617] Thus, incumbent LECs often

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rights under Section 224 with respect to the poles of other utilities.").

[616] *1998 Implementation Order*, 13 FCC Rcd at 6781, para. 5 (citing S. Rep. No. 104-230).

[617] 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,

may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases.[618] 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

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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.").

[618] 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.

entrants" at the time of the 1996 Act.[619] 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.[620]

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

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[619] *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*.

[620] *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").

carrier,"[621] and generally concede that they thus have no statutory right to nondiscriminatory pole access under section 224(f)(1).[622] 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.[623] We agree. They also contend, however, that

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[621] 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.").

[622] *See*, *e.g.*, USTelecom Comments at 5; Verizon *NPRM* Comments at 10; ITTA *NPRM* Reply at 4.

[623] 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

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.[624]

208. We are persuaded to revisit our prior conclusion,[625] 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.[626] For one, this reflects the marketplace

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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.

[624] *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.

[625] 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).

[626] 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

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.[627] 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."[628] As noted above, in principle, the rates charged for pole access are likely to affect deployment decisions for all telecommunications carriers, including incumbent LECs.[629] In this regard, we note that incumbent 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.[630] Incumbent LECs identify five specific categories of consumer

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who is cooperatively organized, or any person owned by the Federal Government or any State." 47 U.S.C. § 224(a)(1).

[627] *See id*. (citing *Sixth Broadband Deployment Report*, 25 FCC Rcd at 9574, para. 28).

[628] 47 U.S.C. § 1302(a).

[629] *See supra* Part V.B.

[630] 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).

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.[631] 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.[632]

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[631] *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.

[632] 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.

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."[633] 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."[634] While the statute does not define the term "provider of telecommunications service" for the purpose of applying section 224(b)(1), it defines

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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).

[633] 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).

[634] *Id.* § 224(a)(4).

"telecommunications carrier," a term that is used in other subsections of the statute.[635]

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 regulate rates, terms and conditions in a particular respect, it stated this clearly.[636] 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

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[635] *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.*

[636] *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).

by a . . . provider of telecommunications service."[637] 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*,"[638] 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,[639] 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 . . . ."[640] These commenters thus argue that "telecommunications

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[637] *Id.* § 224(a)(4).

[638] *Id.* § 224(b)(1).

[639] *See supra* paras. 206, 208.

[640] *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).

carrier" and "provider of telecommunications service" should be interpreted as synonymous in section 224,[641] 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.[642] 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

[641] *See id*.

[642] *See*, *e.g.*, Coalition Comments at 140.

with respect to access to its poles, while also providing a mechanism to ensure that rates, terms and conditions ultimately are just and reasonable.[643]

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[643] 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 inseverable, 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

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.[644]

Thus, the fact that pole attachments by incumbent LECs are not within the "self-described scope" of

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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.").

[644] *Gulf Power*, 534 U.S. at 335–36.

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 to potential remedies for incumbent LECs and the details of the complaint process itself.[645] 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.[646] We therefore decline at this time to

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[645] *Further Notice*, 25 FCC Rcd at 11925, paras. 143, 145–48.

[646] 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

adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis.[647] 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.[648] Where parties are in a position to achieve just and reasonable rates, terms and conditions

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particular area).

[647] 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.

[648] *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).

through negotiation, we believe it generally is appropriate to defer to such negotiations.[649] 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.[650]

216. *Existing vs. New Agreements*. The record reveals that incumbent LECs frequently have access to pole attachments pursuant to joint use agreements today.[651] Although some incumbent LECs express

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[649] *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).

[650] *See supra* note 618 (discussing considerations relevant to evaluating bargaining power).

[651] 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

concerns about existing joint use agreements,[652] 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.[653] As explained above, we question the need to second guess

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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 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.

[652] 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.

[653] *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.

the negotiated resolution of arrangements entered into by parties with relatively equivalent bargaining power.[654] Consistent with the foregoing, the Commission is unlikely to find the rates, terms and

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[654] *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.

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.[655] To 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

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[655] *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 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).

Order based on the totality of those agreements,[656] 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.[657] 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).[658] As discussed above, just and reasonable pole attachments

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[656] *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.").

[657] *See supra* para. 216 and note 654.

[658] 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.

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).[659] 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).[660]

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[659] 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.

[660] *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

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 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.[661] As a higher rate than

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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.").

[661] 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

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.[662]

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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).

[662] We believe that a just and reasonable rate in such circumstances would be the same proportionate rate charged the

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[663] 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

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electric utility, given the incumbent LEC's relative usage of the pole (such as the same rate per foot of occupied space).

[663] *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).

attachment disputes.[664] We do not preclude parties from electing to pursue complaints before state commissions, rather than before the Commission.[665] 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.

* * *

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.

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[664] *See*, *e.g.*, Comcast Comments at 51–52; Alliance Jan. 27, 2011 *Ex Parte* Letter at 2–3.

[665] Insofar as electric utilities cite state commissions as a viable forum of 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 LEC's poles.

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 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):

Rate= Space Factor x 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)

$$\text{Where Space Factor} = \left[\frac{\left(\begin{matrix}\text{Space}\\\text{Occupied}\end{matrix}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

(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):

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\begin{array}{c}\text{Maintenance and Administrative} \\ \text{Carrying Charge Rate}\end{array}\right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\begin{array}{c}\text{Space} \\ \text{Occupied}\end{array}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

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),[1] 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.[2] 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.[3]

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

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[1] *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).

[2] *See* Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864 at App. D (2010) (*2010 Order and Further Notice*).

[3] *See* 5 U.S.C. § 604.

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,[4] adopt an incumbent LEC dispute resolution process,[5] and cap pole attachment

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[4] 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.*).

[5] NTCA *et al.* Comments 8–10.

orders at 100 poles.[6] We squarely address these concerns by revising the section 224(e) rental rate for pole attachments used by telecommunications carriers to provide telecommunications services;[7] permitting incumbent LECs to file complaints with the Commission to ensure reasonable rates, terms, and conditions of pole attachments;[8] and adopting the lesser of a numerical or a percentage-based cap on pole orders.[9]

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.[10] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[11] In addition, the term "small business" has the same meaning as the term "small business concern" under

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[6] NTCA *et al.* Comments 10–11.

[7] *See supra* Part V.B.

[8] *See supra* Part V.C.

[9] *See supra* para. 63.

[10] 5 U.S.C. § 603(b)(3).

[11] 5 U.S.C. § 601(6).

the Small Business Act.[12] 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.[13]

5. *Small Businesses*. Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.[14]

6. *Small Organizations*. Nationwide, as of 2002, there are approximately 1.6 million small organizations.[15] A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[16]

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[12] 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."

[13] 15 U.S.C. § 632.

[14] *See* SBA, Office of Advocacy, "Frequently Asked Questions," http://web.sba.gov/faqs (accessed Jan. 2009).

[15] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[16] 5 U.S.C. § 601(4).

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."[17] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[18] We estimate that, of this total, 84,377 entities were "small governmental jurisdictions."[19] 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 business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[20] 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"

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[17] 5 U.S.C. § 601(5).

[18] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, p. 272, Table 415.

[19] 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.*

[20] 15 U.S.C. § 632.

in scope.[21] 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.[22] According to Commission data,[23] 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

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[21] 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).

[22] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110.

[23] 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.

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.[24] According to Commission data,[25] 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.

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[24] 13 C.F.R. § 121.201, NAICS code 517110.

[25] "Trends in Telephone Service" at Table 5.3.

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.[26] According to Commission data,[27] 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 IXCs 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.[28] The second has a size standard of $25 million or less in annual receipts.[29] The most current Census Bureau data in this context, however, are from the (last) economic census of 2002, and we will use those

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[26] 13 C.F.R. § 121.201, NAICS code 517110.

[27] "Trends in Telephone Service" at Table 5.3.

[28] 13 C.F.R. § 121.201, NAICS code 517410.

[29] 13 C.F.R. § 121.201, NAICS code 517919.

figures to gauge the prevalence of small businesses in these categories.[30]

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."[31] For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year.[32] Of this total, 307 firms had annual receipts of under $10 million, and 26 firms had receipts of $10 million to $24,999,999.[33] 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

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[30] 13 C.F.R. § 121.201, NAICS codes 517410 and 517910 (2002).

[31] U.S. Census Bureau, 2007 NAICS Definitions, "517410 Satellite Telecommunications"; http://www.census.gov/naics/2007/def/ND517410.HTM.

[32] 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).

[33] *Id*. An additional 38 firms had annual receipts of $25 million or more.

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."[34] For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year.[35] 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.[36] 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.[37] Prior to that time, such firms were within the now-superseded categories of "Paging" and

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[34] U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications"; http://www.census.gov/naics/2007/def/ND517919.HTM#N517919.

[35] 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).

[36] *Id*. An additional 14 firms had annual receipts of $25 million or more.

[37] U.S. Census Bureau, 2007 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.

"Cellular and Other Wireless Telecommunications."[38] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[39] 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.[40] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[41] 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.[42] Of

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[38] 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.

[39] 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).

[40] 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).

[41] *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."

[42] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form

this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[43] 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).[44] Prior to that time, such firms were within the now-superseded category of "Paging."[45] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[46] 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

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of Organization," Table 5, NAICS code 517212 (issued Nov. 2005).

[43] *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."

[44] U.S. Census Bureau, 2007 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.

[45] U.S. Census Bureau, 2002 NAICS Definitions, "517211 Paging"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.

[46] 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).

were 807 firms that operated for the entire year.[47] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[48] 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 bidding credits and installment payments.[49] 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.[50] The SBA

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[47] 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).

[48] *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."

[49] *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).

[50] *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

has approved this definition.[51] An initial auction of Metropolitan Economic Area ("MEA") licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold.[52] Fifty-seven companies claiming small business status won 440 licenses.[53] 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.[54] 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.[55]

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[51] *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*").

[52] *See* "*929 and 931 MHz Paging Auction Closes*," Public Notice, 15 FCC Rcd 4858 (WTB 2000).

[53] *See id.*

[54] *See* "*Lower and Upper Paging Band Auction Closes*," Public Notice, 16 FCC Rcd 21821 (WTB 2002).

[55] *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.

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.[56] Of these, an estimated 279 have 1,500 or fewer employees and two have more than 1,500 employees.[57] 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).[58] Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.[59] According to *Trends in Telephone Service* data, 434 carriers reported that they were engaged in wireless telephony.[60] Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.[61] We have estimated that 222 of these are small under the SBA small business size standard.

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[56] "Trends in Telephone Service" at Table 5.3.

[57] "Trends in Telephone Service" at Table 5.3.

[58] 13 C.F.R. § 121.201, NAICS code 517210.

[59] *Id.*

[60] "Trends in Telephone Service" at Table 5.3.

[61] "Trends in Telephone Service" at Table 5.3.

20. *Broadband Personal Communications Service*. The broadband personal communications 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.[62] 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.[63] These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.[64] 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.[65] In 1999, the Commission

[62] *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).

[63] *See PCS Report and Order*, 11 FCC Rcd at 7852, para. 60.

[64] *See Alvarez Letter 1998*.

[65] FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (rel. Jan. 14, 1997).

reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.[66]

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.[67] 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.[68] 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.[69] Of the 14 winning bidders, six were designated entities.[70] In 2008, the Commission

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[66] *See* "C, D, E, and F Block Broadband PCS Auction Closes," *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

[67] *See* "C and F Block Broadband PCS Auction Closes; Winning Bidders Announced," *Public Notice*, 16 FCC Rcd 2339 (2001).

[68] *See* "Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58," *Public Notice*, 20 FCC Rcd 3703 (2005).

[69] *See* "Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71," *Public Notice*, 22 FCC Rcd 9247 (2007).

[70] *Id*.

completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.[71]

22. *Advanced Wireless Services*. In 2008, the Commission conducted the auction of Advanced Wireless Services ("AWS") licenses.[72] 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") 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.[73] Four winning bidders that identified themselves as very small

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[71] *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").

[72] *See* AWS-1 and Broadband PCS Procedures Public Notice, 23 FCC Rcd 7496. Auction 78 also included an auction of Broadband PCS licenses.

[73] *Id*. at 23 FCC Rcd at 7521–22.

businesses won 17 licenses.[74] 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.[75] Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.[76] To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size

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[74] *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).

[75] *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).

[76] *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).

standard in the Narrowband PCS Second Report and Order.[77] 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.[78] 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.[79] The SBA has approved these small business size standards.[80] A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.[81] 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

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[77] *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*").

[78] *Narrowband PCS Second Report and Order*, 15 FCC Rcd at 10476, para. 40.

[79] *Id.*

[80] *See Alvarez Letter 1998*.

[81] *See* "Narrowband PCS Auction Closes," *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

licenses for unserved areas in New Mexico.[82] Bidding credits for designated entities were not available in Auction 77.[83] In 2008, the Commission 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.[84]

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.[85] The

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[82] *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).

[83] *Id.* at 6685.

[84] *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).

[85] *See* 13 C.F.R. § 121.201, NAICS code 517210.

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.[86]

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,[87] private operational-

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[86] *See generally* 13 C.F.R. § 121.201.

[87] *See* 47 C.F.R. §§ 101 *et seq*. for common carrier fixed microwave services (except Multipoint Distribution Service).

fixed,[88] and broadcast auxiliary radio services.[89] 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.[90] 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

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[88] 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.

[89] 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.

[90] 13 C.F.R. § 121.201, NAICS code 517210.

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 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.[91] 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.[92] 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.[93] The SBA has

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[91] *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*").

[92] *See LMDS Second Report and Order*, 12 FCC Rcd at 12689–90, para. 348.

[93] *See id.*

approved these small business size standards in the context of LMDS auctions.[94] 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.[95] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System ("BETRS").[96] 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.[97] 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.

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[94] *See Alvarez to Phythyon Letter 1998*.

[95] The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[96] BETRS is defined in §§ 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

[97] 13 C.F.R. § 121.201, NAICS code 517210.

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")).[98] 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.[99] The BRS auctions resulted 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

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[98] *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*").

[99] 47 C.F.R. § 21.961(b)(1).

BRS licensees that are considered small entities.[100] 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.[101] 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.[102] Auction 86 concluded in 2009 with the sale of 61

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[100] 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.

[101] 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).

[102] *Id.* at 8296.

licenses.[103] 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.[104] 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

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[103] 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).

[104] 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.

technology or a combination of technologies."[105] 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.[106] 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.[107] 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.[108] 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

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[105] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[106] 13 C.F.R. § 121.201, NAICS code 517110.

[107] 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).

[108] *Id*. An additional 61 firms had annual receipts of $25 million or more.

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."[109] 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.[110] 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.[111] 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.[112] Thus, the majority of these firms can be considered small.

33. *Cable Companies and Systems.* The Commission has also developed its own small business

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[109] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[110] 13 C.F.R. § 121.201, NAICS code 517110.

[111] 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).

[112] *Id*. An additional 61 firms had annual receipts of $25 million or more.

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.[113] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[114] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[115] 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.[116] 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 size standard for small cable system

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[113] 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).

[114] 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.

[115] 47 C.F.R. § 76.901(c).

[116] 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.

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."[117] 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.[118] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[119] 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,[120] and therefore we are unable to estimate

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[117] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn.1–3.

[118] 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).

[119] 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.

[120] 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).

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.[121] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[122] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[123] 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.[124] According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for

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[121] 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*").

[122] *See* 47 U.S.C. § 573.

[123] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ ND517110.HTM#N517110.

[124] 13 C.F.R. § 121.201, NAICS code 517110.

the entire year.[125] 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.[126] 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.[127] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[128] 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

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[125] 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).

[126] *Id*. An additional 61 firms had annual receipts of $25 million or more.

[127] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[128] *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.

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."[129] 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.[130] 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.[131] 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.[132] Thus, the majority of these firms can be considered small.

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[129] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[130] 13 C.F.R. § 121.201, NAICS code 517110.

[131] 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).

[132] *Id*. An additional 61 firms had annual receipts of $25 million or more.

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.[133] These definitions were approved by the SBA.[134] On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning

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[133] *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).

[134] *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).

bidders won a total of 192 MVDDS licenses.[135] Eight of the ten winning bidders claimed small business status and won 144 of the licenses. 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.[136]

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,[137] which has an SBA small business size standard of 1,500 or fewer employees.[138] The latter are within the

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[135] *See* "*Multichannel Video Distribution and Data Service Auction Closes*," Public Notice, 19 FCC Rcd 1834 (2004).

[136] *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).

[137] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers", http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[138] 13 C.F.R. § 121.201, NAICS code 517110 (updated for inflation in 2008).

category of All Other Telecommunications,[139] which has a size standard of annual receipts of $25 million or less.[140] The most current Census Bureau data for all such firms, however, are the 2002 data for the previous census category called Internet Service Providers.[141] 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.[142] 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.[143] 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,

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[139] U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications"; http://www.census.gov/naics/2007/def/ND517919.HTM#N517919.

[140] 13 C.F.R. § 121.201, NAICS code 517919 (updated for inflation in 2008).

[141] U.S. Census Bureau, "2002 NAICS Definitions, "518111 Internet Service Providers"; http://www.census.gov/eped/naics02/def/NDEF518.HTM.

[142] 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).

[143] 143 An additional 45 firms had receipts of $25 million or more.

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."[144] 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."[145] According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.[146] Census data do not track electric output and we have not determined how many of these firms fit the

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[144] U.S. Census Bureau, 2002 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution"; http://www.census.gov/epcd/naics02/def/NDEF221.HTM.

[145] 13 C.F.R. § 121.201, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1.

[146] 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).

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."[147] The SBA has developed a small business size standard for this industry, which is: all such firms having 500 or fewer employees.[148] According to Census Bureau data for 2002, there were 468 firms in this category that operated for the entire year.[149] Of this total, 424 firms had employment of fewer than 500 employees, and 18 firms had employment of 500 to 999

[147] U.S. Census Bureau, 2007 NAICS Definitions, "221210 Natural Gas Distribution"; http://www.census.gov/epcd/naics02/def/ND221210.HTM.

[148] 13 C.F.R. § 121.201, NAICS code 221210.

[149] 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).

employees.[150] 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."[151] 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.[152] According to Census Bureau data for 2002, there were 3,830 firms in this category that operated for the entire year.[153] 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.[154] Thus, the majority of firms in this category can be considered small.

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[150] *Id*. An additional 26 firms had employment of over 1,000 employees.

[151] U.S. Census Bureau, 2007 NAICS Definitions, "221310 Water Supply and Irrigation Systems" (partial definition); http://www.census.gov/naics/2007/def/ND221310.HTM.

[152] 13 C.F.R. § 121.201, NAICS code 221310.

[153] 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).

[154] *Id*. An additional 36 firms had annual sales of $10 million or more.

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.[155] The notification rule requires the inclusion of certain information in make-ready notifications sent to other attachers.[156] 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.[157] 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

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[155] *See supra* App. A (47 C.F.R. § 1.1420).

[156] *See supra* App. A (47 C.F.R. § 1.1420).

[157] *See supra* App. A (47 C.F.R. § 1.1422).

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.[158]

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[158] 5 U.S.C. § 603(c).

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.[159] 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

[159] *See supra* para. 63.

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, 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."[160] 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."[161] 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

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[160] NTCA *et al.* at 6.

[161] NTCA *et al.* at 9.

utilities" – and stated that such a provision "would reduce the economic impact on small rural communications providers."[162] 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 comingled Internet and video services," as noted by the U.S. Small Business Administration.[163] Addressing the role of the new telecom rate in the context of commingled services, the Commission recognized concerns by some cable operators[164] 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.[165] 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

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[162] NTCA *et al.* at 9–10.

[163] U.S. Small Business Administration, Office of Advocacy, Comments, GN Docket No. 10-188, at 8 (filed Oct. 15, 2010).

[164] *See*, *e.g.*, Bright House Comments at 2, 12–14; Bright House Reply at 3–5.

[165] *See supra* Part V.B.1.

resulting from the disparity between cable and pre-existing higher telecom rates.[166] 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.[167]

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 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

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[166] *See id*.

[167] *See id*.

instead had been charged higher rates that were unreasonable.[168]

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

51. None.

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. [1] Certification by a state preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules,

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[168] *See id*.

[1] *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541 (WCB 2010).

including the rules adopted in this Order.[2] 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

[2] 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).**

Commenter	Abbreviation
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 *et al.*
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	EEI/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	Sunesys
T-Mobile USA, Inc.	T-Mobile
Time Warner Cable, Inc.	TWC
tw telecom inc. and Comptel	TWTC/COMPTEL
United States Telecom Association	USTelecom
Verizon	Verizon
Virginia Electric Power Company	Virginia Electric
We Energies	We Energies

Reply Commenter	**Abbreviation**
Alliance for Fair Pole Attachment Rules	Alliance
Alabama Rural Electric Association	Alabama Assoc.
American Public Power Association	APPA
AT&T Inc.	AT&T
Bright House Networks	Bright House
Clay Electric Cooperative	Clay Electric
Coalition of Concerned Utilities	Coalition
Comcast Corporation	Comcast
Dairyland Power Cooperative	Dairyland
DAS Forum	DAS Forum
Edison Electric Institute and Utilities Telecom Council	EEI/UTC
Florida Investor-Owned Electric Utilities	Florida IOUs
Flint Electric Membership Corporation	FEMC.
Georgia Electric Membership Corporation	GEMC
Hawaii Telecom, Inc.	HTI
Kansas Electric Cooperatives, Inc.	Kansas Cooperatives

Little Ocmulgee Electric Membership Corporation	LOEMC
Mahanger Consulting Associates	Mahanger Consulting
MetroPCS Communications, Inc.	MetroPCS
Montana Electric Cooperatives Association	MECA
Montgomery County, Maryland and Anne Arundel County, Maryland	Montgomery and Anne Arundel Counties
National Cable & Television Association	NCTA
National Rural Electric Cooperative Association	NRECA
New Mexico Exchange Carrier Group	NMECG
NextG Networks, Inc.	NextG
North Carolina Association of Electric Cooperatives	NCAEC
Northern Virginia Electric Cooperative	NVEC
Oklahoma Association of Electric Cooperatives	Oklahoma Cooperatives
Oncor Electric Delivery Company LLC	Oncor

Sunesys, LLC	Sunesys
T-Mobile USA, Inc.	T-Mobile
Texas Electric Cooperatives, Inc.	Texas Cooperatives
Time Warner Cable, Inc.	TWC
tw telecom inc. and Comptel	TWTC/COMP TEL
Verizon	Verizon
Virginia, Maryland, and Delaware Association of Electric Cooperatives	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 *et al.*
Alabama Power Company; Georgia Power Company; Gulf Power Company; and Mississippi Power Company	Alabama Power *et al.*

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 *et al.*
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 *et al.*
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 Commissioner s
Verizon	Verizon
Windstream Corporation	Windstream
Wireless Communications Association International, Inc.	WCA
WOW! Internet Cable and Phone	WOW!
Zayo Bandwidth Entities	Zayo

Reply 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 *et al.*
Alabama Power Company; Georgia Power Company; Gulf Power Company; and Mississippi Power Company	Alabama Power *et al.*
Ameren Services Company and Virginia Electric and Power Company	Ameren and Virginia Electric

American Cable Association	ACA
American Corn Growers Association	ACGA
American Legislative Exchange Council	ALEC
Americans for Tax Reform and Media Free Project	ATR/MFP
AT&T Inc.	AT&T
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
Embarq Local Operating Companies	Embarq
ExteNet Systems, Inc.	ExteNet
Fibertech Networks, LLC; and Kentucky Data Link, Inc.	Fibertech/KDL
Fibertower Corporation	Fibertower
Florida Cable Telecommunications Association, Inc. FCTA Florida Power & Light Company; Tampa Electric Company; and Progress Energy Florida, Inc.	FPL *et al.*
Georgia Power Company	Georgia Power
Grande Communications Networks, Inc.	Grande

Independent Telephone and Telecommunications Alliance	ITTA
National Association of State Utility Consumer Advocates	NASUCA
National Cable & Television Association	NCTA
National Rural Electric Cooperative Association	NRECA
National Telecommunications Cooperative Association	NTCA
NextG Networks, Inc.	NextG
Oncor Electric Delivery Company	Oncor
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Pacific LightNet, Inc.	Pacific LightNet
PacifiCorp; Wisconsin Electric Power Company; and Wisconsin Public Service Corporation	PacifiCorp *et al.*
State Cable Associations	SCA
segTEL, Inc; Zayo Bandwidth Entities; and 360networks USA, Inc.	SegTEL *et al.*
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

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APPENDIX C

26620 Federal Register / Vol. 76, No. 89 / Monday, May 9, 2011 / Rules and Regulations

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WC Docket No. 07–245, GN Docket No. 09–51; FCC 11–50]

A National Broadband Plan for Our Future

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, 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 also revises the telecommunications rate formula for pole attachments consistent with the statutory framework, reinterprets the Communications Act of 1934, as amended, to allow incumbent LECs to file complaints before the Commission if they believe a pole attachment rate, term, or condition is unjust and unreasonable, and confirms wireless providers are entitled to the same rate as other telecommunications carriers. In addition, the Commission resolves multiple petitions for reconsideration and addresses various

points regarding the nondiscriminatory use of attachment techniques.

DATES: Effective June 8, 2011, except for §§ 1.1420, 1.1422 and 1.1424, which contain information collection requirements that have not been approved by the Office of Management and Budget. The Commission will publish a document in the **Federal Register** announcing the effective date for those sections.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the Office of the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–B441, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT:

Jonathan Reel, Wireline Competition Bureau, Competition Policy Division, 202–418–1580. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to *PRA@fcc.gov* or contact Judith B. Herman at 202–418–0214.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order and Order on Reconsideration* (Order), FCC 11–50, adopted and released on April 7, 2011. The full text of the Order is available for inspection and copying during regular

business hours in the FCC Reference Center, 445 Twelfth Street, SW., Room CY–A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 Twelfth Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site, *http://www.bcpi.com,* or call 1–800–378–3160. This document is available in alternative formats (computer diskette, large print, audio record, and braille). Persons with disabilities who need documents in these formats may contact the FCC by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

Synopsis of Report and Order and Order on Reconsideration

1. 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. Section 224 provides that the Commission will regulate pole attachments except where such matters are regulated by a state. 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.

2. The Telecommunications Act of 1996 (1996 Act) expanded the definition of pole attachments to include attachments by providers of telecommunications service, and granted both cable systems and telecommunications carriers an

affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility. 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. 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."

3. The Commission implemented the new section 224 access requirements in the *Local Competition Order* (47 FR 47283, Sept. 6, 1996, FCC 96–333, rel. Aug. 8, 1996). At that time, the Commission concluded that it would determine the reasonableness of a particular condition of access on a case-by-case basis. Finding that no single set of rules could take into account all attachment issues, the Commission specifically declined to adopt the National Electrical Safety Code (NESC) in lieu of access rules. 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. 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. The Commission did adopt

five rules of general applicability and several broad policy guidelines in the *Local Competition Order*. 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.

4. In the *1998 Implementation Order* (63 FR 12013, Mar. 12, 1998, FCC 98–20, rel. Feb. 6, 1998), the Commission adopted rules implementing the 1996 Act's new pole attachment rate formula for telecommunications carriers. The Commission also concluded that cable television systems offering both cable and Internet access service should continue to pay the cable rate. The Commission further held that wireless carriers had a statutory right of nondiscriminatory access to poles. Although the latter two determinations were challenged, both were ultimately upheld by the Supreme Court. In particular, the Court held that section 224 gives the Commission broad authority to adopt just and reasonable rates. The Court also deferred to the Commission's conclusion that wireless carriers are entitled by section 224 to attach facilities to poles.

5. On November 20, 2007, the Commission issued the *Pole Attachment NPRM* (73 FR 6879, Feb. 6, 2008, FCC 07–187, rel. Nov. 20, 2007) 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. USTelecom argued 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. Fibertech petitioned the Commission to initiate a rulemaking to set access standards for pole attachments, including standards for timely performance of make-ready work, use of boxing and extension arms, and use of qualified third-party contract workers, among other concerns. The *Pole Attachment NPRM* sought comment on the concerns raised by USTelecom and Fibertech, as well as the application of the telecommunications rate to wireless pole attachments and other pole access concerns.

6. 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. 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. Accordingly, the Plan included several recommendations regarding pole attachment access, enforcement, and pricing policies to further advance broadband deployment.

7. On May 20, 2010, the Commission issued the *Pole Attachment Order and FNPRM*. In the *2010 Order* (75 FR 45494, Aug. 3, 2010, FCC 10–84, rel. May 20, 2010), 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. In the *FNPRM* (75 FR 41338, July 15, 2010, FCC 10–84, rel. May 20, 2010), 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 and sought comment on possible adjustments to that timeline. The Commission sought comment on whether to adopt a separate timeline for wireless attachments. 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. The Commission further proposed that utilities may deny access by contractors to work among the electric lines. 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.

8. 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. The *FNPRM* 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).

9. 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. 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.

10. 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." 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. At this conference, the Commission announced its Broadband Acceleration Initiative: an agenda for work inside the Commission, with our partners in Tribal, state, and local government, and with the private sector to reduce barriers to broadband deployment.

Improved Access to Utility Poles

11. We take several steps to improve access to utility poles. Our rules are generally consistent with

proposals in the *FNPRM,* but also reflect a close examination of the record developed int his proceeding. 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. 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 section224(f)(2) denial-of-access issues.

12. 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 the 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.

13. We decline to adopt several proposals set forth in the *FNPRM* 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.

14. 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. 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 attacher shave 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.

15. *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. The 45-day period also accords with the "survey" period in some state models and a proposal in the record. Indeed, the *FNPRM* 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 understood by utilities as such." 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. More than half of the missed deadlines are caused by either the size of the project or errors in the application. 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. 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.

16. 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, 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. We leave the specific processes for establishing such engineering specifications to individual utilities, so long as they are reasonable and timely.

17. *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.

18. *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; (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.

19. 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. Second, the record reflects that, at 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. Also, we follow state models that allow additional days for make-ready for large orders within a single state.

20. *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). Thus, we permit a pole owner to assert its right to 15 days to complete make-ready in lieu of adopting an automatic fifth stage for "multi-party coordination" as proposed in the *FNPRM*. 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.

21. *Scope of the Timeline*. The timeline we adopted—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 attachment 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.

22. *Remedy: Utility-Approved Contractors.* 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 *FNPRM* 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. 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.

23. *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. 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 5percent 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.

24. *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 *FNPRM* sought comment on how best to reconcile the timeline with this reality. 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. A utility must exercise its judgment in invoking a clock stoppage in the context of its general duty to provide timely and nondiscriminatory access, and 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.

B. Wireless

25. *Specificity of Denials.* We clarify that, regardless of whether a utility has a master agreement with a wireless carrier, the specificity requirement of § 1.1403(b) of the Commission's rules 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) of the Commission's rules requires that denials of access be confirmed in writing within 45 days of the request. 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." In the *FNPRM,* 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.

26. *Pole Tops.* 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. 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. 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. Blanket prohibitions are not permitted under the Commission's rules. 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." 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." 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.

C. Use of Contractors for Attachment

27. As proposed in the *FNPRM,* 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. Utilities are not required to keep a separate list of contractors for this purpose, but must be reasonable in approving or disapproving contractors. Accordingly, 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.

D. Joint Ownership

28. In the *FNPRM,* 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. We decline to adopt the proposed rules relating to joint

ownership, 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.

E. Legal Authority

29. We conclude that section 224 authorizes the Commission to promulgate the access rules we adopted, 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," as well as to develop procedures necessary for resolving complaints arising under the Commission's substantive regulations, and to fashion appropriate remedies. In addition, section 224(b)(2) directs the Commission to make rules to carry out the provisions of this section. Congress also gave more specific substantive guidance for access to poles in section 224(f): "just and reasonable" access must also be "nondiscriminatory."

Improving the Enforcement Process

30. *Revising Pole Attachment Dispute Resolution Procedures.* In the *FNPRM,* we sought comment on whether the Commission should modify its existing procedural rules governing pole attachment complaints. Several commenters expressed the view that new procedures and processes are not needed or that existing procedures can be improved to address any problems. Similarly, there was little discussion of, or support for, the formation of specialized forums to

address enforcement issues. 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.

31. 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." 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. We believe a requirement similar to that imposed by the California Public Utility Commission, requiring "executive-level" discussions, should be incorporated into the Commission's rules. We therefore revise 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), preferably face-to-face, prior to the filing of a complaint at the Commission. We will consider in any enforcement proceedings whether such coordination has taken place.

32. In addition, a number of commenters expressed concern about the length of time it takes for the Commission to resolve pole attachment complaints. We believe that the new processes adopted elsewhere in the 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 to resolve them expeditiously. We do not believe that other substantial changes, such as new procedures or specialized forums, are justified at this time.

33. *Efficient Informal Dispute Resolution Process.* The *FNPRM* sought comment on whether the Commission should attempt to encourage "local dispute resolution," and several commenters endorsed the notion. We agree, and believe that 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 issues to be addressed specifically in a dispute resolution provision might include the requirement of executive-level settlement negotiations, and reliance on a forum other than the Commission (*e.g.,* an arbitrator or expert panel) to resolve disputes. 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.

34. This Order also concludes, as proposed in the *FNPRM,* that the portion of the Commission's rules § 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. We believe the 30-day rule no longer serves a useful purpose, and is actually counterproductive at times. Any concern about stale complaints is addressed by our modifications of the Commission's rules § 1.1410, which state that remedies must be "consistent

with the applicable statute of limitations." We therefore eliminate the portion of the Commission's rules § 1.1404(m) requiring that denial of access complaints be filed within 30 days.

35. *Remedies.* The *FNPRM* proposed to amend § 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, simply codifying the existing authority and practice, and we accordingly adopt the rule change as proposed. The *FNPRM* also proposed to amend the Commission's rules § 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. After reviewing voluminous and sharply divided comments on this question, we decline, at this time, to amend the Commission's rules § 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.

36. We also adopt the proposed modification of the Commission's rules § 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." We believe that this modification, which will allow monetary recovery in a pole attachment action to extend back as far as the applicable statute of limitations, will make injured attachers whole, and will be consistent with the way that claims for monetary recovery are generally treated under the law. It will also remove the perceived

impediment to pre-complaint negotiations between the parties to resolve disputes about rates, terms and conditions of attachment. 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.

37. *Unauthorized Attachments.* In modifying our rules regarding penalties for unauthorized attachments, we acknowledge the wide range of opinions among commenters regarding the scope of the problem posed by unauthorized attachments. 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 the current unauthorized attachment regime (*i.e.,* the *Mile Hi* case), which involves 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 overwhelms any deterrent effect. 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. 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.

38. 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. 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);

- 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.

- A requirement that the pole owner provide specific notice of a violation(including pole number and location) before seeking relief against a pole occupant.

- 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.

- 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.

- The opportunity for resolution of factual disputes via settlement conferences before an alternative dispute resolution forum.

39. 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.

40. We do not adopt the Oregon system as Federal law, but rather continue to favor agreements negotiated between utilities and attaching entities. 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.

41. *The "Sign and Sue" Rule.* Our review of the comments responding to the *FNPRM's* proposal to revise 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, persuades us that the Commission should not amend § 1.1404(d) of the Commission's rules to add a notice requirement to the "sign and sue" rule. 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 the Commission's rules § 1.1404(k), requiring executive-level discussions between the parties.

Pole Rental Rates

42. In the *FNPRM,* 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. Accordingly, 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 TW Telecom (TWTC). 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)." 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.

A. The New Telecom Pole Rental Rate

43. The Commission adopts a modified form of the *FNPRM's* proposal as the new telecom rate. The new telecom rate generally will recover the same portion of pole costs as the current cable rate, is fully compensatory, and is grounded in sound economic policies. Accordingly, the new rate 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.

44. The Order reinterprets the telecommunications rate formula for pole attachments consistent with its authority and the existing statutory

framework. The Commission identifies a range of possible rates consistent with section 224(e), from the current application of the telecom rate formula based on fully allocated costs at the upper end, to an alternative application of the telecom rate formula based on cost causation principles that results in a rate closer to incremental costs at the lower end. Within that range, Commission seeks 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 ambiguous statutory term "cost of providing space" on that basis.

45. *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, which recovers costs that the pole owner incurs regardless of the presence of attachments. It includes a full range of costs, some of which do not directly relate to or vary with the presence of pole attachments.

46. *Lower-Bound Rate.* As the Commission observed in the *FNPRM,* "a rate that covers the pole owners' incremental cost associated with attachment would, in principle, provide a reasonable lower limit." 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.

47. 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—the Commission relies 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. 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.

48. For purposes of identifying a lower bound for the telecom pole rental rate, we exclude capital costs from the definition of "cost of providing space." As an initial matter, we note that if capital costs arise from the make-ready process, existing rules are designed to require attachers to bear the entire amount of those costs. With respect to other capital costs, the record demonstrates that the attacher is not the "cost causer" of these costs. 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.

49. 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. 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 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.

50. *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), the Commission adopts 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. We seek to ensure that the Commission's policies promote the availability of broadband services and efficient competition for those services. 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.

51. 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. In addition to reducing barriers to the provision of new services, reducing the telecom rate can expand opportunities for communications network investment. 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. 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 * * * 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." Balancing these concerns, NASUCA recommends that the cable rate "should be used for all pole attachments."

52. 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. 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.

53. 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. 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 rate payers. 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. Moreover, in conjunction with the pole access reforms adopted in this Order, 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. 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 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. 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. Further, the specific percentages we select provide a reduction in the telecom rate, and will, in general, approximate the cable rate, advancing the Commission's policies.

54. 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 broad band 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. 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.

55. 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. 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.

56. 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. 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.

57. 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). 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. 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 wire line providers. 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. 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. 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.

58. We also address the role of the new telecom rate in the context of commingled services. Some cable operators 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 carriers also provide services, such as VoIP, that have not been classified. We agree that this outcome would be contrary to our policy goals of reducing the disparity in pole rental rates among providers of competing services and of minimizing disputes. 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. This action does not disturb prior Commission decisions addressing particular scenarios regarding commingled services.

59. We believe that section 224(e) provides the Commission sufficient latitude to adopt our definition of costs underlying the new telecom rate. 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." Our new telecom rate reflects a reasonable interpretation of the

ambiguous statutory language, and we conclude that 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).

60. We are not persuaded by electric utilities that argue section 224(e) must be read in a manner that mandates use of a fully allocated cost methodology based on legislative history. 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 these arguments compel an interpretation of section 224(e) that is contrary to the Commission's approach.

61. We also 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.

B. Incumbent LEC Pole Attachments

62. In the 2010 *FNPRM,* the Commission asked parties to refresh the record on the issues raised in the 2007 *Pole Attachment NPRM* "both in light of the

specific telecom rate proposals, as well as the factual findings of the National Broadband Plan." 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. The *FNPRM* 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.

63. 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. We allow incumbent LECs to file complaints with the Commission challenging the rates, terms and conditions of pole attachment agreements with other utilities.

64. *Statutory Analysis.* 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. 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, and in part on the view that "Congress' intent" was to "promote competition by ensuring the availability of access to new telecommunications entrants."

65. 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 time, aggregate incumbent LEC pole ownership has diminished relative to that of electric utilities. Thus, incumbent LECs often may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases. 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.

66. 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," and generally concede that they thus have no statutory right to nondiscriminatory pole access under section 224(f)(1). 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. 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 *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.

67. We are persuaded to revisit our prior conclusion, 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. 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. 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. 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 the Order, and in the absence of evidence that expected benefits are being realized, we may, among other things, revisit our approach to this issue.

68. 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." 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."

69. Although section 224(a)(5) cites section 3 of the Communications Act 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 regulate rates, terms and conditions in a particular respect, it stated this clearly. 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.

70. Interpreting these terms as distinct leads us to conclude that the definition of "pole attachment" includes pole attachments of incumbent LECs. Moreover, because section 224(b) requires the Commission to "regulate the rates, terms, and conditions for *pole attachments,*" under our revised reading the Commission has a statutory obligation to regulate the attachments of incumbent LECs.

71. *Guidance Regarding Commission Review of Incumbent LEC Pole Attachment Complaints.* 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 *FNPRM,* the issues related to rates for pole attachments by incumbent LECs raise complex questions, both with respect to potential remedies for incumbent LECs and the details of the complaint process itself. 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. 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. We do, however, provide certain guidance below regarding the Commission's approach to incumbent LEC pole attachment complaints.

72. We also note that outside of the carrier's incumbent LEC service territory, it would be subject to the pole attachment regulations applicable to a telecommunications carrier. In addition, 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.

73. *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. 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. 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.

74. *Existing vs. New Agreements.* The record reveals that incumbent LECs frequently have access to pole attachments pursuant to joint use agreements today. Although some incumbent LECs express concerns about existing joint use agreements, 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. As explained above, we question the need to second guess the negotiated resolution of arrangements entered into by parties with relatively equivalent bargaining power. 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. To 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, consistent with the additional guidance we offer below. 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, 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 between pole owners and either cable operators or telecommunications carriers.

75. *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. 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). 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). 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. 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.

76. 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).

77. 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 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. 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. 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). Further, we find it more administrable to look to the existing, high-end telecom rate, which historically has been used in the marketplace, than to attempt to develop in this Order an entirely new rate for this context.

78. We also recognize that incumbent LECs generally are pole owners themselves and, like electric utilities, have agreements governing access to their 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 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.

79. *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. We do not preclude parties from electing to pursue complaints before state commissions, rather than before the Commission. 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.

Clarification and Reconsideration of the *2010 Order*

80. *Prospective Policies.* 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. As Fibertech points out, even a policy that is equally applied prospectively is discriminatory in the sense that it disadvantages new attachers. 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.

81. *Joint Ownership.* 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. 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. 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.

82. *Similar Circumstances and the Electric Space.* 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. 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. The *2010 Order* specified that attachers are entitled to use the same techniques that the utility itself uses in similar circumstances, and we agree with the petitioners that the above situations do not involve similar circumstances. 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.

83. 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. 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. 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.

84. *Insufficient Capacity and the Electric Space.* 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. 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. Rearrangement of facilities on a pole is one of these methods, 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. 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).

85. *Space-and Cost-Saving*. 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. We disagree that section 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 attacher 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.

Congressional Review Act

86. The Commission will send a copy of this Report and Order in a report to be sent to Congress and

the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Paperwork Reduction Act of 1995 Analysis

87. 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.

Final Regulation Flexibility Analysis

88. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was included in the *2010 Order and FNPRM* in WC Docket No. 07–245 and GN Docket No. 09–51. 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.

A. Need for, and Objectives of, the Proposed Rules

89. In this *Report and Order and Order on Reconsideration* (Order), FCC 11–50, adopted and released on April 7, 2011, 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

90. One commenter discussed the IRFA from the FNPRM. A group of associations representing rural telephone companies argued specifically that the Commission should adopt the lowest telecom rate for broadband connections, adopt an incumbent LEC dispute resolution process, and cap pole attachment orders at 100 poles. We squarely address these concerns by revising the section 224(e) rental rate for pole attachments used by telecommunications carriers to provide telecommunications services; permitting incumbent LECs to file complaints with the Commission to ensure reasonable rates, terms, and conditions of pole attachments; and adopting the lesser

of a numerical or a percentage-based cap on pole orders.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply

91. 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. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. 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.

92. *Small Businesses.* Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.

93. *Small Organizations.* Nationwide, as of 2002, there are approximately 1.6 million small organizations. A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."

94. *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." Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. We estimate that, of this total, 84,377 entities were "small governmental jurisdictions." Thus, we estimate that most governmental jurisdictions are small.

95. 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 business size standard *(e.g.,* a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." 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. 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.

96. *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. According to Commission data, 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.

97. *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. According to Commission data, 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.

98. *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. According to Commission data, 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 than1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

99. *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. The second has a size standard of $25 million or less in annual receipts. 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.

100. 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." For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year. Of this total, 307 firms had annual receipts of

under $10 million, and 26 firms had receipts of $10 million to $24,999,999. Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

101. 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." For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year. 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. Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

102. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category. Prior to that time, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. 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. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. 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. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, we estimate that the majority of wireless firms are small.

103. *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). Prior to that time, such firms were within the now-superseded category of "Paging." Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. 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. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. Thus, we estimate that the majority of paging firms are small.

104. 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 bidding credits and installment payments. 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. The SBA has approved this definition. An initial auction of Metropolitan Economic Area (MEA) licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. 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. 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.

105. 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. Of these, an estimated 279 have 1,500 or fewer employees and two have more than 1,500 employees. We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

106. *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). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to *Trends in Telephone Service* data, 434 carriers reported that they were engaged in wireless telephony. Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees. We have estimated that 222 of these are small under the SBA small business size standard.

107. Broadband Personal Communications Service. The broadband personal communications 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. 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. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. 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. In 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

108. 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. 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. Of the 24 winning bidders, 16 claimed small business status and won156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71. Of the 14 winning bidders, six were designated entities. In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.

109. Advanced Wireless Services. In 2008, the Commission conducted the auction of Advanced Wireless Services (AWS) licenses. 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) 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. Four winning bidders that identified themselves as very small businesses won 17 licenses. 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.

110. *Narrowband Personal Communications Services.* In 1994, the Commission conducted an auction for Narrowband PCS licenses. A second auction was also conducted later in1994. 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. Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses. 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. 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. 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. The SBA has approved these small business size standards. A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

111. *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. Bidding credits for designated entities were not available in Auction 77. In 2008, the Commission 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.

112. *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. 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.

113. 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.

114. *Fixed Microwave Services*. Fixed microwave services include common carrier, private operational-fixed, and broadcast auxiliary radio services. 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. 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 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.

115. *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. 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. 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. The SBA has approved these small business size standards in the context of LMDS auctions. 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.

116 *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS). 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. 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.

117. *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)). 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. The BRS auctions resulted 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. 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. 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. Auction 86 concluded in 2009 with the sale of 61 licenses. 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.

118. 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. 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." 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. 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. 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. Thus, the majority of these firms can be considered small.

119. *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." 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. 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. 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. Thus, the majority of these firms can be considered small.

120. *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. Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard. In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers. 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. Thus, under this second size standard, most cable systems are small.

121. *Cable System Operators*. The Communications Act of 1934, as amended, also contains a 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." 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. Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard. 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, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

122. *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. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers." 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. 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. 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. 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. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises. 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.

123. *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." 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. 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. 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. Thus, the majority of these firms can be considered small.

124. *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. These definitions were approved by the SBA. 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. Eight of the ten winning bidders claimed small business status and won 144 of the licenses. 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.

125. *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, which has an SBA small business size standard of 1,500 or fewer employees. The latter are within the category of All Other Telecommunications, which has a size standard of annual receipts of $25 million or less. The most current Census Bureau data for all such firms, however, are the 2002 data for the previous census category called Internet Service Providers. 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. 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. Consequently, we estimate that the majority of ISP firms are small entities.

126. *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." 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." According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year. 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 maybe considered small under the SBA small business size standard.

127. *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." The SBA has developed a small business size standard for this industry, which is: All such firms having 500 or fewer employees. According to Census Bureau data for 2002, there were 468 firms in this category that operated for the entire year. Of this total, 424 firms had

employment of fewer than 500 employees, and 18 firms had employment of 500 to 999 employees. Thus, the majority of firms in this category can be considered small.

128. *Water Supply and Irrigation Systems.* This economic census category "comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems." 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. According to Census Bureau data for 2002, there were 3,830 firms in this category that operated for the entire year. 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. Thus, the majority of firms in this category can be considered small.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

129. 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. The notification rule requires the inclusion of certain information in make-ready notifications sent to other attachers. 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. 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.

130. 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, 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.*

131. 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

132. 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.

133. 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. 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.

134. 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, 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 revisit sits 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.

135. 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." 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." 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.” 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.

136. Also in this Order, the Commission responds to small cable operator concerns about “possible increases in rates for comingled Internet and video services,” as noted by the U.S. Small Business Administration. Addressing the role of the new telecom rate in the context of commingled services, the Commission recognized concerns by some cable operators 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. 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. 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.

137. 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 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.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

138. None.

Ordering Clauses

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.*

It is further ordered that part 1 of the Commission's rules *is amended* as set forth in Appendix A.

It is further ordered that, pursuant to §§ 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 become effective* June 8, 2011. The information collection requirements contained in the Report and Order will become effective following OMB approval.

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 Reconsideration, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 1

Administrative practices and procedure, Cable television, Communications common carriers, Communications equipment, Telecommunications, Telephone, Television.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 to read as follows:

PART 1—PRACTICE AND PROCEDURE

▪ 1. The authority citation for part 1 continues to read as follows:

Authority: 15 U.S.C. 79 *et seq.;* 47 U.S.C. 151, 154(i), 154(j), 155, 160, 201, 225, and 303.

Subpart J—Pole Attachment Complaint Procedures

▪ 2. Revise § 1.1401 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 amended by revising paragraphs (d) and (e) 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 fora 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 amended by revising paragraphs (g)(1)(ix), (k) and(m) to read as follows:

§ 1.1404 Complaint.

*   *   *   *   *

(g) * * *

(1) * * *

(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 a tissue in the proceeding and shall note the section that specifically determines the treatment and amount of accumulated deferred taxes.

*   *   *   *   *

(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 U.S.C. 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.

■ 5. Section 1.1409 is amended by revising paragraph (e)(2) 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 paragraphs (e)(2)(i) or (e)(2)(ii) of this section.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(ii) of this section:

Rate = Space Factor x Cost
Where Cost
in Urbanized Service Areas = 0.66 x (Net Cost of a Bare Pole Carrying Charge Rate)

in Non-Urbanized Service Areas = 0.44 x (Net Cost of a Bare Pole Carrying Charge Rate).

$$\text{Where Space Factor} = \left[\frac{\left(\begin{array}{c}\text{Space}\\ \text{Occupied}\end{array}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}} \right]$$

(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(i) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\begin{array}{c}\text{Maintenance and Administrative}\\ \text{Carrying Charge Rate}\end{array} \right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\begin{array}{c}\text{Space}\\ \text{Occupied}\end{array}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}} \right]$$

* * * * *

■ 6. Section 1.1410 is amended by revising paragraphs (a) and (b) 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. Add § 1.1420 to subpart J to read 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 § 1.4.

(c) *Survey*. A utility shall respond as described in § 1.1403(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 paragraph (g) of this section). 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 § 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 paragraph (d)(2) of this section, 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 paragraph (g) of this section).

(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 e-mail 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 paragraph (g) of this section).

(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 e-mail 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 paragraph(e)(2)(ii) of this section (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 paragraphs (c) through (e) of this section 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 paragraph (c) of this section 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 paragraph (e) of this section 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 paragraph (c) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may, as specified in § 1.1422, hire a contractor to complete a survey. If make-ready is not complete by the date specified in paragraph (e)(1)(ii) of this section, 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 paragraph (e)(1)(ii) of this section and has failed to complete make-ready.

- 8. Add § 1.1422 to subpart J to read 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 § 1.1420.

(b) If a cable operator or telecommunications carrier hires a contractor for purposes specified in § 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 in sufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

■ 9. Add § 1.1424 to subpart J to read 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.

[FR Doc. 2011–11137 Filed 5–6–11; 8:45 am]

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Section 3 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 153, provides in relevant part:

(51) Telecommunications carrier

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

The Pole Attachments Act of 1978, as amended by the Telecommunications Act of 1996 and codified at 47 U.S.C. § 224, provides:

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls

poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means 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.

(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.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, 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. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312 (b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that–

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does 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.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) 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.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall

impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

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.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).